

Introduction

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to prevent and eradicate domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. SWA is the umbrella organisation for 36 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our network members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

Many perpetrators of domestic abuse use child contact proceedings and arrangements to continue their abuse of both children and the non-offending parent post-separation. Re-victimisation of children and their non-offending parent is the single biggest legal issue raised in calls to Scotland's Domestic Abuse and Forced Marriage Helpline. Re-victimisation in the context of child contact decisions has also featured as a critical problem by our members in their work supporting women and children who experience domestic abuse. The activities of perpetrators have been described as, variously, "legal bullying," "custody stalking," "judicial terrorism," "paper abuse," "procedural stalking" and "abusive litigation."¹

Some of the proposals within the consultation could help to mitigate this issue, but we are deeply concerned that some other proposals have the potential to undermine the safety and wellbeing of women and children with experience of domestic abuse. We therefore welcome the opportunity to respond to this consultation on Part 1 of the Children (Scotland) Act 1995 (the 1995 Act) and the creation of a Family Justice Modernisation Strategy.

In his 1989 paper, "*Family Law Reform in Scotland: Past, Present and Future.*"² Professor Eric Clive analyses the stages and themes of family law reform in Scotland, referring to the values of "*liberty, equality and protection,*" noting that protecting one family member may mean restricting the liberty of another.

At the University of Edinburgh 2016 conference in honour of Professor Clive, Professor Elaine Sutherland referenced his 1989 paper. She advanced that liberty would also encompass freedom, privacy and empowerment³ and that "*...in assessing the availability of the legal system to its potential users, there are, essentially, three components to consider:*

¹ Susan L. Miller & Nicole L. Smolter, "Paper Abuse: When All Else Fails, Batterers Use Procedural Stalking," *Violence Against Women* 17, no. 5 (2011) 637; David Ward, "In Her Words: Recognizing and Preventing Abusive Litigation against Domestic Abuse Survivors," *Seattle Journal for Social Justice* 14, no. 2 (2015) 429.; Emmaline Campbell, "How Domestic Violence Batterers Use Custody Proceedings in Family Court to Abuse Victims, and How the Courts Can Put a Stop to It," *UCLA Women's Law Journal* 24, no. 1 (2017) 41.; Vivienne Elizabeth, "Custody Stalking: A Mechanism of Coercively Controlling Mothers following Separation," *Feminist Legal Studies* 25, no. 2 (2017) 185.; Nancy J. King, "Naming the Judicial Terrorist: An Exposé of an Abuser's Successful Use of a Judicial Proceeding for Continued Domestic Violence," *Tennessee Journal of Race, Gender & Social Justice* 1, no. 1 (2012) 153. ; Maddy Coy, Emma Scott, Ruth Tweedale & Katherine Perks (2015) 'It's like going through the abuse again': domestic violence and women and children's (un)safety in private law contact proceedings, *Journal of Social Welfare and Family Law*, 37:1, 53-69, DOI: 10.1080/09649069.2015.1004863

² 1989 JR 133, 134"

³ http://www.law.ed.ac.uk/data/assets/pdf_file/0017/202580/Sutherland_Future_of_Child_and_Family_Law_Final_paper.pdf

access to the law itself, access to legal services and access to an effective and efficient legal process." Our response to the consultation touches on all three components.

Developments and concepts have advanced from the considerations in play in 1989, and the understanding of the state's obligations in terms of protecting vulnerable citizens and ensuring their safety and access to justice and legal processes are now at the forefront. We hope that the reforms proposed by this legislation will be progressed within a human rights context recognising the need to protect vulnerable women, children and young people experiencing domestic abuse.

To inform our consultation response, we sought the views of our members through a SWA members' network survey. We also held a focus group with Women's Aid workers through one of our regular Policy and Practice Development Days.

Our response is also informed by women, children and young people with experience of domestic abuse. This includes:

- Children's and young people's views and recommendations from two participation projects that SWA has been involved relating to the issues raised in the consultation: Power Up/Power Down⁴ and Everyday Heroes.⁵
- Focus groups with some children and young people who participated in Power Up/Power Down and Everyday Heroes
- Focus groups and one-to-one interviews with women accessing services in three Women's Aid groups.

We are grateful to the Scottish Government for supporting and attending the above focus groups and for taking account of the recommendations from Power Up/Power Down in the development of the consultation.

This consultation covers a wide range of complex issues. We are grateful to the Scottish Government for extending the consultation period in response to concerns about the time period not allowing for meaningful consultation on its proposals with children, young people and their families. However, we would caution against bringing forward legislation on areas that require further substantial discussion and exploration through additional public consultation.

As we note throughout our response, the wording of some questions has meant that we are unable to select any of the provided response options, as none are suitable. Where possible

⁴ Power Up/Power Down was a participation project SWA undertook in partnership with the Children and Young People's Commissioner for Scotland (CYPCS) on improving court-ordered contact processes in the context of domestic abuse. More information about the project can be found here: <http://www.omensaid.scot/project/power-up-power-down/>

⁵ Everyday Heroes was a Scottish Government-funded participation project involving SWA, Barnardo's, Rape Crisis Scotland, the Scottish Youth Parliament and the University of Edinburgh. The project facilitated the participation of children and young people in the development of the Scottish Government's Equally Safe Delivery Plan. Finding and recommendations from the project will be launched later this year.

we have reflected our views in the commentary text. We would specifically draw this to the attention of the Scottish Government, since it is important that the analysis of the consultation takes into account these narrative comments.

Finally, given the consultation's focus on ensuring that victims of domestic abuse are better protected in family law proceedings, it is essential that those undertaking analysis of the consultation responses have sufficient understanding of the gendered dynamics of domestic abuse and its impact on women, children and young people

Question 1): Should the presumption that a child aged 12 or over is of sufficient age and maturity to form a view be removed from sections 11(10) and 6(1) of the 1995 Act and section 27 of the Children's Hearings (Scotland) Act 2011? Please select only one answer.

- a) **Yes – remove the presumption and do not replace it with a different presumption.**
- b) **Yes – remove the presumption and replace with a new presumption based on a different age.**
- c) **No – leave the presumption in.**

Why did you select your answer above?

We have not chosen an answer option from those listed in the consultation paper, as we do not feel that any of them fully capture our position on this issue. Rather, we put forward an alternative option: to remove the current presumption that a child aged 12 or over is of sufficient age and maturity to form a view and replace it with a presumption that children of all ages are capable of forming a view. Our position is explained in further detail below.

We are supportive of the policy intention behind removing the presumption, which is to enable more children under 12 to have their voice heard if they wish to. UNCRC General Comment on Article 12 (the right of the child to be heard) emphasises that children's understandings are not uniformly linked to biological age and makes clear that full implementation of Article 12 *“requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.”*⁶

With the right support and age-appropriate methods of communication, younger children, including pre-verbal children, are capable of giving their views. This was highlighted by a number of responses to our network survey, in which Women's Aid groups related their experiences of even very young children clearly expressing their views and wishes around contact.

In addition, our data indicates that children are often not given the opportunity to be heard due to their age, with negative consequences:

“In our experience children under the age of 12 are able to express their views and have an understanding of how they feel and have a choice and a voice to be heard. We have had experience of supporting children whose views have not been taken into account and this has had a significant impact on the health and wellbeing of the child.” (Women's Aid worker)

⁶ UN Committee on the Rights of the Child (2009). 'General Comment No. 12: the right of the child to be heard': <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

“Many children younger than 12 are very able to express their wishes and views. In fact, very young children have strong views that are not listened to. Children are being traumatised through not being listened to.” (Women’s Aid worker)

The majority of responses to our survey favoured removal of the presumption as a means of enabling more children under 12 to give their views to the court if they wish to.

The consultation paper states that Power Up/Power Down recommended that the presumption be removed. We wish to clarify that children and young people who took part in Power Up/Power Down did not make this specific recommendation – however they did comment that children of all ages should be able to have their voice heard. They were clear that *“it doesn’t matter how old or young the child is – being given the opportunity to have a say is really important.”*⁷

For the reasons outlined above, we are supportive of the presumption being removed; however, we are concerned that the policy intention of more children under 12 having their views heard may not be achieved in practice. A number of respondents to our network survey felt that an unintended consequence of removing the presumption was that it could inadvertently lead to children of all ages being less able to give their views due to more restrictive tests on capacity being imposed.

We believe that including a new presumption making clear that children of all ages are capable of forming a view would be in line with the General Comment on Article 12, which states: *“States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.”*⁸

This reform cannot, however, be achieved in isolation. Any changes to presumptions around children giving their views cannot be separated from work to ensure that children of all ages are able to have their voice heard in the court process (if they wish it) without any negative impact, e.g.; through ensuring children are provided appropriate information, support and feedback throughout the process. This is explored further in our responses to Questions 3 and 44.

Question 2): How can we best ensure children’s views are heard in court cases?

Please select as many answers as you want.

- a) The F9 form.
- b) Child welfare reporters.
- c) Speaking directly to the judge or sheriff.
- d) Child support workers.

e) Another way (please specify).

X

Why did you select your answer(s) above?

⁷ https://issuu.com/scottishwomensaid/docs/final_print_pupd_binder

⁸ UN Committee on the Rights of the Child (2009). ‘General Comment No. 12: the right of the child to be heard’: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

We agree with Clan Childlaw's assertion in their response to the consultation that currently processes in family actions are not child-centred or child-friendly and that more fundamental reform is needed than simply selecting different communication options.⁹ Greater consideration needs to be given to how children are involved in family actions generally; while they are not a party to proceedings, children will have to live with the outcome of the decision. Therefore, more work is needed to ensure that having their views heard is not merely a tokenistic exercise but a truly valid, participative and essential part of the process.

Several processes require to be clarified or established to make this process work:

- In terms of hearing children's views, courts need to fit around what works best for the child, not vice versa. There is no one best means of ensuring children's voices are heard in court cases; what works for one child might not work for another. Children and young people who took part in the consultation focus groups expressed a range of preferences and opinions about the options listed in the consultation. Children and young people who took part in Everyday Heroes said that they wanted more choice and flexibility over how they give their views in justice proceedings (both civil and criminal).
- The best way of ensuring children's views are heard in court cases is for children to be able to choose what works best for them. This is in line with the Council of Europe's guidelines on child-friendly justice, which state that methods of ascertaining children's views should be "*adapted to the child's level of understanding and ability to communicate.... Children should be consulted on the manner in which they wish to be heard.*"¹⁰ This is also recognised in the General Comment on UNCRC Article 12, which states: "*After the child has decided to be heard, he or she will have to decide how to be heard.*"¹¹
- There needs to be more consideration given to enabling children and young people who may need additional support to give their views, e.g., children with learning disabilities, children whose first language is not English, etc. There is also opportunity to consider how the use of technology can enhance how children and young people are able to give their views, drawing on work currently being undertaken around pre-recorded evidence.
- Consideration is needed of how children's views are given due weight. Without establishing a clear methodology for how to weigh them, considering children's views and wishes cannot be done effectively, transparently and consistently.¹²

Below we provide commentary on the options listed in the consultation, though we wish to make clear that first and foremost, children should be given a choice over how they give their

⁹ Clan Childlaw: <https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=31528e16-8681-43dd-ba47-f3c308a33c48>

¹⁰ Council of Europe (2010). 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice': <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804b2cf3>

¹¹ Para. 35, <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

¹² Daly, A. (2018) *Children, Autonomy and the Courts: beyond the right to be heard*. Leiden: Brill|Nijhoff.

views to the court and the following options should therefore by no means be viewed as exhaustive.

- **The F9 form**

As the consultation paper states, as part of Power Up/Power Down children and young people taking part provided feedback to the Scottish Civil Justice Council's Family Law Committee (FLC) on draft versions of a revised F9 form and letter.¹³ Children and young people were generally not positive about the form and letter, and younger children in particular did not engage with the format. We wish to thank the FLC for providing written feedback to the children and young people outlining how the children's views have influenced the revision of the form. However, based on what children and young people tell us, we continue to believe that even a more child-friendly form is not the best means for many children and young people to give their views.

- **Child welfare reporters**

Women's Aid workers and children and young people report that Child Welfare Reporters (CWRs) often do not take a child-friendly approach:

"Currently Child Welfare Reporters are too formal and can be quite intimidating to CYP."
(Women's Aid worker)

"If it had to be a welfare reporter [taking children's views] they need to be casual not pure dressed up and they need to meet with the child more than once so the child knows them and can trust them." (Young person)

Children and young people commented that it can be difficult to open up to someone they do not know. While instructions for CWRs state that in many cases they will need to meet a child more than once to build rapport and ensure they are ascertaining the genuine views of the child,¹⁴ we are concerned that in practice this is rarely the case. We have heard from women and Women's Aid workers that CWRs spend very little time with children to ascertain their views and that women's and children's views and comments have not been accurately represented, a matter specifically referred to by children below. This is especially concerning in cases where domestic abuse is a factor, given that children often need time to build trust before giving their views.

In addition, we have wider concerns around CWRs in the context of domestic abuse, which are set out in our response to Question 4 of the consultation.

