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The Scottish Parliament
EDINBURGH
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21 May 2020

Dear Convener,

CHILDREN (SCOTLAND) BILL: STAGE ONE REPORT

Thank you for your Committee's careful consideration of this Bill and your Stage 1 Report. I welcome the recommendation that the Scottish Parliament approve the principles of the Bill.

Please find attached a response from the Scottish Government to the points and recommendations made in the Stage 1 Report.



ASH DENHAM

CHILDREN (SCOTLAND) BILL RESPONSE BY THE SCOTTISH GOVERNMENT TO THE STAGE 1 REPORT BY THE JUSTICE COMMITTEE

1. The Scottish Government welcomes the scrutiny given by the Committee to the Children (Scotland) Bill and is pleased that the Committee has recommended to Parliament that it support the general principles of the Bill.
2. In the remainder of this response, the Scottish Government is responding to particular points or recommendations made by the Committee. The Committee's comments are shown in boxes, along with the paragraph number in the Stage 1 report, and the Scottish Government's response is given underneath. This response uses headings in the Stage 1 report.

Research & data on parenting disputes

Para 67. We welcome the Scottish Government's commitment in the Family Justice Modernisation Strategy to improve the quality of family law statistics and wider evidence base in Scotland. The Scottish Government should, in its response to this report, provide the Committee with an update on this work.

3. As noted in the Family Justice Modernisation Strategy (FJMS)¹, Scottish Government analysts are now embedded at the Scottish Courts and Tribunals Service (SCTS) with access to the new integrated case management system (ICMS). The Scottish Government is developing strategies to report this more detailed information whilst maintaining statistical rigour and anonymity.
4. The Civil Justice statistics 2018-19 which were published on 20 April 2020 include for the first time counts of all craves associated with a writ².
5. The Scottish Government would be happy to keep the Justice Committee up to date on further developments in relation to family law statistics.
6. The Scottish Government recognises the need for a good evidence base in relation to family law. The current pandemic makes it difficult to plan work in this area but in due course the Scottish Government will outline proposals to help ensure the family law evidence base in Scotland is kept up to date.

Para 68. The Scottish Government should continue to work with the Scottish Courts and Tribunals Service (SCTS) and other relevant agencies to improve the collection and availability of data in relation to parenting disputes (section 11 cases). This should include reviewing current guidance from the SCTS on access to historical court records, with a view to reversing the current restrictions.

7. The Scottish Government will continue to work with SCTS to improve the collection and availability of data whilst maintaining statistical rigour and

¹ <https://www.gov.scot/publications/family-justice-modernisation-strategy/pages/14/>

² <https://www.gov.scot/publications/civil-justice-statistics-scotland-2018-19/>

anonymity. As noted in the response to the previous recommendation, Scottish Government analysts are now embedded at SCTS with access to the new ICMS.

8. It would not be appropriate for Scottish Government to review current guidance from the SCTS on access to historical court records as the SCTS is an independent body.

Para 69: The Scottish Government should commission further research to explore the experiences of families who resolve parenting disputes outwith the court system. The Scottish Government should also commission research in cases where domestic abuse or other serious child welfare concerns are not a factor. This will help policy-makers develop an understanding of what is happening across a broader range of cases.

9. The Scottish Government welcomes the Justice Committee's recommendations to conduct research into cases where parenting disputes are resolved outside the court and also where domestic abuse and serious child welfare concerns are not a factor. Currently, and for the immediate future, Justice analytical resources are almost entirely committed to supporting policy and stakeholders in relation to Covid 19. However, Justice Analytical Services will consider how best to take forward these recommendations after we emerge from the Covid 19 crisis including an initial assessment of the current evidence base in relation to these issues. This assessment will involve conversations with key academics and research bodies. The Scottish Government will provide an update to the Committee on this in due course.

Resolving disputes out of court

Para 72: As we previously recommended, the Scottish Government and the Scottish Legal Aid Board should explore making legal aid available for other forms of ADR. We are disappointed that no progress appears to have been made in this area in the near 18 months since our report on ADR was published in October 2018. The Committee recommends that the Scottish Government provide an explanation for the delay and details on its plans to progress this matter.

10. The Scottish Government response to the Legal Aid Review of 28 February 2018 was published on 29 November 2018³. The response included, amongst other proposals, a commitment to a public consultation to help inform what level of reform is supported and the ways in which this may be achieved.
11. This consultation ran from June to September 2019⁴. Analysis of the responses to this consultation is complete and a report on findings will be published as soon as possible. Publication has been delayed as a consequence of reprioritisation of work required in response to Covid 19. The intention remains that these findings inform the preparation of future legislation on legal aid.

³ <https://www.gov.scot/publications/scottish-government-response-independent-review-legal-aid-scotland/>

⁴ <https://www.gov.scot/publications/legal-aid-reform-scotland-consultation/>

Consideration will be given to the availability of funding from the Legal Aid Fund for other forms of ADR as part of this process.

12. The consultation highlighted that targeted interventions could also help to address the recommendation of the Review to promote the use of mediation by the Scottish Legal Aid Board (and by the legal profession) in family cases, where appropriate to do so. It recognised that the Scottish Government had already consulted on whether it should promote ADR in its Review of Part 1 of the Children (Scotland) Act 1995 and creation of a FJMS, and noted the intention to enhance provision of information around ADR in family cases.

Para 73: Again, as we previously recommended, mandatory dispute information meetings should be piloted, with an exception for domestic abuse cases. We fully recognise that any move towards greater use of ADR must ensure that victims of domestic abuse and their children are not put at risk. However, outwith those cases, we believe that there are potentially significant gains to be made through early recourse to ADR, thereby helping families to avoid the often-damaging adversarial court process.

13. The Scottish Government agrees with the Committee that mediation, and other forms of dispute resolution outwith court, can play a valuable role in helping to resolve family disputes. The Scottish Government fully recognises the concerns that mediation should not be used where there has been domestic abuse, sexual abuse or gender based violence.
14. The Scottish Government is not convinced about piloting mandatory dispute information meetings in family cases. As indicated above, part 11 of the consultation on the Children (Scotland) Act 1995 (the 1995 Act) sought views on whether we should be doing more to encourage ADR, including introducing Mediation Information and Assessment Meetings (MIAMs) as in England and Wales⁵. As paragraphs 11.27 and 11.28 of the consultation indicated, there would have to be a large number of exemptions if MIAMs should be introduced in Scotland.
15. Responses were divided on this, in particular raising concerns in relation to domestic abuse⁶. The Scottish Government remains of the view that in family cases signposting to alternatives to court is a better approach than MIAMs.
16. One of the FJMS actions (in paragraph 7.19) is to produce guidance for individuals who are considering seeking a court order under section 11(1) of the 1995 Act on alternatives to court. The Scottish Government will prioritise work in this area.
17. In line with paragraph 7.20 of the FJMS, the Scottish Government has submitted a paper to the Family Law Committee of the Scottish Civil Justice Council seeking views on extending Ordinary Cause Rule (OCR) 33.22, and

⁵ https://consult.gov.scot/family-law/children-scotland-act/user_uploads/children-scotland-act-1.pdf

⁶ Please see paragraph 12.2.10 of the analysis of the consultation responses: <https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/pages/12/>

the equivalent provisions in the Ordinary Cause Rules for civil partnership actions and in the Court of Session Rules, to all family and civil partnerships actions.