- **Speaking directly to the judge or sheriff**

¹³ The full response to the Scottish Civil Justice Council's Family Law Committee can be found here:

<http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-08-may-2017/paper-4-1d-scottish-women-39-s-aid-and-cypcs-feedback-report-on-form-f9.pdf?sfvrsn=2>

¹⁴ <http://www.gov.scot/Resource/0049/00498005.pdf>

The majority of children who took part in Power Up/Power Down said that speaking directly to the judge or sheriff would be their preferred means of giving their views to the court. In consultation focus groups, one young person explained that this was because they felt that giving their views to the person who is making decisions about them meant there would be less chance of having their words “twisted.”

This option may not be appropriate in many cases; however, if a child specifies that they wish to speak to the sheriff directly, we believe this should be respected. The General Comment on Article 12 makes clear that children should have the opportunity to be directly heard by the decision-maker.¹⁵ We know of cases where children have asked to speak to the sheriff directly as they have not felt that their views are being listened to, only to have this request denied. Children have expressed great frustration with the fact that a person who is making potentially life-changing decisions about them has never met them:

*“Sheriffs should try to get to know you instead of just trusting reports.”*¹⁶ (Young person)

If children do meet with a sheriff, they would need the support of a trusted, known adult to attend with them and to have advance sight of questions they would be asked. These processes would minimise any stress or anxiety. Children would also need to have clarity about confidentiality, a matter we have discussed elsewhere in the consultation. In cases where it may not be in the best interests of the child to meet directly with the sheriff, this should be explained to the child by the sheriff.

These reforms will only succeed if sheriffs communicate appropriately and effectively. Therefore, sheriffs should also receive training in communicating with children and young people at all ages and stages of development, in line with the Council of Europe’s guidelines on child-friendly justice.¹⁷

- **Child support workers**

As stated previously, children and young people prefer to open up to someone who they know and trust. Feedback from the children’s consultation focus groups favoured having a child support worker to support children through the court process and enable them to give their views. Children and young people who took part in Everyday Heroes identified that a priority for both civil and criminal justice processes should be the provision of a consistent person – specialised in gender-based violence, children’s rights and participation – to support children and young people through the process.¹⁸

Similarly, responses to the network survey were also in favour of having a child support worker to help children to give their views, as this was seen as easing the process for children, helping them feel more comfortable and promoting a child rights-centred approach. Many respondents commented that this is a role already carried out by Women’s Aid child

¹⁵ Para. 35: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

¹⁶ Everyday Heroes (report forthcoming)

¹⁷ Council of Europe (2010). ‘Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice’: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804b2cf3>

¹⁸ Report forthcoming.

support workers, with several Women's Aid groups having a worker dedicated specifically to the court process:

"We already have a CYP advocacy worker whose role is to support CYP to express their views when involved in both civil and criminal court cases.... Feedback from CYP who have had support from the advocacy worker have found their support invaluable and have given CYP confidence to express their views." (Women's Aid worker)

Concerns were expressed through the network focus group and survey that introducing a new role could duplicate or undermine the work that Women's Aid child support workers are already doing, with the potential harm of too many adults being involved in a child's life and children having to retell their story multiple times. Respondents commented that child support workers within Women's Aid provide a vital service as not only do they have a specialist understanding of child development, children's rights and participation, they also have an in-depth understanding of the dynamics of domestic abuse and its impact on children.

Therefore if a system of child support workers is introduced, it is essential that, in cases where children and young people are already being supported by Women's Aid child support workers, the Women's Aid worker should be enabled to carry out the role of supporting the child through the court process rather than bringing in a new worker; our preferred option. Alternatively, the external child support worker must work in close partnership with the Women's Aid worker to minimise undue stress on the child.

We routinely hear from Women's Aid services that in the court process, rather than being seen as highly skilled, experienced and specialised professionals, they are viewed as biased, despite their services being highly valued and positively independently evaluated:

"At the moment we feel that a lot of this work [of supporting children to give their views to the court] is carried out by our Children and Young Peoples Service now, however often our advocacy work in terms of offering the views of the child within the court process are often dismissed as being biased in favour of mum." (Women's Aid worker)

"...[S]upporting the child to give their views to the court is a big part of what we already do, however the biggest issue is always the problem of bias. Women's Aid workers are always seen to be biased." (Women's Aid worker)

Children and young people taking part in Everyday Heroes identified that courts need to listen more to specialised workers who have an established relationship with the child, including Women's Aid support workers:

*"The sheriff should listen to people who know me and support me, like my Women's Aid support worker."*¹⁹ (Young person)

Examples of Women's Aid workers' exclusion in contact proceedings includes:

¹⁹ Report forthcoming.

- Cases where reports submitted to the court by Women's Aid have been rejected, in spite of Women's Aid workers having spent significant amounts of time with the child to assess safety and wellbeing risks and ascertain their views.
- CWRs have not permitted workers to sit in as an emotional support to women and children when they are being interviewed. This has happened despite both the express wishes of women and children to have the worker present and the CWR Guidance specifically permitting the presence of a support worker. For instance, a child requested to have her Women's Aid support worker sit in with her during an interview with a CWR, but this request was denied. She was permitted to have a teacher sit in with her; however, the child had only recently moved school and had not built trusting relationships with any teachers at that point.

This undermines the recognised positive work and support provided by Women's Aid children's workers, whose primary responsibility is to promote children's best interests, safety and wellbeing and to enable their voices to be heard. Women's Aid workers' vital role in assessing the interlinked safety and wellbeing needs of women and children is also acknowledged and used in other justice processes. This has been important given the increased understanding that children's recovery from domestic abuse is widely linked to that of their mother's²⁰ and therefore any contact decisions must take this into account. If contact arrangements enable perpetrators to continue the abuse of the mother, this will inevitably harm the child and prevent recovery.

In summary, it is clear that children and young people are not always able to enjoy the support they need and want due to Women's Aid workers often not being afforded the status of a specialised professional within the court process. Regardless of whether a child support worker system is introduced, further action needs to be taken to raise awareness of the role of Women's Aid support workers and enable them to fully support and advocate for children.

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

Please select only one answer.

- a) Child support worker.
- b) Child welfare reporter.
- c) **Another option (please specify) X**

Why did you select your answer above?

Similar to our response to Question 2, we believe that the best way of feeding back a decision to the child will depend on the individual child and what works best for them in terms of communication. There should certainly be a duty on courts to ensure that children have the decision explained to them, but the method should be decided according to what works best for the child. In general, children and young people in the focus groups felt that it should be someone who they have already met and who the child trusts. Good practice

²⁰ Mullender, A., Hague, G., Imam, G., Kelly, L., Malos, E., and Regan, L. (2002) Children's Perspective on Domestic Violence, London, Sage.

guidance should be developed for courts around how to explain decisions to a child in an accessible, age-appropriate way and what this explanation should include, e.g.; where a decision has been made that is not in line with the child's views, courts need to very clearly explain the reasons for this.

Question 4): What are the best arrangements for child welfare reporters and curators *ad litem*? Please select only one answer.

- a) There should be no change to the current arrangements.
- b) A new set of arrangements should be put in place that would manage and provide training for child welfare reporters**
- c) 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 list if the reporters cease to meet the necessary standards.
- d) Another option (please specify)
Why did you select your answer above?

Participants at the network focus group and the majority of responses to our network survey were in favour of introducing a new set of arrangements that would manage and provide training for CWRs. Women's Aid workers repeatedly report an ongoing problem of CWRs' responses not being child friendly along with varying levels of understanding among CWRs about the dynamics of domestic abuse and its impact on women, children and young people. Key issues around CWRs reported by Women's Aid include:

- Women raising concerns about children's safety during contact with a perpetrator can be dismissed as 'hostile' or 'over-anxious' by CWRs.
- Child welfare reports being biased in favour of the perpetrator, with vital information – such as children's behavioural changes following contact with a perpetrator – not being recognised and so left out of reports altogether.

Introducing a new system of regulation would provide more consistency and, of all the options, would likely provide the greatest level of accountability. Such a system should also have clear appraisal and complaints processes and a set of standards that CWRs need to meet regarding prior experience, skills and qualifications.

It is essential that CWRs receive long overdue, mandatory training and Continuing Professional Development around the dynamics of domestic abuse and its impact on women and children. This training must reflect that domestic abuse is a cause and consequence of gender inequality and make clear that domestic abuse is a parenting choice, drawing on the

Safe and Together model.²¹ There should also be training on GIRFEC, children's rights and communicating with children at all ages and stages of development.

Finally, given the role of the CWRs and their necessary skills and understanding, we are not clear as to why the majority of CWRs are solicitors. Given that CWRs will often be gathering children's views, it is surely more appropriate for those with a background in working with children, young people and families to provide this service. A new regulation system may provide more scope for such professionals to become CWRs.

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

Yes	X
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Why did you select your answer above?

We are in absolute agreement since there is existing evidence that this process has considerable negative implications for children and young people experiencing domestic abuse.

Women and children have told us that information is disclosed and shared by children on the understanding that, subject to child protection obligations, it will not be shared with others in the family and certainly not the perpetrator. If the child had known that any person they have discussed or shared information about, particularly the perpetrator, would have access to this, they would not have shared it in the first place. This highlights serious implications for support services to children. Disclosure to the court for legitimate purposes is an entirely different matter from disclosure to an abuser, so given that the point is not to conceal or restrict the court's consideration of information but to restrict access of the parties in order to protect the child, there should be no concerns about the former.

The issues here are much wider than simply confidentiality and encompass considerations such as the child's best interests, their safety and possibly information about their mother, which could impact on her safety and other civil and criminal proceedings. Sharing children and young people's sensitive, confidential and personal case files without seeking their views and consent first is a violation of their rights under Article 8 of the European Convention on Human Rights ("ECHR"); potentially Articles 2 and 3 in relation to the risk posed to the child by disclosing such information to perpetrators of domestic abuse; and their right to a fair hearing under Article 6. It also amounts to a breach of Article 16 of the UNCRC.

Confidential information relating to children can currently be disclosed without their views on that matter being sought. A child's best interests should be paramount in any decision to

²¹ <https://safeandtogetherinstitute.com/about-us/about-the-model/>

request such files, meaning that children's views in relation to sharing this information must be obtained and the risk to them of this information being shared with the perpetrator

assessed, because after all, it is the child's information. Clarity about the factors the court should consider in this matter and situations involving children is needed.

A further observation is that children have the right to be personally legally represented themselves in any such proceedings to ensure that their best interests are, indeed, taken into account. The considerations elsewhere in this paper around the age presumption currently operating around taking children's views and their ability to express a view are, therefore, also germane to this question. Further, all the operational legislation quoted in the consultation paper was made before the 1995 Act, so there was no consideration of child protection, their welfare and best interests, children's rights or any adequate awareness of domestic abuse and the impact on children.

Question 6): Should child contact centres be regulated?

Yes x
No

Why did you select your answer above?

The court response to considering child contact in the context of domestic abuse routinely involves granting perpetrators supervised contact, or even simply supported contact as an appropriate response to dealing with the risk of further abuse, and such contact is facilitated through Child Contact Centres. Regrettably, SWA and women using our services have repeatedly raised the issue of a lack of consistency, safety and understanding of domestic abuse in the service provided by these facilities.

Although they receive public funding from the Scottish Government, Child Contact Centres currently have no independent system of external regulation, inspection or complaints process and staff are not required to have formal qualifications or a proven understanding of domestic abuse. It is puzzling to note that the consultation expresses the view that minimum standards pose a potential negative impact on contact centres through closure if they could not meet certain minimum standards. It is wholly appropriate to expect services supporting children to be subject to standards, reporting criteria and inspection visits.

It is crucial that in order to adequately protect vulnerable children and their mothers from further abuse, a more formal regulation of this service is urgently needed. This matter attracted both a Members' Bill in Westminster²² and a Report from the Westminster All-Party Parliamentary Group on Domestic Violence²³ noting the necessity of training for contact centre staff and the importance of an accreditation process and associated standards.

²² Child Contact Centres (Accreditation) Bill [HL] <http://researchbriefings.files.parliament.uk/documents/LIF-2017-0009/LIF-2017-0009.pdf>

²³ <https://1q7dqy2unor827bqjis0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2015/11/APPG-Inquiry-report-domestic-abuse-child-contact-and-the-family-courts.pdf>

Indeed, Relationships Scotland, as the main provider of Child Contact Centres in Scotland has, itself, agreed that the introduction of external regulation would be welcome and has

publicly stated this position in their response to Petition PE1635,²⁴ a petition currently under consideration by the Scottish Parliament which, amongst other matters, specifically calls upon the Scottish Government to review the current system and operation of child contact centres.²⁵

This should involve a process for inspection and a complaints procedure, a programme of training for contact centre staff around the causes, dynamics and impact of domestic abuse, along with standardised questions and training on observing contact where domestic abuse is an issue, given the requirement for contact centres facilitating supervised contact to report back to the court. This is particularly important in being able to identify the continuation of abuse where perpetrators use the contact time as a tactic to obtain information from children, an issue where the children's first language is not English and the contact centre staff may not be alert to what is taking place. Ensuring that they are not undertaking behaviour complicit in the further abuse of children, for instance, 'persuading' children to engage with perpetrators, an activity at any rate completely outwith their responsibility, is also important.

However, the more important point is that a discussion around the use of child contact centres in relation to domestic abuse cannot be undertaken in isolation from any consideration as to whether this response is at all appropriate in relation to domestic abuse. This is not a new concern; as long ago as 2002-3, studies looking at the risk of harm (mostly physical violence aimed at women rather than their children, it has to be said) concluded that use of contact centres for court-ordered contact in the context of domestic abuse was often dangerous for women and their children. In a September 2003 article in the *Child and Family Law Quarterly* Humphreys and Harrison noted that: "*In the week of 31 April, 2003 while writing this article, the media reported four children were killed on a contact visit, one man was convicted of killing his two children on a contact visit and a further man murdered his ex-partner in front of his two children.*"

As we said in our response to Petition PE1635²⁶, this system problem identified 15 years ago remains the core problem in Scotland in 2017: namely the widespread and unchallenged assumption, despite our legislation, that all contact is in the best interests of the child. This pro-contact stance distorts decision-making by sheriffs, solicitors, court reporters, social workers, contact centre staff, and indeed sometimes even the non-abusing parent, who so often is blamed for not protecting her children by, presumably, controlling the abuser. Given the copious evidence that children in highly conflicted contact situations are some of the most distressed children in the population and that their needs for physical and

²⁴ http://www.parliament.scot/S5_PublicPetitionsCommittee/Submissions%202017/PE1635D_Relationships_Scotland.pdf

²⁵ <http://www.parliament.scot/GettingInvolved/Petitions/PE01635>

²⁶ http://www.parliament.scot/S5_PublicPetitionsCommittee/Submissions%202017/PE1635F_Scottish_Womens_Aid.pdf

psychological safety are very high, court orders insisting on contact at any cost demonstrate the influence of pro-contact bias in our system.

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

The starting point of supporting children to have relationships with wider family members must always be consideration of what is in the child's best interests. Where domestic abuse is a factor, there is a risk that relationships with wider family members can put children and their mothers at further risk of harm and this should always be assessed. Women's Aid workers report that perpetrators routinely use family members to continue their abuse post-separation, either through threats and harassment or because family members are actively colluding with the perpetrator. In these situations, contact inevitably becomes harmful.

Concerns were also raised in the network survey about BME children being at increased risk of so-called 'honour'-based violence (HBV) or forced marriage through contact with wider family members. This reflects research which demonstrates that for the majority of BME women and children experiencing domestic abuse, post-separation abuse is perpetrated not only by the partner but through extended family members.²⁷

Children and young people who took part in a consultation focus group also expressed concern that family members may 'take sides', force children into contact with the abusive parent, or pressure them to give information (e.g.; their address). They felt that there should be explicit rules in place for family members who have contact; this included not talking about the abusive parent if the child does not want to, and not disclosing details about contact visits with that parent. Women's Aid workers highlighted that contact with family members works best when the perpetrator's family acknowledge his abusive behaviour and are able to separate their relationship with the perpetrator from their relationship with the child.

Any steps that are taken to help ensure children continue to have relationships with family members must consider the above considerations.

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

Yes

No x

Why did you select your answer above?

²⁷ Thiara, R. and Roy, S. (2009) 'BAMER Women and Children and Domestic Violence: Recent Findings', London: Imkaan; Thiara, R and Gill, A. (2012) 'Domestic Violence, Child Contact and Post Separation Violence: Issues for South Asian and African-Caribbean Women and Children; A Report of Findings'. London: NSPCC.

The majority of responses to the network survey and views from the network focus group were not in favour of such a presumption. The starting point of contact with grandparents, as with any other matter a court makes a decision about in relation to a child, is that the child's welfare is the paramount consideration. It is essential that their safety and best interests are assessed first before making any assumptions.

While many grandparents are protective factors in a child's life, this is unfortunately not a blanket rule. As outlined in the response to Question 7, in the context of domestic abuse grandparents may put the child and their mother at further risk of harm. Indeed, Women's Aid workers report cases where grandparents who have contact with a child have gone against a court order to facilitate contact with the perpetrator, with harmful consequences.

We are also concerned that such a presumption undermines the voice of the child; not all children wish to have contact with their grandparents and children's views, alongside consideration of their safety and best interests, must be the means by which contact with grandparents is decided.

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

Yes X

No

Why did you select the answer above?

It is our understanding that there have been conflicting judgements around this issue, whereby the Act has been interpreted as allowing the grant of contact with siblings under the section, whilst the opposite has also been decided on the grounds that granting contact to siblings under this section will also, by default, give PRRs to someone under 16. Other judgements say that use of this section is only regulating contact, as opposed to giving children under 16 rights that they should not get.

Relationships with children can be an important protective factor in children's and young people's lives, as Clan Childlaw's valuable work around promoting sibling contact makes clear.²⁸ Therefore, any uncertainty around applications for sibling contact should be clarified within the law and appropriate guidance produced for those applying for contact in such circumstances.

However, similar to our response to Question 7, in the context of domestic abuse there is a risk that perpetrators may use a sibling applying for contact as an avenue to continue the abuse of another child and their non-abusing parent. While we are supportive of enabling sibling and wider family relationships where this is safe and in children's best interests, there are times when this will not be the case. Courts must carefully assess risk when considering contact orders in relation to siblings where domestic abuse is a factor. Training on the

²⁸ <https://www.clanchildlaw.org/sibling-contact>

dynamics of domestic abuse, including the use of wider family members as an avenue for continuing abuse, needs to be provided for relevant bodies such as contact centres, which may be facilitating sibling contact.

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

The language could be strengthened to make clear that, if contact with other children they have shared family life with is assessed as being in the child's best interests (and, importantly, in the best interests of all children involved) the local authority must promote this contact.

The guidance should make clear that domestic abuse perpetrators may use contact with wider family members to continue their abuse, and this risk should be assessed when determining whether contact is in a child's best interests.

**Question 11): How should contact orders be enforced?
Please select only one answer.**

- a) no change to existing procedure.
- b) alternative sanctions (eg unpaid work, attending a parenting class or compensation).
- c) making a breach of a contact order a criminal offence with penalties including non custodial sentences and unpaid work.

d) another option (please specify) X

SWA believes that children should be able to have contact with both parents but only where the contact can be shown to be safe for both the child and the non-abusing parent; is of clear benefit to, and in the best interests of, the child and takes place in a safe and nurturing environment.

None of the options appropriately address the issue as to why contact orders made in domestic abuse cases are not followed. Unpaid work, parenting classes or compensation will not protect children where inappropriate and unsafe decisions have been made and will inevitably be imposed on women struggling to protect their children. It is not a matter of forcing traumatised women and children to 'work together' with the abuser and a punitive approach to the enforcement of contact orders, particularly a criminal justice response, could be to the significant detriment of the children involved.

As with other civil issues, unless legislation provides otherwise, the police will not involve themselves in the enforcement of a civil order, such as a contact order, unless there is an indication that a criminal act may be carried out and the safety of the child and/or the parties would be an issue during contact. Introducing such a provision around enforcement of contact orders is not acceptable as this would effectively leave women open to perpetrators making allegations against them in order to muddy the waters and possibly even interfere with an ongoing criminal investigation or proceedings against the perpetrator.

Similarly, making breaches of these orders a criminal offence would significantly increase the vulnerability of a mother and her children and should be avoided at all costs. As recent cases evidence, it is far more likely that criminal sanctions will be used against women experiencing domestic abuse than against perpetrators endangering women and their children. Women experiencing domestic abuse attempting to protect their children should not

be criminalised for this and actions of this kind simply serve to damage the relationship between non-abusing mothers and their children.

It is our submission that the courts must consider another option to 'enforcing' civil court orders around child contact through investigating why children are not being made available and the motive behind a breach of the order. In this regard, the comments from the "Comparative study on enforcement procedures of family rights" referred to in the consultation at page 58 is apposite.²⁹

The Children (Scotland) Act 1995 contains a general requirement that contact should be in the best interests of the child and there is a specific duty on the court in section 11(7A)-(7E) to have regard to the need to protect the child from domestic abuse. This requires the court to take into account the abuse, or risk of any abuse to the child, the effect this abuse would have on the non-abusing parent with care and the capacity of the abusing parent to effectively parent the child.

Perpetrators of abuse will use child contact as a means of continuing domestic abuse and as a mechanism to control women, a fact well-documented in extensive research.³⁰ Despite the duty the 1995 Act places on the court and in opposition to the best interests of the child, we know from the existing evidence base and anecdotal evidence from women and children that abusive men are regularly granted contact with their children. Regardless, the mother is required to continue to make the child available or take them to the contact point, under pain of being held in contempt, to force the child to go to contact even where the child emphatically and clearly states that they do not want to go. This results in women and children being placed in an impossible position as women will try to protect their children which puts them in conflict with the court order through no fault of their own. Also forcing women to, in turn, force their children into contact with the abuser when the child patently does not want to, or the contact is patently inappropriate for the child, only undermines the child-mother relationship which may already be damaged by the abuse.

The impact of abuse on women, children and young people is not understood or always taken into account, particularly the trauma and distress this has on children, even when they

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http://ec.europa.eu/civiljustice/publications/docs/family_rights/study_family_rights_synthesis_report_en.pdf

³⁰ Coy, M., Perks, K., Scott, E., Tweedale, R. (2012) **Picking up the Pieces: Domestic Violence and Child Contact**. London. Rights of Women.; MacKay, K (2013) **Hearing children in court disputes between parents**; Centre for Research on Families and Relationships; MacKay, K (2013) **The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse; A report to Scotland's Commissioner for Children and Young People**; Morrison, F, Tisdall K, Jones f, Reid, A (2013) **Child Contact Proceedings for Children Affected by Domestic Abuse; A report to Scotland's Commissioner for Children and Young People**

have not been directly abused or witnessed the abuse of their mother. In fact, the presence of abuse is sometimes even actively disregarded and children's views, views which legally must be part of the proceedings, are similarly ignored.

"Another approach is needed... Kids getting dragged into cars screaming – barbaric. Why should women be punished for putting their child through that?" (Women's Aid worker)

"I have seen children traumatised by having to go into their father's care for contact and when the child returns to the mother they are back at ground zero and the mother has to try to support the child, all for it to be undone come the next contact with the father. Children need to be listened to. Their voice has to be heard. I have worked with a P1 child who was able to share how her dad hurt her mother and she was able to say that she did not want to see her father. The Sheriff listened and there is no contact order in place... Children need time to heal and recover after domestic abuse and need a safe space to do this." (Women's Aid worker)

"There has been a family I have supported recently where the 10 year old boy was so distraught at the thought of going on contact with his dad that he was feeling physically ill. His dad was questioning him about his mum and saying he (the child) wouldn't ever see him (the father) again should he side with his mother. The boy was scared of his dad and continually worried to say the wrong thing. When asked what the wrong thing could be he said 'suggesting to go somewhere or do something my dad doesn't want to or like'." (Women's Aid worker)

In summary we are calling for an overhaul of decision making around contact and provisions for enforcing orders should be part of that review:

- The safety, quality and benefits of the contact, particularly where there are issues of abuse, must be the starting point in determining whether such contact would be in the best interests of the child and promote their welfare. The court must take much more notice of representations around domestic abuse, particularly the more subtle controlling and coercive behaviours deployed, and deployed against children in child contact and residence actions, and the negative impact of the contact arrangements on children's safety.
- Where there is domestic abuse, women and children's experiences as a whole should be prioritised; the court must look at the case in more depth, using skilled workers and the Safe and Together model, noting that children and young people are often scared to speak out against the abusive parent for fear of repercussions or may, indeed, wish to have contact but in circumstances that, if properly assessed in terms of the child's welfare and their best interests, would render that contact with the father inappropriate
- There must be better support for women who have serious concerns about their children's safety and their fear of experiencing further abuse through the contact process. Situations within the relationship are controlled by the perpetrator and are not always what they appear to be and the concept of controlling and coercive behaviour, which is set out in the new criminal offence of abuse against a partner, must be taken into account.

- The child must be allowed a voice in this process since the decision is, after all, about them. Adult rights must not be put above the well-being, safety and the rights of children and there must be no shift from children's best interests being paramount in any decision made, to that of parents' 'rights' to contact.
- The court should make better use of specialist, expert and experienced services currently available, for instance Women's Aid Children and Young People's Support Workers to better gauge what the risks are to women and children where domestic

abuse is behind the breach. Liaising with other agencies to assess the 'contempt' situation will also assist in determining whether domestic abuse is the issue where the woman's solicitor has failed to raise this, or the matter has been downplayed.