18. OCR 33.22 provides that: “In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation”⁷. There are similar provisions in Ordinary Cause Rule 33A.22 for civil partnership actions⁸ and in 49:23 of the Court of Session Rules⁹.
19. In addition, and in line with paragraph 4.27 of the FJMS, the paper to the Family Law Committee proposes amendments to reflect article 48 of the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence (“the Istanbul Convention”)¹⁰. Article 48 of the Istanbul Convention¹¹ prohibits the use of mandatory alternative dispute resolution processes including mediation and conciliation, in relation to all forms of violence covered by the scope of the Convention. The paper proposes that OCR 33.22, and the equivalent provisions in relation to civil partnership actions and in the Court of Session rules, be amended to include an exemption from referrals to mediation in cases where there is domestic abuse.

The role of the court

Para 76. The Committee asks the Lord President to reflect on this evidence and to provide further details on how the training needs of the judiciary will be assessed and met in relation to the areas covered by the Bill.

20. Judicial training is a matter for the Lord President. We understand that the Justice Committee have contacted his office directly for comment.

Para 77. The Committee also asks the Lord President to provide his view on whether there could and should be greater judicial specialisation in family cases.

21. This is a matter for the Lord President. We understand that the Justice Committee have contacted his office directly for comment.

⁷ [https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33-\(actions-lodged-on-or-after-24-june-2019\).doc?sfvrsn=6](https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33-(actions-lodged-on-or-after-24-june-2019).doc?sfvrsn=6)

⁸ [https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33a-\(actions-lodged-on-or-after-24-june-2019\).doc?sfvrsn=4](https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33a-(actions-lodged-on-or-after-24-june-2019).doc?sfvrsn=4)

⁹ <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap49.pdf?sfvrsn=24>

¹⁰ The Istanbul Convention is at <https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>

¹¹ <https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>

Drafting of the Bill

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

Para 79 : The Scottish Government should also therefore provide details on how it will ensure that Part 1 of the 1995 Act, if amended as proposed by the Bill, is clear and understandable to members of the public seeking advice about a family law dispute.

22. The Scottish Government agrees with the Committee that it is important for legislation to be clear and understandable.
23. It is, however, unavoidable that an amending Bill like this consists partly of a series of instructions to insert, delete and replace portions of existing legislation.
24. The challenges that this presents for the clarity of the legislation will be resolved with the passage of the Bill. Once the Bill is an Act, its instructions about the changes to be made to existing legislation will be implemented by expert editors so that the general public, and indeed legal practitioners working in the field, will see the end result of those instructions reflected in the statute book and need not be concerned with following the instructions themselves. The amended text of primary legislation is available, for free, on legislation.gov.uk¹².
25. To help people understand, during the Bill's passage, what its net effect will be on section 11 of the 1995 Act (which is the enactment most extensively amended by the Bill), the Government has prepared a document with the changes the Bill would make marked up and is grateful to the Committee for making that publicly available via its webpage.¹³
26. The Scottish Government has given careful thought to framing the Bill so that the final law which will result from the Bill's various insertions, deletions and substitutions will be as clear and understandable as possible. Of course, the Government is always willing to consider any proposals that would help to make the law clearer.
27. The Scottish Government also recognises that there will always be the need for other sources, outside of a statute, to explain the law in a complex area like family law. Members of the public seek advice about family law disputes because it is not possible to write rules of general application in a way that makes their application to every conceivable set of facts so clear and

¹² <http://www.legislation.gov.uk/>

¹³ [https://www.parliament.scot/S5_JusticeCommittee/Inquiries/Keeling_version_Children_Scotland_Act_1995_section_11_amendments_v3\(1\).pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/Keeling_version_Children_Scotland_Act_1995_section_11_amendments_v3(1).pdf)

understandable that expert advice is unnecessary. The Government has committed in paragraph 6.21 of the FJMS to producing guidance for parties and children on the court process. We will work with stakeholders, including children's organisations, to make sure this information is as accessible as possible.

Children's participation in decisions affecting them

Para 177: The Scottish Government should bring forward amendments at Stage 2 which address the concerns expressed to the Committee and will ensure that the views of all children, regardless of age, are heard.

28. The Scottish Government's policy is that all children who are capable and wish to do so should be able to give their views in decisions which affect them. We appreciate the concerns raised by the Committee and stakeholders during the stage 1 oral and written evidence about the risk that the provisions as they stand could be misinterpreted and lead to decision makers deciding a child does not have capacity to give their views.
29. The Scottish Government therefore accepts this recommendation and proposes to bring forward an amendment to the Bill at Stage 2. The amendment will strengthen the provision in sections 1 to 3 of the Bill to avoid, so far as possible, the risk of the capacity exemption being used excessively by decision makers.

Para 178: No child should ever feel under pressure to express a view. The Scottish Government should therefore amend the Bill at Stage 2 to make it clear that it is up to the child whether to express a view, as is currently clear in the 1995 Act.

30. The Scottish Government's policy is that a child should not have to give their view to decision makers if they do not wish to do so. We note the comments by Professor Sutherland in her oral evidence session expressing concern about the removal of the phrase "whether he wishes to express a view". While the drafting of the Bill as it stand retains the effect of those words, we will consider this point further ahead of the first stage 2 session.

Para 180: The Scottish Government should before Stage 3 bring forward more detailed proposals on how it will ensure that the necessary infrastructure and resources are in place to support children, including very young children, to give their views. This may require the Government to revisit the estimates in the Financial Memorandum, which currently only covers the costs associated with children giving their views directly to a sheriff or child welfare reporter, and not via any other method which may be more appropriate.

Para 181: The Scottish Government should amend the Bill at Stage 2 to provide for a review of the impact of the Bill on children's participation after three years following the commencement of the relevant provisions.

Para 183: The Scottish Government should commit to ensuring that children's advocacy is available to all children involved in cases under section 11 of the 1995 Act. The Government should before Stage 3 bring forward more detailed plans and timescales on the work it plans to undertake to meet this commitment.