- Criminal and family law need to match up to protect survivors of domestic abuse, and the civil law has to catch up with the developments in understanding around the dynamics of abuse that have informed reforms to the criminal law, hence the importance of the perpetrator's criminal offending and behaviour being exposed and considered by the court when making civil orders involving children.
- Where orders are not being obeyed, the courts should take more responsibility in positively questioning the party 'in contempt' and investigating why children are not being made available. Sheriffs must consider the motive behind a woman's breach of the order, for instance, protecting the child from known, previous abusive behaviours perpetrated by the father, and work on the assumption that if a parent is breaching a contact order there is a good reason which should be further explored.
- Circumstances of the failure to comply must be fully explored, including any concerns around the safety and welfare of the child and parent with residence- we understand that in the decision mentioned in the consultation paper, the court stated, *"Furthermore, proof of a deliberate intention to flout the authority of court is required, and not, for example, the establishing of a genuine although misguided reason for the behaviour criticised."* This must, by necessity, involve an active re-consideration as to whether the initial decision on contact was, indeed, in the best interests of the child and is, in fact, commensurate with their ECHR Article 8 rights to family life.
- The courts have a range of sanctions for civil contempt, including the use of imprisonment as a last resort, enabling them to respond to each case in an individualised way.

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

No X

Enforcement of child contact from other jurisdictions is a serious issue, particularly where women have not been afforded the opportunity to participate in proceedings where orders have been made against them. Since the same considerations around the welfare of the child and their safety that exist in Scots law may not have been taken into account in the granting of these orders, 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.

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

No X

It is our understanding that there are no issues with the operation of the Family Law Act 1986.

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

Yes

No

Why did you select your answer above?

We do not have a definitive position on this issue.

Question 15): Should DNA testing be compulsory in parentage disputes?

No X

Why did you select your answer above?

We would reiterate the position stated by us in response to Petition 1513³¹ that there should be no compulsory DNA testing; the existing remedies in law are appropriate and proportionate.

Where the mother and father of the child are married, the man is presumed to be the father; if the mother and father are unmarried, and the mother acknowledges the man as the father and he is then accordingly registered as such, the presumption also applies - section 5(1) (b) of the Law Reform (Parent and Child) (Scotland) Act 1986 Act. If the mother does not acknowledge the unmarried father as such, he can apply to the court for a declarator of parentage under section 7 of the 1986 Act where the court will look at “*sufficient evidence*” and make a decision accordingly.

In terms of DNA and blood tests, consent to this may be given by a party having PRRs for a child under 16 - Section 6 of the 1986 Act above - or the court may request a party to provide a sample or to consent to the taking of a sample from a child. If the party refuses or fails to provide or consent, “*the court may draw from the refusal or failure such adverse inference, if any, in relation to the subject matter of the proceedings as seems to it to be appropriate*”, under Section 70 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Consequently, it may be possible for the father to establish paternity that way,

³¹

http://www.parliament.scot/S4_PublicPetitionsCommittee/General%20Documents/PE1513_H_Scottish_Womens_Aid_27.06.14.pdf

even if the mother refuses consent to a DNA test or through the court's powers under section 7 of the 1986 Act.

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 and is surely a breach of the child's rights under Article 8 of ECHR; similarly, such compulsion could also amount to a breach of the mother's

Article 8 rights. This proposal also ignores difficulties in enforcement and the fact that the child could refuse to give a sample, if they are recognised as having capacity to do so.

Much seems to be made of the so-called "maternal opposition" to DNA testing without looking further at the underlying issues. An important and much overlooked issue is that the mother may not wish to either acknowledge the man as the father of the child, or have his name registered as the father on the birth certificate, due to domestic abuse and related fears for her and the child's safety and welfare. This is a particular issue if she is no longer living with, or in contact with, the perpetrator. Pregnancy is often a time when abuse begins or intensifies;³² about 30% of domestic abuse starts in pregnancy.³³ For some women experiencing abuse, this could be an unwanted pregnancy, perhaps conceived through rape, or because they have been denied access to contraception.

We suggest that instead of mandating potentially intrusive and upsetting testing in all disputed cases, it is preferable that the court should continue to have discretion on the matter. There is a very strong argument that can be made that 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).

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

Yes

No X

Why did you select your answer?

³² Mezey GC. **Domestic violence in pregnancy**. In: Bewley S, Friend J, Mezey G, editors. *Violence against women*. London: RCOG; 1997.; Mezey, G., Bacchus, L., Bewley, S. & Haworth, A. (2001) 'An exploration of the Prevalence, Nature and Effects of Domestic Violence in Pregnancy'. London: ESRC/Violence Research Programme.

³³ 2. Lew is, Gwynneth, Drife, James, et al. (2001) **Why mothers die: Report from the confidential enquiries into maternal deaths in the UK 1997-9**; commissioned by Department of Health from RCOG and NICE (London: RCOG Press); Lew is, Gwynneth, and Drife, James (2005) **Why Mothers Die 2000-2002** - Report on confidential enquiries into maternal deaths in the United Kingdom (CEMACH).

The possibility that having such an agreement could reduce the number of court cases of step parents seeking PRRs is not automatically a positive outcome. While the courts have a duty to take the views of the child into account and have their best interests as a paramount consideration when making decisions, it is unclear how the child's voice would be robustly and meaningfully included as part of a step parents PRRs agreement, or how their best interests will be at the heart of such an agreement. Indeed, widening the pool of people with PRRs over a child, particularly since the proposals could result in these being granted to multiple step-parents, may not be, as the consultation paper states, in the best interests of a child.

There is also no consideration of domestic abuse and the risk of an abusive step parent gaining PRRs over a child. The majority of responses to the network survey were not in favour of establishing a step parents PRRs agreement, citing instances of abusive stepfathers gaining rights over step children and using this as a mechanism of control.

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

Yes

No

Why did you select your answer above?

A slim majority of responses to the network survey were in favour of removing the term 'parental rights' to emphasise that a parent's duties are for the benefit of the child. However, due to the lack of clarity about what the effect of this change would be on other pieces of legislation in relation to children and young people, we do not have a formal definitive view on this proposal and further discussion is required on this matter. It may be more practicable to improve consistency of language across various guidance, laws and policies to make clear that parental rights exist to enable parents to do what is in the best interest of their child rather than to serve their own interests.

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

Yes

No

Why did you select your answer above?

We have not selected an option to this question since, again, there were mixed responses from the network survey.

On the one hand, the current terms make clear to everyone involved what the orders are in relation to. Some commented that language such as a 'child's order' is too vague and unclear. There was also some scepticism about how much a terminology change would contribute to a change in attitudes and practice.

On the other hand, some felt that the terminology should be updated to reflect the child being at the centre of the process. We do not feel, however, that a 'child's order' sufficiently

captures this principle; a suggestion from the Women's Aid network was to change the terminology to 'best interests of the child order'.

Question 19): Should all fathers be granted PRRs?

Yes

No X

Why did you select your answer above?

Responses to the network survey were not in favour of granting PRRS to all fathers.

Under the Children (Scotland) Act 1995 the acquiring of parental rights is there to support parents fulfilling their responsibilities; PRRs are always qualified by the rights and best interests of the child. Giving all unmarried fathers automatic PRRs may therefore have unintended consequences detrimental to children.

As the consultation makes clear, the vast majority of parents do gain PRRs currently – where the remaining minority do not, this is often down to disputes between the parties or very good reasons for mothers resisting. Where the matter is disputed, resolution must be through a robust court process given that in a significant number of these cases there will be safety and wellbeing concerns for women and children, including domestic abuse. As stated previously, pregnancy is often a time when abuse begins or intensifies; about 30% of domestic abuse starts in pregnancy. This proposal would also be inappropriate for women who have conceived due to rape. The commitment to parenting shown by, for example, a joint birth registration, remains more appropriate than an automatic grant.

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

No X

Why did you select your answer above?

During the passage of the 2006 Act, the Scottish Parliament actively chose not to backdate automatic rights for unmarried fathers. **The Justice Committee agreed with the position taken by the then Scottish Executive on the matter that to so legislate could “... have the effect of requiring mothers to go to court to seek the removal of PRRs from a father simply in order to restore the status quo.”** The Scottish Executive had stated in the Bill's Policy Memorandum that *“It would be 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. In addition, there is a need to protect families whose arrangements had already been settled by courts, it would not be in anyone's interests to re-open such cases.”*³⁴

³⁴ <http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-01.htm#retrospectivepr>

Our view is that position still stands and to change the legislation retrospectively would result in unintended consequences, specifically conferring rights over children to abusive fathers, who may never have had contact with the children and whose involvement may be disruptive, counterproductive and unsafe. Further, the children may not have any wish to interact with the father and this would be utterly disregarding the views of the children on the matter, notwithstanding the fact that this change would be open to challenge as a breach of the child's human rights, particularly ECHR Articles 6 and 8.

Most of the children this would impact on, born before the commencement of the legislation in 2006, will now be at least 12 years old and given that they will reach 16 by 2020, this proposal seems redundant.

Question 21): Should joint birth registration be compulsory?

Yes

No X

Why did you select your answer above?

Responses to the network survey were not in favour of compulsory joint birth registration, for the same reasons as those outlined in the response to Question 19.

We would also add that having exemptions such as those proposed for England and Wales is not a viable solution, given that rape is notoriously under-reported and conviction rates are low. In relation to domestic abuse, there continues to be varying levels of professional understanding of the dynamics of domestic and its impact on women and children, so there is no guarantee that having an exemption based on professional concerns about women's and children's welfare would actually protect those at risk.

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

Why did you select your answer above?

We did not take a definitive stance on this question since this recognition depends whether or not the PRRs are comparable with PRRs in Scotland and whether the processes elsewhere have engaged women and children's human rights, meet the best interests and welfare tests, take the views of children/involvement in decision making into account when dealing with PRR issues and cover a comparable age range of what is defined as a child.

Our concern around this proposal relate to jurisdictions where women's rights are less progressive than those under Scots Family Law and are subjugated to the rights of fathers. Decisions around the child could be made unilaterally by the father and the child taken abroad from Scotland by a father legitimately, and, in terms of the law of a foreign jurisdiction, not be returned to Scotland.

To legitimise into Scots law PRRs given to fathers in these circumstances, where the fathers would have more control over the lives of their children and could exclude mothers, would be a regressive step for women and children, especially where domestic abuse is the issue.

Indeed, during the passage of the then Family Law (Scotland) Bill, the Scottish Executive raised concerns around equivalences of PRRs in overseas jurisdictions. Granted that this was in 2006 but there are still legitimate concerns and so we would therefore suggest that this proposal needs further investigation.

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

Yes

No	x
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Why did you select your answer above?

The current position in Scotland, laid out in the 1995 Act, is that any court decision about a child must have the child's welfare as its paramount consideration. While Article 9 of the UNCRC states that children have a right to contact with both parents, it also makes clear that this right must not be enforced if it could cause the child harm.³⁵

SWA is deeply concerned that introducing a presumption of the involvement of both parents may undermine the paramountcy principle, inadvertently increase risk to children, place children's human rights in conflict with parents' legal entitlements and prioritise parents' entitlements over their responsibilities for their children's welfare.

SWA supports the involvement of both parents in a child's life where this is safe for women and children and such involvement is in the child's interest. Definitions of 'shared parenting' vary widely in academic and political debate. Sometimes 'shared parenting' is taken to mean "a co-parenting approach characterised by flexibility and focused on the child's needs".³⁶ Shared parenting is most likely to be good for children where parents have entered into agreement *freely* and with the child's best interests and safety at heart; importantly, good relationships (both parent to parent and parent to child) where mothers are safe and supported are a key feature of successful shared parenting.

Shared care is also often conflated with shared parenting; shared care is concerned primarily with a set amount of contact or residency time for parents, providing a guarantee that both parents spend equal or substantial amounts of time with a child. It is important to note that evidence shows children's best interests and wellbeing are served by the *quality* of

³⁵ https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf?ga=2.225252634.1098457861.1532688661-2141668862.1531486585

³⁶ Philippa New is Firm Foundations (2011). 'Shared Care in Separated Families: Building on what Works.' London: Gingerbread.

the parenting they receive, rather than the amount of time spent with a parent.³⁷ In relation to shared care, the following factors are critical to positive outcomes for children:

- The wishes and needs of children are prioritised
- The arrangements are flexible and adapt to children's changing needs
- Children feel equally safe and well with both parents³⁸

In contrast, as is generally often the case when courts are involved, families are experiencing high levels of conflict, repeat litigation and low levels of cooperation. Further,

research suggests that domestic abuse is a feature of half of all court actions over contact.³⁹ The evidence shows that where there is abuse, coercion or conflict, shared care does not offer positive outcomes for children.⁴⁰ This is illustrated by the example of Australia, where a statutory provision for shared parental care/involvement following separation was interpreted by judges to mean dividing time equally between parents at the expense of considerations of safety and wellbeing. This was shown to be an overly rigid approach with damaging consequences for individual children,⁴¹ leading to the law being amended.

Closer to home, evidence from England demonstrates that the existing legal presumption of involvement of both parents in the life of the child has led to a 'pro-contact' philosophy that puts women and children with experience of abuse at risk.⁴² The presumption has a silencing impact on children affected by domestic abuse, with courts taking a selective approach to children's perspectives – there is evidence that children are believed if they say they want contact, but that they are more likely to be ignored or over-ruled if they say they do not want contact and their fears about abuse are minimised.⁴³

Research into the perspectives of young adults who had experienced parental separation in their childhood found that the young people agreed overwhelmingly that contact should never take place in circumstances of an abusive parent-child relationship and that no contact is better than bad contact in such situations. The conclusion of the research was that the English courts' current approach that contact is almost always in the interests of the children

³⁷ Fehlberg, B., Smyth B. et al. (2011) 'Caring for children after parental separation: would legislation for shared parenting time help children?' Family Policy Briefing 7. University of Oxford, Department of Social Policy & Intervention. Irving, H. & Benjamin, M. (1995) 'Shared parenting: Critical review of the research literature' in HH Irving & M Benjamin (eds) *Family mediation: Contemporary issues*. Thousand Oaks: Sage Publications, pp. 229-276. Trinder, L. (2011) 'Shared residence: A review of recent research evidence', *Child & Family Quarterly*, vol22, no4 pp 475-498.

³⁸ Smart, C. 'Equal shares: rights for fathers or recognition for children?' *Critical Social Policy*, Vol. 24 No. 4, pp. 484-503.

³⁹ McKay, K. (2013) 'The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse': <https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>

⁴⁰ Philippa New is Firm Foundations (2011). 'Shared Care in Separated Families: Building on what Works.' London: Gingerbread; Fehlberg B., Smyth B. et al (2011). 'Family Policy Briefing 7: Caring for children after parental separation: would legislation for shared parenting time help children?' University of Oxford, Department of Social Policy & Intervention; Trinder, L. 'Shared residence: A review of recent research evidence', *Child & Family Quarterly*, Vol 22, No. 4, pp. 475-498.

⁴¹ Chisholm, R. (2009) 'Family courts violence review.' Canberra: Attorney-General's Department; Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu, L., et al. (2009). 'Evaluation of the 2006 family law reforms.' Melbourne: Australian Institute of Family Studies.

⁴² Coy, M., Scott, E., Tweedale, R. and Perks, K. (2015) "It's like going through the abuse again": domestic violence and women and children's (un)safety in private law contact proceedings.' *Journal of Social Welfare and Family Law*, 37:1, 53-69

⁴³ Harrison, C. (2008). 'Implacably hostile or appropriately protective?': Women managing child contact in the context of domestic violence.' *Violence Against Women*, 14, 381-405; Holt, S. (2011) 'Domestic abuse and child contact: positioning children in the decision making process', *Child Care in Practice*, 17 (4), 327-346.

is not sufficiently nuanced, and should take account of the child's need for *good* contact rather than simply *any* contact.⁴⁴

The right to private and family life, enshrined under Article 8 of the ECHR, is often raised in relation to children maintaining contact with a parent. However in the context of domestic abuse, if the relationship between the child and parents is being disrupted by ongoing abuse, it has been argued that there is a strong case for claiming that both the child's and the abused parent's right to family life are being interfered with, creating an obligation on authorities to intervene to protect their rights of family life.⁴⁵ It has been further argued that courts have failed to adequately apply human rights to child contact, and that if Article 3 of the ECHR – the right to protection from torture and inhuman and degrading treatment – was properly applied, direct contact would be refused in the majority of cases where children have been adversely affected by abuse.⁴⁶

Given the evidence, we are deeply concerned that introducing a presumption in contact and residence cases will inadvertently increase risk to children. A common tactic of perpetrators

is to use court ordered-contact processes and arrangements to further control women and children. Contact orders with perpetrators continue to be imposed on children against their wishes with harmful consequences, as the following quote from a child involved in Everyday Heroes illustrates:

*"Imagine having to stay with someone who scares you so much your tummy hurts. The whole time you are wishing you were home where you feel safe."*⁴⁷

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

Yes X

No

Why did you select your answer above?

The majority of responses to the network survey were in favour of legislation being made to make clear that courts should not presume that a child benefits from both parents being involved in their life. We do not believe that this would cut across the best interests principle as the wording of the question suggests that such legislation would not be a presumption *against* the involvement of both parents in a child's life (which we would not be in agreement with). Rather, it is making clear to courts their starting point and duty is not to begin the process with any presumptions or outcome in mind until all the issues and evidence has been considered, in line with the need to assess a child's best interests on a case by case basis.

⁴⁴ Fortin, J., Hunt, J., and Scanlan, L. (2012) 'Taking a Longer View of Contact: The Perspectives of Young Adults Who Experienced Parental Separation in Their Youth', Sussex, Sussex Law School, University of Sussex.

⁴⁵ Choudhry, S. (2012) 'Contact, domestic violence, and the ECHR', *Current Legal Issues*, Oxford University Press

⁴⁶ *Ibid.*

⁴⁷ Everyday Heroes; report forthcoming.

We are concerned that currently parents' rights to be involved in a child's life, including abusive parents, is prioritised over children's safety and wellbeing. Introducing legislation making clear that courts should not presume that a child benefits from both parents being involved in their life promotes the principle of assessing a child's welfare on a case by case basis, where the best interests principle has to be considered when interpreting all factors, including a child's right to have direct contact with a parent they have been separated from. Taking the child's views into account must form an integral part of the decision-making process

As we have stated throughout this response, we support the right of children to have both parents involved in their life where this is in their best interests. However, children also have a right to be protected from violence, abuse and maltreatment.⁴⁸ The Istanbul Convention makes clear the duty on states to ensure that, in cases of gender-based violence, "the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children."⁴⁹ The experience of women, children and young people affected by domestic abuse suggests that legislation on no presumption may be necessary to further protect their rights in contact and residence cases.

There is a requirement on courts under Section 11 (7A) - (7E) to protect the child from abuse or the risk of abuse and to consider the ability of a person who has carried out abuse or might carry out any abuse to care for, or otherwise meet the needs of, the child. In spite of this, as we outlined in our response to Question 6 there appears to be an unspoken assumption in courts of 'contact at all costs', where the involvement of both parents in a child's life is deemed to be in their best interests even where domestic abuse is a factor. Domestic abuse should be understood as a parenting choice;⁵⁰ however, there continues to be a harmful separation between men's abusive behaviour and their parenting capacity. A study into the treatment of children's views in child contact disputes where domestic abuse is a factor found that, of the children who expressed clear views about contact, 34% had a contact outcome that bore no resemblance to the view they expressed. Apart from two children who wanted to see more of their mother, all the children for whom the contact outcome bore no resemblance to their express views were children living with their mothers who either wanted no contact or less contact with their father. The abusive behaviour these children had been exposed to was no less severe than in cases in which contact was not ordered by the court.⁵¹

Research also indicates that domestic abuse is the most common context for child abuse.⁵² Yet children are still forced into contact with perpetrators who pose a risk to them and their mother. We are aware that such orders are sometimes made even against the advice of professionals including social workers, child psychologists and Women's Aid workers. In cases where domestic abuse and/or child abuse has been raised, a 'solution' of the courts

⁴⁸ Under Article 19 of the UNCRC:

⁴⁹ Article 31: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>

⁵⁰ <https://safeandtogetherinstitute.com/the-invisibility-of-the-domestic-violence-perpetrator-as-parent/>

⁵¹ McKay, K. (2013) 'The treatment of the views of children in private law child contact disputes

where there is a history of domestic abuse': <https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>

⁵² Walby S. & Allen J. (2004) Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey, Home Office Research Study 276, London: Home Office

can sometimes be for supervised contact to take place. However, in addition to the problems around contact centres in relation to domestic abuse (outlined in our response to Q6), supervised contact can continue to put a child at risk of emotional harm; a child's fear of the perpetrator does not diminish just because another person is in the room. For instance, we are aware of instances where perpetrators have pressured children for information (e.g.; the child's and mother's address) during supervised contact, leading to great distress on the child's part and increasing risk to both the mother and child.

Research has found that children who have ongoing contact with perpetrators can display a range of effects before and after contact visits, such as fear, anxiety and distress, expressed through behaviours such as being withdrawn, anxious, bedwetting, anger and nightmares.⁵³ This is reflected by women and Women's Aid workers who report that, where court-ordered contact with the perpetrator has been granted against the wishes of the child, this can be

fundamentally detrimental to the child's health and wellbeing, disrupting their ability to overcome the physical, psychological and emotional effects of the abuse.

It can also undermine women's relationship with their child, a relationship vital to women and children in recovering from abuse (as recognised through the Safe and Together model), as children feel that they are not being protected by their mothers. Women taking part in a focus group commented:

"My son doesn't trust me as I make him go [to court-ordered contact]." (Woman)

"My daughter said to me, 'You must hate me.'" (Woman)

Children and young people express great frustration and distress at being forced into contact with a perpetrator when they do not want to. Children taking part in Everyday Heroes felt that there needs to be greater flexibility and choice around contact with perpetrators. Children were particularly scared about overnight stays with the perpetrator. They felt sheriffs should only consider overnights after a long period of contact that the child reported had gone well. They felt someone should be regularly checking the child is safe and well, and some suggested that the Sherriff should have regular updates on the child's life.⁵⁴

Question 25): Should the Scottish Government do more to encourage schools to involve non-resident parents in education decisions? Please select only one answer.

- a) Yes – put the pupil enrolment form and annual update form on a statutory basis.
- b) Yes- issue guidance on the enrolment form and annual update form.
- c) Yes – other (please specify).
- d) No – no further action by Scottish Government is required.

Why did you select your answer above?

⁵³ Thiara, R. and Gill, A. (2012) 'Domestic Violence, Child Contact and Post Separation Violence: Issues for South Asian and African-Caribbean Women and Children; A Report of Findings', London, NSPCC.

⁵⁴ Everyday Heroes: report forthcoming.

We have not selected an option in relation to this question given that there were mixed responses from the network survey, with concerns that the options all have the potential to both help and harm women and children experiencing domestic abuse. On the one hand, Women's Aid groups report circumstances where women experiencing domestic abuse, as the non-resident parent, have been excluded from being involved in their child's school life. On the other, in spite of the exemption in the Pupils' Educational Records (Scotland) Regulations 2003, perpetrators have also used schools to find out information which puts women and children at risk, e.g.; the address of the mother and child.

There have also been concerning cases where schools have inappropriately shared information with a perpetrator about their child accessing Women's Aid services, thereby increasing the risk to the child and their mother and leading to children being prevented from accessing specialist Women's Aid support. These experiences suggest that further work is needed to ensure that schools have sufficient knowledge and understanding of

the dynamics of domestic abuse when it comes to sharing information and involving non-resident parents.

Question 26): Should the Scottish Government do more to encourage health practitioners to share information with non-resident parents if it is in the child's best interests? Please select only one answer

- a) Yes – legislation.
- b) Yes – guidance.
- c) Yes – other (please specify).

d) No – no further action is required X

Why did you select your answer above?

The majority of responses to the network survey were not in favour of the Scottish Government taking further action on this issue. We are unsure why action is needed when parents with PRRs can already apply for access to their child's medical records. Similar safety and confidentiality issues arise as discussed in our response to Question 25 above and they are relevant here. Some responses to the network survey expressed concern that perpetrators use medical information to continue their abuse, e.g.; blaming a mother for a child's health issue or preventing necessary medical interventions. Decisions on applications for information from a non-resident parent should be predicated on a child's wishes and what is in their best interests, which should be assessed on a case-by-case basis.

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

Yes X

We have been advised that there are issues where perpetrators who do not either already have PRRs nor have been granted them are granted contact by the courts. They have behaved as if they have PRRs and have attempted to interfere with children's schooling, medical care, etc. Therefore, clarification of the position would be helpful.

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

Yes

No

Why did you select your answer above?

We have not selected one of the response options listed, as we do not feel they fully capture our position on this issue.

While the consultation paper does not use the term 'parental alienation', we are concerned that in practice there will be the same risk of negative consequences for women and children experiencing domestic abuse regardless of terminology.

Parental alienation allegations against mothers are often used as a tactic by perpetrators in courts to deny, minimise or counter abuse allegations, effectively silencing women and children and diverting attention away from the perpetrator. Research with women's aid shelters in Canada demonstrate this silencing effect, highlighting that women are being advised by lawyers not to disclose domestic abuse in their contact cases in order to reduce the risk of being accused of parental alienation. The consequences of this included women actively minimising their experience of domestic abuse, questioning their own actions and sometimes being pressured into decisions that weren't in their child's best interests rather than risk losing custody altogether.⁵⁵

Research evidence reveals that women who oppose father-child contact, express serious concerns for their children's safety or request safe and supervised contact arrangements can be perceived as 'non-collaborative' or as 'hostile'⁵⁶ rather than having legitimate concerns. Indeed, we know from women supported by Women's Aid that attempts to keep their children safe have been interpreted as 'unduly influencing' them:

"Everything I do to protect my children is turned around in court to make out that I'm trying to turn them against their dad [...] I'm scared to discuss anything at all [about the case] with the children in case of being accused of trying to influence them." (Woman)

⁵⁵ Lapierre, S. & Côté, I. (2016). 'Abused women and the threat of parental alienation: Shelter workers' perspectives'. *Children and Youth Services Review* 65, 120–126.