31. The Scottish Government notes the recommendation at paragraph 180 and agrees before stage 3 to produce a public paper outlining the ways that children can be supported to give their views to decision makers.
32. Currently, a child can give views in cases under section 11 of the 1995 Act. This includes:
 - Completing a form (F9) which was recently revised to make it more child friendly;
 - Court ordered reports prepared by a Child Welfare Reporter;
 - Speaking directly, and in private to sheriffs; and
 - Representation by a solicitor.
33. The Financial Memorandum reflects additional costs associated with younger children giving their views to the court either through a Child Welfare Reporter or directly to the sheriff.
34. The Scottish Government is happy to commit to reviewing the impact of the provisions in the Bill in relation to children's participation after three years following commencement of the relevant provisions but does not consider the Bill needs to be amended to reflect this.
35. The Scottish Government notes the recommendation at paragraph 183. The Scottish Government is aware that in certain areas of the country there are Child Support Workers but this is not consistent.
36. The Scottish Government has committed in paragraph 2.24 of the FJMS to undertaking further work in relation to child support workers. Whilst we appreciate these could play an important role in ensuring children are able to give their views, many children already have a support worker or advocacy worker in other contexts such as Children's Hearings or in criminal proceedings. We have concerns about whether it would be in the child's best interest to bring another adult into the mix. To ensure the best interests of the child are met, there would need to be minimum standards of training and experience. The paper we will produce before Stage 3 will take account of this.

Para 186: The Scottish Government should work with stakeholders including children's organisations, the legal profession and the judiciary to develop guidance for decision-makers on options for taking children's views. This guidance should be reviewed regularly to ensure that it reflects current best practice.

37. The Scottish Government notes this recommendation. As indicated above, one of the actions in the FJMS, in paragraph 6.11, is to provide guidance for parties and children on going to court in a case under section 11 of the 1995 Act. This will include information on ways in which a child can give their views to the court. We will work with stakeholders including the SCTS, the legal profession, children's organisations and organisations representing parents and grandparents in developing this guidance to ensure that it is relevant and accessible. Once developed we would seek to ensure that the guidance remains current and is reviewed at appropriate intervals.
38. It would be for the courts to consider guidance on how they should take the views of the child as the courts must be independent of the Scottish Government.
39. Section 6 of the 1995 Act contains provision on persons with parental responsibilities and rights (PRRs) seeking the views of the child if they are making major decisions about the child. It would be very difficult to issue guidance to parents on how they should seek the views of the child in these circumstances as they are more informal. However, the Scottish Government will consider producing some hints and tips for parents and other persons with PRRs on how to obtain views from children.

Para 188: The Scottish Government should amend the Bill at Stage 2 to make it clear that decision-makers should ask children how they wish to express their views

40. The Scottish Government appreciates the comments raised by a number of stakeholders that decision makers should ask children how they wish to express their views.
41. The Bill places a duty on the decision maker to give the child the opportunity to express their views in a manner suitable to the child. There are a range of ways for a child to give their views. The method chosen must be suitable to the child and the welfare of the child is paramount.
42. In deciding what is the best way for a child to give their views we would expect the decision maker to ask the child how they wish to communicate their views. At present in cases under section 11 of the 1995 Act this is done through the form F9¹⁴. The F9 form includes questions asking children:
 - Would you like to say what you think in a different way?
 - What different way would you like to say what you think?

¹⁴ <https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms>

43. We consider that the Bill fulfils our policy aims in this area and therefore do not propose bringing forward a stage 2 amendment. However, we would propose to reiterate in the guidance for parties and children on attending court that we expect decision makers should ask children how they wish to express their views.

Para 190: The Scottish Government should amend the Bill at Stage 2 to remove the presumption in relation to instructing a solicitor

44. The Scottish Government retained in the Bill the presumption in section 11 of the 1995 Act that a child aged 12 or over is presumed mature enough to make a decision on whether to instruct a lawyer. The Scottish Government considers that whilst very young children are able to express their view on who they live with or have contact with, a child may require a certain degree of maturity to be able to decide if they wish to instruct a lawyer to give their views to the court.
45. However, we appreciate the point made in paragraph 189 of the Committee's report that as the presumption in relation to legal capacity already exists in section 2(4A) of the Age of Legal Capacity (Scotland) Act 1991, there is no need to replicate it in the Bill. Therefore, we are happy to accept the Committee's recommendation and will bring forward an amendment removing the presumption in section 11 of the 1995 Act in relation to instructing a solicitor.

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

46. The Scottish Government appreciates the concerns raised by the Judiciary in their oral and written evidence in relation to the duty to explain a decision to a child. We will continue to work with the SCTS and the Lord President's Office to address the concerns of the judiciary around this provision in the Bill. We agree to set out prior to the first Stage 2 session how we will address the issues raised by the duty on the courts to explain a decision.
47. We have set out in the Financial Memorandum cost implications of the courts themselves providing explanations of decisions and also the courts appointing Child Welfare Reporters to provide explanations.
48. We welcome the Committee's agreement in principle that a child should be provided with an explanation of a decision. We consider it important that a child receives an impartial explanation of important decisions about who they live with or have contact with. Although clearly parents can play an important role, in a court situation relying on one parent to explain a decision to a child could lead to a child not receiving impartial information. In addition, the role of explaining the decision can be a difficult one for a parent who may not agree with the decision.

49. We would not expect every decision to be explained to the child as we are aware that there may be a number of hearings which may only be procedural.
50. We note that a number of the organisations representing children and young people suggested in their oral and written evidence the importance of the decision maker themselves providing feedback to the child.
51. We have included the option of a Child Welfare Reporter being appointed to provide an explanation of a decision as they might have already built up a relationship with the child when they were undertaking their initial report on the best interests of the child or seeking the child's views.
52. We have also taken the powers to amend by regulations the list of who can provide feedback to a child.

Para 194: The Scottish Government should also consider whether to amend the Bill at Stage 2 to allow for greater flexibility over the methods that could be used by the court to fulfil its duty to explain decisions to children.
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53. The Scottish Government accepts the concerns by some children's organisations that there should be a range of ways a decision can be explained to the child. The Bill allows for an explanation to be given either by the court itself or by a Child Welfare Reporter. Having considered the concerns, the Government is not convinced that it would be useful to amend the Bill to allow for greater flexibility over who can explain a decision to a child.
54. In deciding who can provide an explanation of a decision the Scottish Government took on board the need for the information to be provided in an impartial manner. Therefore, it may not be appropriate that this is done by, for instance, a relative (who may not be impartial) or by a teacher (who may not be trained in providing information of this nature).
55. We note suggestions by some stakeholders in their oral and written evidence that Child Support Workers could undertake this role. The Scottish Government is aware that in certain areas of Scotland Child Support Workers are already in place but this is not Scotland wide and there are currently no minimum standards that a Child Support Worker must meet in terms of training and skills. Therefore, it would not be appropriate to list these people at present as people who can provide explanations of decisions.
56. The Bill gives the Scottish Ministers the power by regulations to lay down other people who may explain a decision to a child. If a system of Child Support Workers were introduced in Scotland then we would consider whether one of their roles would be to provide explanations of decisions to a child.