⁵⁶ Harrison, C. (2006). 'Dammed if you do and damned if you don't? The contradictions between public and private law.' In C. Humphreys, & N. Stanley (Eds.), *Domestic violence and child protection: Directions for good practice* (pp. 137–155). London: Jessica Kingsley

This is all the more problematic given that there is little to no concrete empirical evidence about the existence of what is referred to as parental alienation⁵⁷ - that is, the unwarranted rejection of the non-resident parent and an alliance with the alienating resident parent. There is also a lack of evidence around the effect of 'alienation' on a child's emotional and psychological development.⁵⁸ Further, a retrospective study of grown-up children's views of contact concluded that there was no evidence of children resisting contact based entirely on pressure from their resident mothers; rather this was due to the child's own reasoning, often in response to the non-resident parent's own behaviour.⁵⁹

In light of the evidence, we are concerned that a focus on preventing a parent putting a child under pressure to reject another parent will have the practical effect of denying and minimising domestic abuse allegations. This will have the impact of distracting from the impact of domestic abuse on a child by wrongly attributing harm to a mother's 'pressure' or 'undue influence'; and undermining children's voices through casting any views they express against contact under automatic suspicion as being 'manipulated'. Thus, more awareness

needs to be raised about the highly problematic evidence base around parental alienation and the tactics perpetrators routinely use to deny, minimise and counter abuse allegations in family courts.

In addition, more awareness needs to be raised around perpetrators' strategies to undermine mother-child relationships as part of their abuse.⁶⁰ Research evidence shows that

perpetrators use a range of tactics to undermine supportiveness between women and children, including monitoring or limiting the time women and children spend together;⁶¹ belittling and insulting women to their children; forcing or manipulating children and young people to take part in the abuse of their mother;⁶² coercing a woman to parent in a style she isn't comfortable with; and reporting partners or ex-partners as 'unfit mothers' to child protection services.⁶³

It is for this reason that domestic abuse should be fully recognised here as a parenting choice on the part of perpetrators; yet too often there is an assumption that 'poor partners' can be 'good fathers'. Indeed, we know of cases where sheriffs have accepted that the abuse happened, but ordered contact on the basis that the perpetrator 'wasn't abusive to the children'. This demonstrates a concerning lack of understanding about how domestic abuse impacts on children.

⁵⁷ Doughty, J., Maxwell, N., & Slater, T. (2018) 'Review of research and case law on parental alienation.' Cardiff University: <https://gov.wales/docs/cafcass/publications/04052018AReviewofResearchandCaseLawonParentalAlienation.pdf>

⁵⁸ Meier, Joan S (2013). Parental Alienation Syndrome and Parental Alienation: a Research Review. Harrisburg, PA: VAWnet. https://vawnet.org/sites/default/files/materials/files/2016-09/AR_PAUpdate.pdf

⁵⁹ Fortin, J., Hunt, J., & Scanlan, L. (2012). 'Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth.' Brighton: Sussex Law School.

⁶⁰ Morris, A. (2009) 'Gendered Dynamics of Abuse and Violence in Families: Considering the Abusive Household Gendered Regime', *Child Abuse Review*, 18: 414-487; Humphreys, C., Mullender, A., Thiara, R., Skamballis, A. (2006) "'Talking to My Mum": Developing Communication between Mothers and Children in the Aftermath of Domestic Violence', *Journal of Social Work*, 6: 53-63; Heward-Belle, S. (2017) 'Exploiting the 'good mother' as a tactic of coercive control: Domestically violent men's assaults on women as mothers', *Journal of Women and Social Work*, 1-16.

⁶¹ Katz, E. (2016) 'Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed By and Resist Regimes of Coercive Control', *Child Abuse Review* 25:1, 46-59.

⁶² Mullender, A., Kelly, L., Hague, G., Malos, E. and Iman, U. (2002) *Children's Perspectives on Domestic Violence*, London: Routledge

⁶³ Heward-Belle, S. (2017) 'Exploiting the 'good mother' as a tactic of coercive control: Domestically violent men's assaults on women as mothers', *Journal of Women and Social Work*, 1-16.

Children continue to be manipulated by perpetrators through contact arrangements, especially to get information about women's movements and relationships, to undermine mothers to children, and to coach children to make negative comments and repeat abusive messages.⁶⁴ There needs to be further awareness raised among courts and legal professionals about this aspect of coercive control, with such behaviour fully recognised as part of the pattern of abuse and taken into account in the court process.

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

Please select only one answer.

- a) Yes – by an application to the criminal court following a conviction to remove that person's PRRs.

- b) Yes – by giving the criminal court a duty to consider the removal of PRRs when a person is convicted of certain types of offences.

- c) No – leave as a matter for the civil courts.

- d) No – another way. (please explain).
Why did you select your answer above?

Our network was supportive of this proposal, with a majority leaning towards this, as it would forge a clearer link between the impact of criminal behaviour on parenting, but they also made the point that there are too many unanswered questions to firmly approve the method by which this could be done and it would have to be dealt with on a case-by-case basis.

If used properly, this provision could potentially be positive for protecting children from domestic abuse perpetrators. SWA has repeatedly said that criminal penalties relating to domestic abuse offending must be taken into account in decisions around PRRs.

However, many questions about the practical application of this provision were raised, as follows:

- Clarity is needed as to what constitutes a 'serious' offence and whether this would be defined by the nature of the sentence or the criminal activity. Care should be taken around the introduction of thresholds, especially given the terms of the forthcoming domestic abuse offence, as it would be inappropriate to create a hierarchy of abuse.
- It was suggested that this could include criminal offences under the new domestic abuse legislation, HBV, sexual offending, child abuse, offences attracting a Schedule 1 listing and offences committed relating to children that, under the Children's Hearing legislation would require the child to be referred to a Children's Hearing. It would not, however, be appropriate to include offences involving, for instance, fraud.
- The passage of time since the offence - how current would they have to be?

⁶⁴ Holt, S., Buckley, H. and Whelan, S. (2008), 'The Impact of Exposure to Domestic Violence on Children and Young People', *Child Abuse and Neglect*, 32 (8), 797-810;

- The proposal is not gendered so a possible unintended consequence is the negative impact on women who have been coerced into committing crimes as part of the abuse, for instance, benefit fraud or have committed crimes in order to keep themselves safe and their children safe.
- The consultation is not clear about how the best interests of the child and the welfare of the child be considered here, along with the child's views. Given the concerns around the courts' treatment of domestic abuse, there may be no consistency in application and it is not clear what would happen if the court did not remove the PRRs from a perpetrator in cases where the child wanted this to happen and vice versa.
- The standard of evidence required as it is not clear whether or not the court would apply the criminal or civil evidential thresholds.
- It was unlikely that this removal would be automatic. An appeal process would be needed which could drag out the process. This would potentially require witnesses and the woman and/or child to give evidence to support the removal of the PRRs in the face of an objection by a perpetrator, an unappealing situation.

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

Yes

No

Why did you select your answer above

We do not have a settled view on this matter.

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

Yes

No

Why did you select your answer above?

This is a difficult question on which to give a definitive answer as it has consequences both for women fleeing the UK, in order to protect children from abuse, as well as for perpetrators abducting children. There is also the issue of whether a child's consent to being removed would be considered. We also note that an interdict could be used to prevent removal without consent.

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

Yes X

Why did you select your answer above?

This is a supportive proposal which will be helpful in both Child Welfare Hearings (CWH) and cases gone to Proof; we note that other jurisdictions have done this or are proposing to do so.

The outcome will be that perpetrators who would otherwise be representing themselves because they are not eligible for civil legal aid or do not wish to pay for a lawyer would therefore be obliged to use a lawyer. Therefore, 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.

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

Yes

No

Why did you select your answer above?

While we considered supporting this proposal, the issue here is that 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.

The consultation makes reference, at paragraph 9.19 to the fact that the courts rely on parties bringing domestic abuse to their attention and that this process is entirely deficient. We note that this was raised with the Family Law Committee of the SCJC in their meeting of 30th April 2018 and that in relation to protecting women experiencing domestic abuse at CWH, the Rules "...provide for a party to be excused attendance at a child welfare hearing if cause is shown as to why they should be so excused. The lack of such motions being made to the court was noted. Members felt that, rather than being a matter for the Committee, it may be more appropriate for the Scottish Government to liaise with the Law Society of Scotland about issuing a circular on the matter."⁶⁵The lack of Motions in this area is

⁶⁵ <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/30-april-2018/draft-minutes-of-flc-meeting-30-april-2018---a-waiting-approval.pdf?sfvrsn=2>

concerning and it may be that solicitors are either not aware of the Rule or are not advising women of this provision. Therefore, a circular to the Law Society is entirely appropriate and should be produced without delay, as it does not require any legislative reform.

However, we want reform in this area to go further. Women in civil proceedings involving the same abuser experience the same anxiety and fear around his presence in court as they do in criminal proceedings. Therefore, we are seeking the transposition, to civil proceedings, of the automatic protections available in criminal proceedings to deemed vulnerable witnesses in offences relating to domestic abuse, stalking and forced marriage under sections 10 and 11 of the Victims and Witnesses (Scotland) Act 2014. In actions under section 11 of the 1995 Act, women would, therefore, be automatically entitled to use certain special measures, such as a screen in the courtroom; a live TV link allowing them to give evidence from somewhere outside the courtroom during the trial and/or a supporter who can sit with them while they give evidence. This will take forward, into civil proceedings, recommendations from the Evidence and Procedure Review ⁶⁶ that “... *the best practice and procedures recognised in this paper are drawn upon to influence similar best practice and procedures to support and protect child and adult vulnerable witnesses give their best evidence in civil proceedings.*”

As stated by one Women's Aid worker: *“It seems shocking and dangerous to us that a woman can receive special measures at criminal court one week for a serious assault on her for which there were bail conditions imposed, yet still have to appear at a child welfare hearing sitting next to a man who has threatened to kill her. The effects on this woman's mental health every time she has to attend a CWH is extremely detrimental.”*

Given that, as we have mentioned, domestic abuse may not be explicitly mentioned in pleadings or by the woman's solicitor, we recommend that domestic abuse victims and vulnerable parties have an explicit right to request these standard special measures where the court has not identified the need for them and for them to be provided if so requested.

In the light of the prevalence of domestic abuse in child contact cases, despite the views of the SCJC to the opposite, the court must have a duty to make inquiries about the need for special measures and take action to ensure women are protected.

Further, in response to this question, the proposals put forward by the SCJC in relation to using the initial case management hearing as a “triage hearing” have not taken domestic abuse into account and may negatively impact on the availability of this protection. Firstly, the woman would be subjected to an encounter with the abuser at that early stage with no special measures available. Further, if domestic abuse was not made explicit by the woman's lawyer or readily identified by the court, it is entirely possible that the case would be marked for the “fast track” process with all the dangers inherent in domestic abuse not being properly addressed during the ongoing expedited process.

⁶⁶ <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-pre-recorded-evidence-report-28-09-17.pdf?sfvrsn=2> page 6

In terms of costs, the training for Social Work, court personnel, judiciary, legal professionals, specialist personnel, equipment, court rules and procedures for providing special measures and pre-recorded evidence should be already in place, and will be expanded for criminal cases under the Evidence and Procedure Review, so cost savings can be found there. For civil cases, additional costs will arise from adapting existing rules and procedures for civil actions and extending the training, particularly in relation to domestic abuse, to all relevant parties, with specific reference to legal profession and judiciary.

We would note that in applying these special measures, supporters should be allowed into the process much earlier and Women's Aid workers should be appropriately recognised as valid professional witnesses and supporters/officers of the court in terms of their expertise.

On the matter of protection for children, we would urge the incorporation of children and young people's recommendations from Power Up/Power Down and that trained Children and Young People support workers are enabled to support children and young people as soon as possible.

This move toward improved judicial case management should also include steps being taken to make cases under part 1 of the 1995 Act less stressful for the child and for the parties. This would include:

- Improving processes around CWH
- Improving processes for taking and giving of evidence
- Again, it would be useful to incorporate recommendations from children and young people in Power Up/Power Down, including early involvement of trained support workers; clarity on confidentiality; feeding back decisions to children and young people; children and young people being able to see questions ahead of time; involvement of a limited number of trusted adults and court processes being generally made more user-friendly.

Access to justice and securing protection as vulnerable witnesses is a particular issue for BME women and children. Specific issues have been raised by service users from Shakti Women's Aid in relation to the barriers and issues for BME women in child contact proceedings:

- A lack of information around rights and the process - women are puzzled by the law, and feel *"Confused, scared and alone when you walk in to the court.. Supporter to be there in court to meet you and make you feel comfortable – good to have someone you're comfortable with but if you have no one then someone provided by the court."*
- Women feel that they have *"slipped through the cracks"* and were concerned about having to go to court with no support, and not having a safe place to wait
- They do not have confidence in the process and felt *"bullied"*; that statutory agencies had a lot of power and that the interplay between immigration law in the family court system was negative– they wanted *"more opportunity to give opinions to the sheriff"*
- They wanted more information to be available for people wishing to (or having to) represent themselves (and their children)

- More information about how historical court orders can be challenged
- The necessity of an adequate interpreter service and a lack of confidentiality around interpreters was identified
- Language was a barrier - reports are all written in English and translation is of poor quality
- More support for women where there is an absence of settled immigration status for women since they are especially vulnerable to misuse of the court process by abusive partners

Question 34): Should subsections (7A)-(7E) of section 11 of the 1995 Act containing a list of matters that a court shall have regard to be kept? Please select only one answer.

a) **Yes – retain as currently.**

Why did you select your answer above?