Welfare of the Child

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

57. The Scottish Government does not accept this recommendation.
58. The Scottish Government is aware that paragraphs 50 and 51 of General Comment 14 of the UNCRC state that:
- “50. The Committee considers it useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests. The non-exhaustive nature of the elements in the list implies that it is possible to go beyond those and consider other factors relevant in the specific circumstances of the individual child or group of children. All the elements of the list must be taken into consideration and balanced in light of each situation. The list should provide concrete guidance, yet flexibility.
51. Drawing up such a list of elements would provide guidance for the State or decision maker in regulating specific areas affecting children, such as family, adoption and juvenile justice laws, and if necessary, other elements deemed appropriate in accordance with its legal tradition may be added. The Committee would like to point out that, when adding elements to the list, the ultimate purpose of the child's best interests should be to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child. Consequently, elements that are contrary to the rights enshrined in the Convention or that would have an effect contrary to the rights under the Convention cannot be considered as valid in assessing what is best for a child or children.¹⁵”
59. We are also aware that General Comment 14 goes on to say that the UN Committee considers that the following elements should be taken into account when assessing and determining the child's best interests¹⁶:
- The child's views;
 - The child's identity;
 - Preservation of the family environment and maintaining relations. This includes an assessment and determination of the child's best interests in the context of potential separation of a child from their parents. The Committee suggest that separation should only occur as a last resort when the child is in danger of experiencing imminent harm;
 - Care protection and safety of the child. This includes the child's right to protection from all forms of physical or mental violence, injury or abuse;
 - Situation of vulnerability; and
 - The child's right to health and education.

¹⁵ https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

¹⁶ https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

60. The court, in deciding whether to make an order under section 11(1) of the 1995 Act and what order to make, must regard the welfare of the child concerned as its paramount consideration. As well as the list of factors in section 11ZA(3) of the Act to which the court must have regard when considering the child's welfare, the court is required to have regard to the child's views (section 11ZB also added by section 1 of the Bill).
61. As noted in paragraph 148 of the Policy Memorandum¹⁷ which accompanies the Bill, the child's identity is not included in the list of factors because the 1995 Act and the Bill already provide that the court must regard the welfare of the child concerned as its paramount consideration.
62. We have included the involvement of the child's parents in bringing the child up and the child's important relationships with other people in the list of factors. We consider that this reflects the suggestion from General Comment 14 regarding the preservation of the family environment and maintaining relations.
63. We consider the references to the care, protection and safety of the child are already covered by the existing factors relating to protection from risk of abuse in section 11(7A) to (7C) of the 1995 Act which have been preserved in section 11ZA of the 1995 Act by the Bill.
64. We have not included specific provision requiring the court to have regard to the child's right to health and education in every case as we are satisfied this is clearly taken into account as part of the requirement to regard the welfare of the child concerned as its paramount consideration.
65. The two factors that we have included in the Bill build on sections 11(7A) to(7C) of the 1995 Act which focus on domestic abuse.
66. The Scottish Government believes both parents should be involved in the upbringing of the child as long as this is in the child's best interests. The Scottish Government also recognises the important role that siblings and grandparents can play in a child's life.

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

67. The Scottish Government agrees with the Committee's view that the list should not be seen as exhaustive. In our view the amendment proposed is not necessary to achieve that effect.
68. Section 11ZA of the 1995 Act which is being introduced by section 1 of the Bill states that "the court must have regard to the following matters in particular". The words "in particular" are used, extensively, throughout the statute book in many areas of the law to signal that a list is non-exhaustive. For instance, they

¹⁷<https://beta.parliament.scot/bills/children-scotland-bill>

are used in the existing section 11(7A) of the 1995 Act, on which the new section 11ZA is based, which is widely understood to be non-exhaustive. We are clear that the Bill does not provide for an exhaustive list.

69. As the Committee's report acknowledges, opinions differ on whether it is advisable to have a checklist of particular factors that are to be considered in every case. Some fear that there will be a tendency for courts to apply their minds only to the factors specifically mentioned.
70. If the words "any other relevant factor" were added, the court would still be required, as at present, to identify those other factors which are relevant in the circumstances of each case. Currently if the court identifies any other factor as relevant to the child's welfare, it is required by the paramountcy principle to take that factor into account. So the inclusion of the words would not add to the effect of the Bill. To include those words might create doubt as to the effect of other non-exhaustive lists across the statute book which do not expressly provide for "any other relevant factor".
71. The paramount consideration, in this context, remains the welfare of the child concerned. The factors listed must be considered in every case regardless of the facts and circumstances, but are considered only as part of all other relevant factors arising in the individual circumstances of each case. Factors which are not specified on the list can be given greater weight when coming to a decision.

Para 264: The Committee notes the concerns raised by Scottish Women's Aid and others about how the existing factors in the 1995 Act have been reproduced in the Bill. The Committee asks the Scottish Government to respond to these concerns before Stage 2 and to consider whether the Bill should be amended to reflect the definition of domestic abuse in the Domestic Abuse (Scotland) Act 2018, which includes coercive control. The Government should also consider amending the Bill to keep all factors in one section, rather than split across different provisions.

72. The Scottish Government appreciates the concerns raised by Scottish Women's Aid in relation to the definition of abuse and also the separation of section 11(7A) to 11(7C) from 11(7D) and 11(7E).
73. In relation to the definition of abuse, the definition used in section 11ZA(3) and (4) of "abuse" and "domestic abuse" reflects the language used in sections 11(7B) and 11(7C) of the 1995 Act. We have noted the Committee's recommendation and will respond to the concerns raised by Scottish Women's Aid in advance of the first stage 2 session.
74. On the other drafting issue, the Scottish Government has considered keeping what are currently subsections (7A) to (7C) and (7D) and (7E) of section 11 of the 1995 Act in a single section. In the Government's view, doing that would make the law less accessible.

75. Section 11 of the 1995 Act currently has 18 subsections (not including those which have been repealed but remain in force for certain purposes by virtue of savings provisions). To accommodate the policies reflected in the Bill, further subsections need to be added. Legislative drafting guidelines vary across Commonwealth jurisdictions, but many have a recommended limit on the number of subsections within a section to maintain the readability of the text. The recommendation of the Scottish Government's drafting office is to avoid exceeding 9 subsections (half the number that section 11 of the 1995 Act currently has). So far as the Government is aware, no drafting office in the Commonwealth that has published guidelines on the recommended maximum number of subsections for a section recommend a total close to or in excess of 18.
76. The reason that Commonwealth drafting offices lay down recommendations about the number of subsections that should comprise a section is because long sections make for inaccessible statutes. Sections of Acts have headings and in statutes, as in any other long document, headings help readers navigate through their contents.
77. The Bill, as it stands, would create a series of sections each performing a specific function in connection with orders under section 11 of the 1995 Act with headings to highlight what those functions are and help readers navigate their way through them. The upshot will be a run of sections dealing with the following subjects:-
- Court orders relating to parental responsibilities, etc.
 - Paramountcy of child's welfare and the non-intervention presumption
 - Regard to be had to the child's views
 - Restriction on making orders under section 11 [concerning adoption]
 - Vulnerable parties
 - Special measures under section 11B [vulnerable parties]
 - Appointment of curator ad litem
 - Explanation of court decisions to the child
 - Duty to investigate failure to obey order under section 11
78. In the Scottish Government's view, dividing the material up in this way makes for a clearer arrangement of the rules than would be the case if they were all run together in a single, very long section. Rather than being buried 7 subsections into section 11 between technical rules about the effect of an order if made, the important principles that the child's welfare is paramount and the court should only intervene if it would be better than not doing so are given their own section, as is the principle that the child's views are to be taken into account. Each is given a heading that gives readers a sense of those principles from the contents page.
79. Subsections (7D) and (7E) of section 11 would not fit in the new section 11ZA or 11ZB as the rule they articulate is not part of the principles that the child's welfare is paramount, that the court should only intervene if it would be better than not doing so or that regard should be had to the child's views. On balance, the Scottish Government considers there to be little advantage in relocating the rule expressed by subsections (7D) and (7E) of section 11. Moving other

material out of section 11 into new sections does mean that subsections (7D) and (7E) are less lost within section 11. If subsections (7A) to (7C) were left in section 11, and the various policy changes the Bill makes to them reflected within that section, subsections (7D) and (7E) would become at least the 13th and 14th subsections of the section.

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

80. The Scottish Government agrees with the Committee that the Charter for Grandchildren should be promoted further. We recognise the important role that grandparents can play in many families in relation to bringing up children. The Scottish Government wants to ensure that grandchildren can expect, amongst other things, to know and maintain contact with their wider family, except where it is not in the best interests of the child for them to do so.
81. In paragraph 3.22 of the FJMS, the Scottish Government made a commitment to continue to promote the Charter for Grandchildren.
82. A key aim is to ensure that bodies such as Local Authorities, Social Work Scotland, and bodies representing family lawyers are fully aware of the Charter for Grandchildren.
83. If the Bill is passed by Parliament, the Scottish Government intends to issue and publish circulars on implementing the legislation and on related matters. The Scottish Government will ensure that one of these circulars relates specifically to the Charter for Grandchildren.
84. The Scottish Government will also write specifically to key bodies to draw attention to the Charter for Grandchildren.
85. We will also ensure information on the Charter for Grandchildren is more prominent on the Scottish Government website MyGov.Scot¹⁸ and whether it could be included on any other platforms, such as the Parentclub website¹⁹, which is an online hub with up to date Scottish Government information on matters relating to children's health and education.
86. In addition, the Scottish Government will engage with key stakeholders, such as Grandparents Apart UK, on what further steps could be taken to raise awareness of the Charter for Grandchildren.

Para 269: Training and guidance for child welfare reporters (a topic discussed in more detail in the next section of this report) should emphasise the importance of exploring a child's wider family relationships and support networks.

87. The Scottish Government agrees to this recommendation. The Scottish Government appreciates the important role that other family members can play

¹⁸ <https://www.mygov.scot/>

¹⁹ <https://www.parentclub.scot/>

in a child's life. As discussed above, one of the actions in the FJMS is to further promote the Charter for Grandchildren. In addition, we have added to the list of factors for the court to consider when deciding whether or not to make an order under section 11 of the 1995 Act the likely impact on the child's relations with other important people.

88. Training of Child Welfare Reporters will be a matter for further consideration but we would expect this to cover the child's important relations with other family members. As outlined below, the Scottish Government will carry out a full consultation on training requirements for Child Welfare Reporters.
89. Currently when a Child Welfare Reporter is appointed the court, in discussion with the parties, decides who the Child Welfare Reporter should speak to. This could include other family members and can be included in the Form F44²⁰ on the role and remit of the Child Welfare Reporter.

Court appointed officials

Para 334: The Scottish Government should explore with the Scottish Courts and Tribunals Service (SCTS) and other relevant stakeholders whether responsibility for managing lists of child welfare reporters and curators could be retained at a local level, alongside national standards on training and qualifications. This should include consideration of the potential cost and other resource implications of such an approach compared with managing the lists centrally.

90. The Scottish Government recognises that Child Welfare Reporters can play an important role in ensuring the best interests of the child are reported to the court. By introducing a register of Child Welfare Reporters we are aiming to ensure that Child Welfare Reporters appointed by the court are subject to suitable and consistent qualification and training requirements.
91. Since the introduction of the Bill we have continued to discuss the register of Child Welfare Reporters with key organisations including parents' organisations, children's organisations and the judiciary. We will continue discussions as the Bill continues through Parliament and during the implementation phase.
92. The Scottish Government appreciates the concerns raised by the SCTS, the judiciary and the legal profession around creating a national list of Child Welfare Reporters. However, we are also aware of support for regulation of Child Welfare Reporters by parents' organisations, Scottish Women's Aid and children's organisations.
93. Establishing a national list of Child Welfare Reporters would ensure consistency of approach across Scotland in terms of appointment of Child

²⁰ [https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms/form-f44\(actions-or-minutes-to-vary-lodged-on-or-after-24-june-2019\).doc?sfvrsn=6](https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms/form-f44(actions-or-minutes-to-vary-lodged-on-or-after-24-june-2019).doc?sfvrsn=6)

Welfare Reporters and handling complaints about Child Welfare Reporters as this would be done centrally. It would also ensure that there is consistency across the country in how Child Welfare Reporters on the list are appointed to undertake reports.