SWA's position is that this subsection is a useful and fundamental addition to section 11, reflecting the issue that domestic abuse is present and often ignored. Our survey of network

members, harnessing their decades of experience and professional understanding of domestic abuse indicated overwhelming support for the retention of the subsections.

There are well publicised, recorded and clear issues in the public domain on the problems inherent in child contact where domestic abuse is an issue.

- Views were expressed well before the amendment to the, then, Family Law (Scotland) Bill in 2005 that even though the 1995 Act clearly stated that the “... *welfare of the child is paramount*”, that was not being taken account of in relation to domestic abuse.
- The harm caused by domestic abuse, and the lack of any imperative around this in section 11 was recognised by the Scottish Parliament during the passage of Family Law (Scotland) Bill in 2005, to the extent that the, then, Deputy Minister for Justice at the Scottish Executive brought forward an amendment to the Bill at Stage Two ⁶⁷ ⁶⁸
- At the meeting of the Justice 1 Committee on 9 November 2005, the Minister further stated that “... *In key cases, judicial evaluation of the circumstances of the case, in light of its child welfare characteristics, will be recorded.*”
- Committee Members further noted that “... *Guidance and training are also needed before we can make a real impact on people's lives.*”⁶⁹

⁶⁷ http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2142&mode=html#job_10072- Justice Committee 9 November 2005; Official Report

⁶⁸ <http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/Scottish%20Executive%20Correspondence%20at%20Stage%202.pdf>

⁶⁹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2144&mode=pdf>

In the light of Parliament's intention to address a long-overdue deficiency in the law, we are perplexed by the Scottish Government's suggestion that the subsections might be usefully removed. Similarly, we have been asked, particularly by women and children why the state and the Scottish Government would not want to ensure that in private child arrangements decided by a court, there is a requirement to protect children from abuse and to consider effects of abuse and that "*removal (of the subsections) would be regressive and reprehensible.*"

We have heard of claims that the presence of these subsections "... *causes problems*" and "... *leads to people saying that domestic abuse is present when it is not.. false allegations*"

and that legal practitioners "broadly" think that 11(7A)-(7E) is not necessary, that the law should simply provide that welfare of the child is paramount. We see no evidence that these claims reflect interest in children's best interests. Reference to false allegations about domestic abuse is even more concerning, given the copious evidence that false allegations are no more prevalent in domestic abuse than in any other crime; such references 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.

Our network has commented, inter alia, that removing the subsections:

- "... *would exclude the very valid and important experiences of women and children who have experienced domestic abuse whose lives continues to be affected by the perpetrator...*
- *inclusion of the subsections is the only way to ensure a discussion can even take place around safety and wellbeing for the child, as they are centred around safeguarding and rights of the child...*
- *They must absolutely be retained in order to uphold the safety and wellbeing of vulnerable children and young people, as well as diffuse the ignorance and denial sometimes demonstrated by others in situations where domestic abuse is a factor...*"

Section 11(7A-E) is good law and *could* be a powerful tool in protecting women and children at risk of domestic abuse if it were properly implemented. Whereas other provisions of the Act relating to domestic abuse, such as the creation of matrimonial and domestic interdicts, have met with some success, this crucially important provision has been markedly misused.

Despite the duty the 1995 Act places on the court and the matters in subsections (7A)-(7E) that the court "... **shall have regard to...**" and thus, the very specific inquiries that the court is required to undertake around the presence or risk of domestic abuse on the child and the non-abusing parent, the impact of abuse on women, children and young people is not always taken into account or understood. Clearly, views of children are rarely taken and even more rarely listened to. More thought needs to be given by the courts to the "definition

of abuse” that they are considering, particularly given the new offence under the Domestic Abuse (Scotland) Act 2018.

It is a matter of considerable concern to SWA, the network of local Women’s Aid groups, the women, children and young people they support and other organisations working toward the protection of vulnerable women and children that such an important piece of legislation is so cavalierly and actively ignored. Legal practitioners, by silencing women and children through not raising domestic abuse as an issue in contact and residence cases, and the courts, by refusing to hear submissions around domestic abuse (in some instances, dismissing them and actively preventing the matter from being discussed) are, surely breaching women and children’s Article 6 and Article 8 rights.

We would therefore suggest that we engage with the Scottish Government in further discussions on how to strengthen and improve the subsections as opposed to removing them.

As a general observation, enforcing the application of the law in the way intended by the Scottish Parliament could be achieved by a Practice Note from the Lord President, possibly backed up by a statutory Code of Conduct for lawyers dealing with family cases.

Clarity in decision-making is also needed and this could be achieved by introducing a standard format around the wording and content of family judgements. More needs to be “written up” to promote awareness of cases where the provisions have been used appropriately.

There is a need for a clear promotion as to the provisions of the legislation and the obligation placed on practitioners and the courts- we would be happy to work further with the Law Society, Family Law Association and the Faculty to achieve this in addition to further engagement with the JIS and the Lord President.

Domestic abuse is, rightly, in terms of international and domestic obligations,⁷⁰ a clear priority for Ministers and removing the subsections would be an obvious derogation of their duty and, indeed, a backward step.

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

⁷⁰ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046031c> ; Thiara, R.K. and Harrison C., University of Warwick, *Safe not sorry: Supporting the campaign for safer child contact* (Bristol: Women’s Aid, 2016), <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/01/FINAL-Safe-not-sorry-FOR-WEB-JAN-2016.pdf> ; “Nineteen Child Homicides; What must change so children are put first in child contact arrangements and the family courts-<https://1q7dqy2unor827bqjls0c4m-wpengine.netdna-ssl.com/wp-content/uploads/2016/01/Child-First-Nineteen-Child-Homicides-Report.pdf> ;

Stark, Professor E., *Public Health and Public Administration*, Rutgers University, Newark, NJ; (2012) *The Battered Mother’s Dilemma: Reframing Child Maltreatment in the Context of Coercive Control*. <http://nau.edu/Centers-Institutes/Family-Violence-Institute/Foms/Workshop-Dr-Stark-The-Battered-Mother-s-Dilemma/>

Stark, E ; *Coercive Control: The Entrapment of Women in Personal Life* (Oxford, 2007)

On this note, we would emphasize that an increased focus in mediation as an option for “disputed “ cases, it is wholly inappropriate for child contact cases involving domestic abuse, which continues to be erroneously and inappropriately conflated into the category of “family disputes” or “family breakdown” and, thus, an issue that can be “resolved” through mediation. Mediation in family cases where domestic abuse is an issue, particularly any issue relating to children, is specifically highlighted in international instruments from the UN and Council of Europe as being wholly inappropriate and in fact, a procedure that is specifically prohibited.

Yes

No

Why did you select your answer above?

This proposal elicited a mixed response from our network. It was seen as positive for women in preventing repeated misuse of the legal process by perpetrators, the “legal bullying” we referred to in our introduction. However, some expressed concern that this would also effectively prevent women from accessing the courts to challenge harmful contact orders, particularly where the impetus to do so came from the child who did not want contact; *“Often mothers raise repeated contact cases with court at the behest of the child. e.g. child wants contact stopped ..Repeat litigation can be the only way to sort out intimidating or challenging contact behaviours...DA is real and out there and often occurs several times within the one family.”*

Alternatively, repeat litigation by perpetrators is a common tactic so some form of preventive action is required but with a nuanced approach that does not prevent women from protecting their child.

There is also the question of whether this proposal would also extend to preventing children entering into the process to challenge an order, which would not be acceptable.

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

Yes X

If yes, what action should be taken?

Please select all answers that apply.

- a) **Introducing a duty in legislation on the civil courts to establish if there has been domestic abuse.**
- b) **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.**
- c) **Including domestic abuse in any welfare checklist for the courts to consider in section 11 cases.**
- d) **Discussing with the Law Society of Scotland and the Family Law Association whether guidance for practitioners would be helpful.**
- e) **Other (please give details).**

Why did you select your answer(s) above?

Given that the welfare of the child is the paramount consideration when making an order under section 11, the court should be making extensive inquiries to establish this matter. We also note that the matter of domestic abuse was noted by the SCJC FLC in their report,⁷¹ on pages 13 and 14 and by the Scottish Government in their paper⁷² at paragraphs 24 and 25, namely that in relation to protection of the parties, information on domestic abuse was considered important. The Scottish Government also made a recommendation in paragraph 10 of Annexe D to its paper that new proposed forms “...*(the forms)* should ask whether any other relevant court cases – civil or criminal – have taken place or are taking place.” It therefore follows that this information is generally important to the court and must be available to it.

All of the above options were identified as being positive and “taking the pressure off women” since the more information that the court had, then the better, when dealing with domestic abuse; it is absolutely vital that the court has as much information as possible to inform appropriate 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. Also, given the nature of domestic abuse and the controlling aspects of abusers pressuring women not to disclose, particularly if the woman is representing herself, putting this duty on the court would increase her protection.

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

Yes

No

If yes what should be done?

This question attracted support but with substantial caveats on the basis of adequate training, assessment and tools used:

- It was not clear who the “trained person” providing these assessments was and how their understanding, expertise and training around domestic abuse would be ensured.

⁷¹ [http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1a---report-by-flc-sub-committee-on-case-management-in-family-actions-\(revised\)--private34ae4ba7898069d2b500ff0000d74aa7.pdf?sfvrsn=2](http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1a---report-by-flc-sub-committee-on-case-management-in-family-actions-(revised)--private34ae4ba7898069d2b500ff0000d74aa7.pdf?sfvrsn=2)

⁷² <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1c-case-management-in-family-actions--policy-paper-by-the-scottish-government.pdf?sfvrsn=2>

- It was unclear how these assessments would be used and when they would be presented in court, whether children's views would be included and the status of the assessments if their conclusion countered that of a CWR?
- In addition to any formal "tool", the network considered the importance of the woman's thoughts and views being heard in court and recorded accurately by an assessment
- Risk assessments used to identify high risk women would fail to support women who are involved in contact disputes and validity and prediction by existing tools are highly variable, depending heavily on practitioners' training and understanding of the gendered nature of domestic abuse and contact proceedings. There still exists a lack of education and awareness as to the complexities of domestic abuse and the impact that this has towards women and children. It was noted that "*A tool to determine risks to children from domestic abuse perpetrators could be really useful.*" They should not simply be based on a physical incident model and should also embed the Safe and Together model.
- It is crucial that Scottish Women's Aid and our network are involved in all stages of the design, delivery and training around this and the suggestion is that Women's Aid workers could carry out these assessments due to their expertise and relationship with the woman – "*We find that to women risk can be very subjective and it is only through building a relationship and establishing trust that women will reveal certain experiences that we believe would be high risk.*"
- Any reform will have cost implications but the payback should be safer, more supportive, inclusive, and representative decisions around children's futures.

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

Yes X

Why did you select your answer above?

The current disparity in protection between civil and criminal proceedings where domestic abuse is an issue is poignantly demonstrated by a quote from one of the young participants in the Everyday Heroes project who asked, "*I get a screen in [criminal] court to protect me from him as I'm scared of him but now I have to fight to not have contact with him, why?*"

In child contact cases, where a child's welfare and safety are paramount, all relevant information must be provided to the court to inform judicial decision-making. Therefore, provision of information on convictions, etc. to the court should be mandatory on the part of both the solicitors representing the parties and any CWR appointed. However, this disclosure could simply be a tick box exercise if domestic abuse offences are not identified to the court or offences which are, in fact, domestic abuse are not identified as such on criminal court systems, and are missed as a result.

There should be no necessary additional cost implications since, theoretically, this information should already be before the courts as evidence

Our network was ambiguous on the creation of an “integrated court” given the lack of understanding of the judiciary around domestic abuse and were not persuaded that, currently, this development would actually improve the situation for women and children. However, as stated above, any process that improves the information available to sheriffs hearing civil matters in cases where domestic abuse is a factor is likely to be helpful, and SWA thinks all avenues for doing so should be considered.

There was clear agreement that robust and thorough training for legal professionals, judiciary and court personnel on the dynamics, nature and implications of domestic abuse in civil and criminal cases would be necessary. The issue would be ensuring criminal issues/evidence related to domestic abuse offending and criminality was actively and routinely introduced into civil court proceedings, with the challenge seen as whether the information/system that captures criminal information can send this to the civil courts.

Concern was raised as to the lower-tier sheriff courts being designated as the forum for these courts and whether cases destined for the High Court or Sheriff and Jury would be demoted to an “integrated DA sheriff court”. This was viewed an issue because of the high tariff attached to the domestic abuse offence which attracts a potential custodial sentence of 14 years in prison, while the custodial sentencing powers of the Sheriff courts is restricted to 12 months.