94. We have set out the cost implications of running a list of Child Welfare Reporters nationally in the Financial Memorandum which accompanies the Bill. A national list would create economies of scale. The costs of holding lists locally could be more as there would be duplication if Child Welfare Reporters are on multiple lists for different Sheriffdoms. Local lists could lead to issues in relation to ensuring a Child Welfare Reporter who is removed from a list held in one Sheriffdom is removed from the lists held by other Sheriffdoms.
95. We appreciate the need to ensure that where possible local reporters are appointed. We would envisage where possible that local Child Welfare Reporters would be appointed.
96. We propose to undertake a public consultation on the regulations regarding appointment of Child Welfare Reporters.
97. In summary, the Scottish Government considers that the list should be run at a national level rather than a local level: Our key reasons for this are:
 - To achieve economies of scale.
 - To ensure increased consistency of approach across the country.

Para 336: The Scottish Government should undertake a more thorough assessment of the training needs of child welfare reporters and fully consult on the proposed training requirements before bringing forward secondary legislation to give effect to the new regulatory scheme.

98. The Scottish Government are grateful for the views from stakeholders in the oral and written evidence about the training requirements of Child Welfare Reporters. Section 101A(3)(a) of the 1995 Act which is introduced by section 8 of the Bill gives Scottish Ministers the power by regulations to set the requirements that a person must satisfy in order to be included and remain on the register of Child Welfare Reporters.
99. The Scottish Government notes this recommendation and will consult publicly on the proposed training regulations for Child Welfare Reporters before bringing forward secondary legislation. This consultation will include a full assessment of the training needs of Child Welfare Reporters.

Para 337: Children and young people should be involved in the development of training for child welfare reporters.

100. The Scottish Government notes this recommendation and agrees to involve children and young people in the development of training for Child Welfare Reporters.

101. The training for Child Welfare Reporters will be set by secondary legislation. We would propose to ensure that children and young people are aware of and can participate in the consultation on the requirements for being on the list of Child Welfare Reporters. In the consultation on the review of the Children (Scotland) Act 1995 we ran a child friendly questionnaire and commissioned the Children's Parliament to undertake a report on the views of younger children²¹. We also engaged directly with children and young people through events with the Scottish Youth Parliament, Scottish Women's Aid and local youth centres.

Para 340: The Scottish Government should before Stage 2 provide further details on the steps that it will take to encourage other professionals, such as social workers and psychologists, to act as child welfare reporters. This should include working with relevant professional bodies to ensure, for example, that resources are available to allow people to undertake the necessary training.

102. The Scottish Government notes this recommendation and agrees to provide further details before the first Stage 2 session on how we propose to encourage other professionals to become Child Welfare Reporters.

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

104. We are aware that in some areas of the country the courts are currently already appointing a local authority to produce a child welfare report. Section 14 of the Bill requires individuals working for a local authority who are producing child welfare reports to be on the register of Child Welfare Reporters.

105. The qualifications and experience required to be a Child Welfare Reporter will be set by secondary legislation and we have committed to consulting on these criteria in advance of laying these regulations. We would expect that these criteria would not exclude lawyers but also would include criteria that could be met by child psychologists and social workers.

106. We would expect to work with a range of stakeholders in developing these regulations, this would include Social Work Scotland, child psychologists, bodies representing the legal profession, the judiciary, the SCTS, COSLA, local authorities and organisations supporting grandparents, parents and children.

Para 341: We welcome the Minister's commitment to reflect on the evidence to the Committee on fees for child welfare reporters. Fee rates for child welfare reporters should be set in a way that will attract good quality professionals, while still representing an efficient use of public resources. Any system for fees should ensure that we do not reduce the number of professionals available for

²¹ <https://www.childrensparliament.org.uk/our-work/past-work/children-scotland-act-1995/>

this important role or create perverse incentives that, for example, reward the length rather than the quality of a report. The Scottish Government should consult fully on the proposed fee rates.

107. We note this recommendation and agree to undertake a public consultation on proposed fee rates for Child Welfare Reporters. We are grateful for the suggestions in the oral and written evidence on this.

108. The Scottish Government recognises that fee rates for Child Welfare Reporters is a complex issue balancing the need to recruit and retain good quality reporters with the need to ensure value for money to the public purse. Fee rates could be set in a variety of ways such as by using an hourly rate, by report (although reports vary in complexity and size) or by page (although this may encourage longer reports and, as the Committee says, we need to avoid creating perverse incentives that reward the length rather than the quality of a report). There could be a rate for reports covering the welfare of the child generally and for reports aimed at obtaining the views of the child.

Para 343: The Scottish Government should amend the Bill at Stage 2 to respond to the concerns raised about the requirements in section 13 in relation to the appointment of curators. For example, the Scottish Government could remove the requirement to review appointments every six months and replace it with a general requirement to keep any appointments under review.

109. The Scottish Government appreciates the concerns raised by the SCTS and the judiciary in their oral and written evidence regarding the requirement to review appointments of a curator ad litem every six months.

110. We accept the concerns raised by the SCTS about the practicality of the provision in the Bill regarding reviewing appointments of a curator ad litem applying to curators appointed before the review requirement comes into effect. Therefore, we propose to bring forward an amendment at stage 2 to ensure that this provision will only apply to appointments starting after these provisions have commenced.

111. We do not propose to replace the requirement to review appointments every six months with one to keep any appointments under review as the current provision ensures that their appointment is reassessed at regular intervals. The regular review is aimed at ensuring that the court is satisfied that their appointment remains in the best interests of the child.

Para 345: The Scottish Government should amend the Bill at Stage 2 so that regulations made under sections 8 and 13 of the Bill are subject to the affirmative procedure.

112. The Scottish Government appreciates that the regulations regarding the register of Child Welfare Reporters and curators ad litem will contain significant detail on areas such as fee rates, training requirements and eligibility criteria. For this reason we have committed to undertaking a full public consultation on the regulations.

113. We do not propose to bring forward an amendment at stage 2 to change the procedure for these regulations because the powers are to be used to make what are largely administrative, operational and procedural provisions in relation to Child Welfare Reporters and curators ad litem. In addition, similar powers in the Children's Hearings (Scotland) Act 2011 are subject to the negative procedure²².
114. The Scottish Government notes that the Delegated Powers and Law Reform Committee reported on 19 November 2019 that it was content with the delegated powers provisions in the Bill.

Para 409: The Scottish Government should undertake a review of special measures to ensure that, where possible and appropriate, the approach to children and vulnerable individuals is the same across all criminal and civil proceedings, including children's hearings themselves.

115. The Scottish Government accepts this recommendation. However, this will have to be a longer-term piece of work, taking account of the reality of the impact of Covid 19 on the justice system and the challenges this presents.
116. In terms of work that is already underway, the Victims Taskforce, which is chaired by the Cabinet Secretary for Justice and the Lord Advocate, is considering a wide range of matters with a view to improving experiences across the justice system. Again, this work will be reshaped by the need to respond to Covid 19 but the workstreams on a Victim-Centred Approach and Gender Based Violence may both be of relevance.
117. Section 7 of the Bill gives the court the power to order a range of special measures to assist a vulnerable parties in proceedings (including child welfare hearings) where attending or participating in hearings is likely to cause distress. The court may order that the proceedings be conducted with the use of video link, with the use of screens or with supporters. The measures in the Bill are similar to existing special measures used in the different context of assisting vulnerable witnesses when giving evidence in other civil and criminal proceedings.
118. On children's hearings, the Scottish Government recognises that proceedings can sometimes be distressing for parties and children. For that reason there are already measures that can be taken to enable children to give their views in the absence of parties or remotely via telephone or virtually. Similarly arrangements can be made for parents to take part in the hearing remotely via telephone or virtually. This can be used, for example, where the hearing is considering cases where domestic abuse is a factor. The enforced use of technology during lockdown for all is likely to lead to increased use of remote participation.

²² <http://www.legislation.gov.uk/asp/2011/1/section/34>

119. The Scottish Government is working with key stakeholders to extend the circumstances in which parties can be excluded from children’s hearings.

Para 411: The Scottish Government should work with the Law Society of Scotland and other relevant stakeholders to address the practical issues raised in evidence to the Committee about the register of solicitors to act for litigants who have been prohibited from conducting their own case.

120. The Scottish Government appreciates the concerns raised by some stakeholders about the operation of the list of solicitors appointed where an individual has been prohibited from personally conducting the remainder of the case themselves. We accept the recommendation to work with stakeholders to address their concerns and will do this in advance of commencement of these provisions.

121. Provision of legal representation is required to ensure the right to a fair trial if a person has been prohibited from personally conducting the remainder of the case themselves. If the person is unwilling or unable to appoint a lawyer themselves then one would be appointed by the court from the register.

Para 412: When recruiting solicitors for the register, the Scottish Government must ensure that representation will be available for litigants across all areas of Scotland.

122. The Scottish Government appreciates the need to ensure that representation of the register of lawyers covers the whole of Scotland and accepts this recommendation.

123. Paragraph 72 of the Financial Memorandum which accompanies the Bill estimates that between 24 and 36 lawyers may be required in any year. It adds that “To ensure that lawyers are geographically spread and available Scottish Government would assume that there would need to be 80 lawyers on the register”.

124. As indicated above, we will work carry out further work with stakeholders in advance of commencement of these provisions.

Para 414: The Scottish Government should ask the SCTS to review the facilities available to implement special measures in child welfare hearings and, if necessary and requested by the SCTS, provide additional resources to ensure that cases are not delayed.

125. The Scottish Government agrees to ask the SCTS to review the facilities available to implement special measures in Child Welfare Hearings. This work may take time due to the ongoing Covid 19 crisis.

126. In the Financial Memorandum which accompanies the Bill the Scottish Government discussed the cost implications of the Bill with the SCTS. We considered that this provision would not have cost implications because the

courts should already have facilities such as screens and live video link available for use in criminal cases.

127. We would not intend for the provisions in the Bill regarding special measures to lead to delay in child welfare hearings. We will consider any requests from SCTS for further funding.

Regulation of child contact centres

Para 467: The Scottish Government should before Stage 2 provide details on how it will ensure that sufficient funding will be available for contact centres to meet both their existing level of service provision and the new regulatory requirements (including improvements to premises and additional training).

Para 468: The Scottish Government should before Stage 2 provide the Committee with an update on its ongoing discussions with Relationships Scotland about securing a sustainable funding arrangement for child contact centres in Scotland.

128. The Scottish Government agrees with the Committee that child contact centre services should require sufficient funding in order to meet the additional costs of the new regulatory system.
129. As the Committee notes, the Financial Memorandum that accompanies the Bill set out the estimated costs of child contact centre regulation, acknowledging that these costs would be significant. However, child contact centre services are not expected to meet the additional costs of regulation. The Financial Memorandum sets out the estimated costs to the Scottish Government in this regard.
130. The Scottish Government continues to work with Relationships Scotland (RS) on the funding of their child contact centre services, over and above the costs of regulation in the Bill.
131. The funding RS received from the Big Lottery, which covered the bulk of their members' contact centre costs, ended on 31 March 2020. The Scottish Ministers have provided RS with an interim grant of £200,000 to protect their members services from 1 April to 30 June 2020. The Scottish Ministers have also given assurance to RS that an appropriate level of funding will be made available for their contact centre services from 1 July 2020 to 31 March 2021.
132. The Scottish Government also recognises the need for a sustainable funding arrangement to be in place for child contact centre services in the longer term. We will continue to monitor the impact of Covid-19 on contact centre provision and, in considering future funding options, the Scottish Government will seek to ensure that funds are used as effectively as possible to support the best interests of children.

133. The Scottish Government will provide further details before the first Stage 2 session on funding being made available for contact centres to meet both their existing level of service provision and the new regulatory requirements (including improvements to premises and additional training).

Para 469: The Scottish Government should before Stage 2 set out its detailed response to the recommendations made in the Care Inspectorate's feasibility study report.

134. The Scottish Government is grateful to the Care Inspectorate for their feasibility study report on child contact centres.

135. The Scottish Government accepts the Committee's recommendation and agrees to provide a detailed response to the recommendations made by the Care Inspectorate.

136. We will endeavour to work with the Care Inspectorate when preparing this detailed response in advance of the first Stage 2 session. However, due to current pressures on the Care Inspectorate as a result of the Covid-19 crisis they may not be able to engage fully on the future regulation of contact centres at the moment.

Para 471: The Scottish Government should amend the Bill at Stage 2 so that referrals to contact centres from other sources, including solicitors, must be to a regulated centre.

137. The Scottish Government's policy is that all court referrals to a child contact centre should be to a regulated contact centre. The Scottish Government would also expect solicitors and other parties to use a regulated centre when making a referral to a contact centre. It is considered that once a system of regulated centres is available solicitors will straightforwardly use those centres.

138. The Scottish Government notes the concerns raised that the Bill provisions relating to contact centres do not apply to referrals from solicitors. However, we continue to have concerns around how such a duty on solicitors would be enforced. In particular, what sort of legislative enforcement measure would be proportionate for a duty of this nature.

139. We have committed in paragraph 3.19 of the FJMS to discuss with the Law Society of Scotland and Faculty of Advocates whether guidance can be issued so lawyers when referring clients to a contact centre to refer them to a regulated centre.

Para 473: The Scottish Government should work with the Scottish Courts and Tribunals Service, Scottish Women's Aid, Relationships Scotland and others to address the concerns raised about the safety of court referrals to contact centres. This should include piloting and evaluating the use of domestic abuse risk assessments by the courts when making decisions about contact. This work should also include exploring how to improve the information provided by the courts to contact centres at the point of referral about the detailed circumstances of a case, particularly where it involves domestic abuse.