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

Yes X

No

Why did you select your answer above?

Our network voiced support for this proposal on the grounds that “... prolonged cases can cause further distress and impact on the trauma a child who has experienced DA is having to deal with. Making sure that family cases are dealt with quickly may also reduce the time a perpetrator has during contact proceedings to continue with the abuse.. Prolonged family court cases can delay the healing process for Women and CYP. One child had nightmares for nearly a year as the case kept being delayed.”

It would be interesting to hear how this is working in countries where this is in place.

We note that the BRIA preceding the consultation asked whether “Part 1 of the 1995 Act be amended to make it clear that cases should be dealt with expeditiously and delays are contrary

to the child's best interests and whether “*time limits should be placed on cases under part 1 of the 1995 Act?*” This depends on the definition of “expeditiously” and whether this and the imposition of time limits would result in undue shortcuts to the process.

Parties including individual experts must get their evidence heard without prejudice or the courts deciding that their evidence is not necessary, otherwise this will likely increase Article 6 appeals on the grounds that parties were not heard by the court and did not get a fair hearing. This would be of considerable concern in domestic abuse cases if evidence was excluded for “expeditious” purposes, particularly where the court did not understand that domestic abuse was at the heart of the matter or the legal representatives did not raise the issue, which underlines the importance of training.

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

No X

For the reasons set out in the consultation paper in paragraph 10.16, there are no compelling reasons to do so. It is appropriate that complex cases involving section 11 orders should continue to be heard by the Court of Session and that litigants have access to that court for complex cases. At any rate, the Court of Session has the power to remit cases to the Sheriff Court where it considers that forum to be more appropriate.

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

No X

The network was not convinced of the efficacy of this proposal, while being very clear that under no circumstances should a checklist replace the protective provisions of section 11(7A)- (7E).

We would like to see evidence and evaluations of its use in other jurisdictions and whether the Welfare Checklist introduced into the Children Act 1989 in England and Wales has worked, before recommending its introduction in Scotland and to confirm whether it would be compatible with Scots law.

The proposal needs considerable thought if it is not simply to become a “tick-box exercise” and it would have to be used to ensure that the child’s welfare was paramount.

The parameters would have to be very wide, making this potentially a very long list, which could dilute its efficacy and standing in the eyes of the court. Also, there is the danger that an important matter could be left off and if omitted, would be effectively ignored, so it would have to be non-exhaustive. In relation to domestic abuse, this would have to go into explicit details and cover issues such as coercive control, animal abuse, financial abuse, stalking, emotional abuse, HBV and so forth. The problem is that all criminal activity around domestic

abuse is not always reported so there is a danger that if this did not feature as a “ticked” category, then the abuse would be downgraded.

Question 42): Should the Scottish Government do more to encourage Alternative Dispute Resolution in family cases?

Please select as many options as you want.

d) No – no further action required.

Why did you select your answer(s) above?

We do not propose to go into detail on this, since our position around the use of mediation in relation to domestic abuse is well recorded and widely known. Suffice to say that this should not, for all the reasons rehearsed at length in previous consultation responses to the Scottish Government, the Scottish Parliament’s Petitions Committee⁷³ and Justice Committee⁷⁴, mediation is not appropriate in the context of domestic abuse. It should not be promoted for use in this situation, as underlined by the recent Report of the Independent Review of Legal Aid.

We are concerned that the Scottish Government’s paper to the SCJC, referred to above, recommends “... *the forms ask what steps have been taken to resolve the issue out of court*

(e.g. by use of mediation or other forms of ADR) and what the areas of dispute and agreement are”. Requiring a clarification of the issues may help ensure that domestic abuse is highlighted to the court but given the lack of understanding of the matter and the current mis-referral of women to mediation, we have grave concerns that this procedure would simply result in more women being sent off by the court to undertake mediation, or women having, quite inappropriately, to endure this before seeking the protection of the court.

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

Yes

No

Why did you select your answer above?

⁷³ <http://archive.scottish.parliament.uk/business/petitions/docs/PE1120.htm>;
<http://archive.scottish.parliament.uk/business/petitions/docs/PE1120.htm>

⁷⁴ http://www.parliament.scot/S5_JusticeCommittee/Inquiries/ADR-SWA.pdf;
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11399>

We are unsure of our response in this matter. Given that “cross-border abduction of children” can involve domestic abuse, it would be unhelpful to have this matter restricted in evidence before the court.

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

Yes	X
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No

Why did you select your answer above?

Women who took part in the consultation focus groups unanimously supported having more guidance in relation to contact and residence, with many relating experiences of feeling ‘in the dark’ and confused about the court process. Given the prevalence of domestic abuse in contact and residence cases, it is vital that this is reflected in guidance with relevant information including:

- A clear statement of the legislation around child contact , the emphasis on domestic abuse and the duty of the court to consider this
- Legal representatives’ role and duty to present issues to the court
- Children’s right to separate legal representation
- CWRs - process, guidance and interaction with parties
- Courts’ duty to protect from abuse during the process and the availability of special measures for women and children- see our answer to Question 49 below
- Protection within the court building itself and duties of SCTS

In relation to children and young people, efforts to improve how children’s voices are heard in contact and residence cases will only be successful if accompanied by the provision of high-quality, accessible and age-appropriate information. Providing guidance is important for ensuring that children and young people can make an informed decision about whether they wish to give a view or not and, if they wish to give their view, to feel prepared for doing so. As one young person in a consultation focus group stated, regardless of whether children give a view or not, they should be given information about the court process because “it is about them”.

In the Everyday Heroes project, children and **young people recommended action on the following for criminal, civil and child protection processes:**

- There should be accessible and child-friendly information on the process that informs children of their rights.
- Key information must be provided at each stage of the process; children and young people must always be informed about something before it happens, not as it is happening.

- Information must include: why something is happening; who is involved; reasons for decisions made and how they will be implemented.⁷⁵

Children and young people who took part in the consultation focus groups recommended that guidance should include things like: knowing who's "*in charge [of the court process]*"; who else is involved; what the court looks like; when, where and how long it will take; and if they need to attend court, who can go with them. Children expressed the importance of having someone to talk through the guidance with them and reassure them if needed.

Guidance should also be provided in a range of ways (e.g.; video, app, booklet etc.) to suit children's preferences and needs. There are various considerations around producing such guidance – for instance, one young person recommended that guidance in the form of a booklet should be discreet so that "*you could read it when you get time at school and no one would know what it was.*" We recommend that guidance should be developed with children and young people who have lived experience of the court process to ensure that it is fit for purpose.

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

Yes X

No

Why did you select your answer above?

We feel this is in line with the status of children as independent rights-holders. The majority of responses to the network survey were supportive of children under 16 with capacity to understand being able to apply to record a change of name. Some commented that in cases of domestic abuse, changing a name can be helpful as part of the healing process, with some children having strong views about this. One young person who took part in a consultation focus group commented, "*If they feel that they need to change their name to move on then they should be allowed to even if their parents disagree*".

We would agree that children under 16 applying to change their name should be encouraged to consult with their parents/guardians on this, though children should not be pressured to do so given that in some cases this may not be appropriate. There needs to be greater clarity on how capacity will be assessed in these cases.

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

⁷⁵ Everyday Heroes report forthcoming.

Yes X

No

Why did you select your answer above?

As Article 12 of the UNCRC makes clear, children have a right to express their views in all matters affecting them; modifying the form to ensure that those applying to record a change of name for a child under 16 first obtain their views is in line with this right. In cases where a child disagrees with the change of name, there would need to be careful assessment about whether a change of name would be in the child's best interests.

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

Yes

No

Why did you select your answer above?

We are unsure of our answer here but are concerned that this would allow unilateral registration of fathers on birth certificates, in that a father would be able to change the child's birth certificate to register himself as the father, without the mother's consent. This also does not take the rights, welfare and views of the child into consideration in this decision.

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

Yes X

This would be helpful where relatives of the abuser are attempting to secure deemed relevant person status in order to facilitate the abuser obtaining contact with a child.

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

Yes X

No

Why did you select your answer above?

Given the work currently underway around pre-recorded evidence in criminal justice, it is appropriate that similar considerations are given to the use of technology in the Children's

Hearings system. As stated previously, children and young people expressed a range of preferences for giving their views and want more choice and flexibility over this, including the use of remote links. Children's Hearings have been identified as a particularly stressful place for children and young people to give views, sometimes in front of several people including the Panel, perpetrators and professionals.⁷⁶

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

Yes

No X

Why did you select your answer above?

It is not clear why local authorities should be given these reports as they are not a party to the proceedings and there is the issue of the consent of the parties to this sensitive information being provided.

Question 51): Should personal cross examination of vulnerable witnesses, including children, be banned in certain Childrens (Hearings) Scotland Act 2011 proceedings?

Yes X

Why did you select your answer above?

We support this proposal and would refer to our response to question 32 above since the same issues apply here, in addition to noting the support from the Scottish Civil Justice Council's Family Law Committee for this.⁷⁷

Question 52): Should section 22 of the Family Law (Scotland) Act 2006 which prescribes where a child is deemed to be domiciled be amended?

Yes

No

Why did you select your answer above?

We have no specific response to this question as it is not clear whether this is an issue and requires change.

⁷⁶ Everyday Heroes: report forthcoming.

⁷⁷ <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/30-april-2018/paper-5-2a-sg-policy-paper-on-personal-examination-of-child-and-other-vulnerable-witnesses-in-children-39-s-referrals.pdf?sfvrsn=2>

Question 53):

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?**

Yes X

No

SWA operates Scotland's Domestic Abuse and Forced Marriage Helpline. The Helpline recorded that in 2016 and 2017, in terms of legal issues, child contact and residence issues in relation to domestic abuse were the most common reason for calling.

In relation to shared parenting, there is evidence which 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.⁷⁸ There is no research evidence that establishes a clear and direct link between shared care and better outcomes for children. 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.⁷⁹ There is

evidence to show that shared care in such cases is a significant source of psychological strain on children.⁸⁰ Additionally, research indicates that children who are forced into contact with fathers against their will are less likely to have positive relationships with them in later life.⁸¹

The EQIA highlights correspondence which claims that court decisions in family cases "favour women". Our experience of working with women, children and young people experiencing domestic abuse, along with extensive research evidence, suggests otherwise. In fact, 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.⁸² Indeed, empirical studies have identified a trend toward favouring fathers, in contrast to widespread assumptions that mothers are favoured in custody litigation.⁸³ It is

⁷⁸ Fehlberg, B., Smyth B. et al. (2011) 'Caring for children after parental separation: would legislation for shared parenting time help children?' Family Policy Briefing 7. University of Oxford, Department of Social Policy & Intervention. Irving, H. & Benjamin, M. (1995) 'Shared parenting: Critical review of the research literature' in HH Irving & M Benjamin (eds) *Family mediation: Contemporary issues*. Thousand Oaks: Sage Publications, pp. 229-276. Trinder, L. (2011) 'Shared residence: A review of recent research evidence', *Child & Family Quarterly*, vol22, no4 pp 475-498.

⁷⁹ Philippa New is Firm Foundations (2011). 'Shared Care in Separated Families: Building on what Works.' London: Gingerbread; Fehlberg B., Smyth B. et al (2011). 'Family Policy Briefing 7: Caring for children after parental separation: would legislation for shared parenting time help children?' University of Oxford, Department of Social Policy & Intervention; Trinder, L. (2011) 'Shared residence: A review of recent research evidence', *Child & Family Quarterly*, Vol 22, No. 4, pp. 475-498.

⁸⁰ Rhoades, H. (2008) 'The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform'. *Federal Law Review* 279: <http://classic.austlii.edu.au/au/journals/FedLawRw/2008/12.html>

⁸¹ Daly, A. (2018) *Children, Autonomy and the Courts: beyond the right to be heard*. Leiden: Brill | Nijhoff.

⁸² Meier, J. and Dickson, S. (2017) 'Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation.' 35 *Law & Ineq.* 311

⁸³ Ibid.

also disappointing to note that the EQIA does not also refer to the extensive correspondence we are aware has been submitted from women experiencing domestic abuse, highlighting how the civil court process is routinely misused by perpetrators.

While the consultation rightly focuses on what could be done to further protect victims of domestic abuse in family law proceedings, further exploration needs to be taken into how other forms of gender-based violence, including so-called 'honour'-based violence and forced marriage, are considered in family courts. Further, research indicates that where there is an absence of settled immigration status for women, child contact and the threat of child abduction can be used by the perpetrator to create additional difficulties and prevent both disclosure and access to support.⁸⁴ This issue must be more thoroughly explored ahead of any legislation being introduced.

Question 54):

Do you have any further comments?

Yes

No X

If you have answered yes please provide your comments below.

⁸⁴ Thiara, R. and Harrison, C. (2016) 'Safe not sorry: supporting the campaign for safer child contact. Key issues raised by research on child contact and domestic violence.' Women's Aid.