140. The Scottish Government notes and understands the Committee's concerns, and those raised by stakeholders during Stage 1 evidence, around the safety of court referrals to contact centres. It is the Scottish Government's view that in all cases contact should be safe for the child concerned and in the child's best interests.
141. There are a number of existing domestic abuse risk assessment (DARA) models being used by agencies in the UK. The Scottish Government believes that further work is required to assess the effectiveness of these, in the context of child contact, before any commitment can be made to pilot the use of DARAs by the courts in such cases.
142. In responses to the consultation on the review of Part 1 of the 1995 Act there was general support for the use of DARAs in child contact cases. However, some stakeholders, including Scottish Women's Aid, expressed concerns and reservations. These included that those carrying out the assessments must be adequately trained; that the type of DARA tool would need to be appropriate for children; where DARAs would fit in the court process; the potential for DARAs to cause delays; that courts can already request a range of reports where they deem it necessary; and that it may move focus away from the welfare of the child being paramount.
143. Decisions on contact are often made by the courts after having obtained a report by a Child Welfare Reporter. Section 8 of the Bill proposes to introduce the regulation of child welfare reporters to ensure they are adequately trained and qualified. The training and qualification requirements will be laid down in secondary legislation. The Scottish Government expects that the regulations will include a requirement that Child Welfare Reporters are trained on domestic abuse and coercive control.
144. The Scottish Government notes the importance of good dialogue between the court and contact centres. We will encourage contact centres to provide information to courts on the services they offer.

Breaches of court orders

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

145. As paragraph 506 of the Report notes, evidence to the Committee was divided on the merits of section 16.
146. Some argued that section 16 could ensure more consistent practice and, in particular, could act as an important safeguard in domestic abuse cases. On the other hand, the Committee heard evidence that the provision is unnecessary as the courts already investigate the reasons for non-compliance. It was also suggested in evidence that section 16 could encourage people to disobey court orders in order to reopen issues already decided by the courts.
147. The Scottish Government does not find the last argument to be particularly compelling. It does appear to be generally accepted that the courts should be investigating reasons for non-compliance. The question, therefore, is whether this is happening already (and so section 16 is not needed) or whether section 16 is needed to ensure that it is done.
148. Section 16 is part of the Bill following the Scottish Government consultation on the review of the 1995 Act. As the Committee notes in paragraph 509 of its report, “it is clear from the evidence we heard that there is no easy solution in cases where people refuse to comply with court orders relating to contact”.
149. However, a number of consultees did suggest the need for investigation. Section 5.8 of the analysis of the consultation responses refers²³. Relevant points include:
- It was suggested (by both individuals and organisations) that the reasons for a breach needed to be fully understood before any sanctions were imposed. [Paragraph 5.8.10 of analysis].
 - Some respondents felt that a better option would be to try and understand the reason for the breach and/or why children were not being made available for contact, and to provide support to ensure that it could be facilitated or amend the order as necessary. [Paragraph 5.8.23 of analysis].
150. On empirical evidence, as the Report says in paragraph 505, the review carried out by the Scottish Government noted that the evidence base on the enforcement of contact orders within Scotland, the UK and other jurisdictions is

²³ The analysis of responses to the consultation is at <https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/pages/5/>

limited. Work by the previous Justice Committee before the last Scottish elections noted the position on the publication of family law judgments by the Sheriff Courts²⁴.

151. However, the Scottish Government considers that at least one published case in Scotland does show a need for section 16. In *SM v CM*, the Court of Session said “we have found that the procedure adopted in the Sheriff Court was, though not incompetent, clearly inappropriate and prone to cause confusion and injustice”²⁵.

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

152. The Scottish Government accepts this recommendation and will lodge an amendment at Stage 2.

153. We appreciate that a child may not wish to give their views and they should not be required to do so. We envisage that the requirement on the court to offer the child the opportunity to give their views should be on the same lines as the duty in sections 1 to 3 of the Bill in respect of giving the child an opportunity to express views in section 11 cases. The opportunity to express views should be in a manner suitable to the child, and it should be subject to exceptions where the child is not capable of forming a view, or where the location of the child is unknown.

Para 511: The Scottish Government should before Stage 2 provide details on the steps it will take, as part of its wider commitment to support the use of ADR, to encourage where appropriate people to use ADR to resolve issues around breach of contact orders.

154. The Scottish Government notes this recommendation and will update the Committee before the first Stage 2 session.

155. The Scottish Government recognises that mediation, and other forms of dispute resolution outwith court can play a valuable role in helping to resolve family disputes and we will continue to support the use of alternatives to court in appropriate cases. However, the Scottish Government fully recognises the concerns that mediation should not be used when there has been domestic abuse, sexual violence or gender based violence. Therefore, we think a cautious approach is needed in relation to the use of ADR to resolve issues around breach of contact orders.

²⁴ <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/97604.aspx#r>

²⁵ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=434c27a7-8980-69d2-b500-ff0000d74aa7> (paragraph 57)

Delay

Para 534: The Scottish Government should respond to the concerns raised about section 21 of the Bill and provide details of other measures that will be taken to address the root causes of delays in family cases. Going forward, the Scottish Government should provide regular updates to the Committee on the progress of these measures, including the new case management rules being developed by the Scottish Civil Justice Council.

156. The Scottish Government accepts that section 21 of the Bill (or any other legislative provision) will not of itself solve the issue of delay. However we consider there is value in a provision which requires the court in every case to consider the risk of prejudice to the child's welfare that delay would pose. This provides an assurance that the impact of delay on the child will, in every case, be considered before a decision is made. The Committee notes in paragraph 531 of the Report that section 21 could send a signal that delay can prejudice a child's welfare.
157. Work is being undertaken by the Family Law Committee of the Scottish Civil Justice Council on case management in family actions. This work will help to address delays in court proceedings. A meeting of the Family Law Committee which was due to take place on 11 May 2020 has been postponed due to the pandemic. However, papers are being sent to members by correspondence. The Scottish Civil Justice Council Secretariat have confirmed they would be happy to assist with any further inquiries the Justice Committee may have in this area.
158. The Scottish Government does not consider that section 21 might lead to undue haste in a case. The provision simply requires that when considering a child's welfare, the court is to have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose. That forms part of a balanced assessment of what course of action is in the child's best interests. The court is not instructed or required to make any particular decision.

Contact with siblings

Para 569 The Scottish Government should before Stage 2 provide further details on how the changes which will result from the Independent Care Review will enable local authorities to fulfil the duty in section 10 of the Bill. This should include information on proposed timescales and specific budgets that will be provided to individual local authorities for the purposes of promoting sibling contact.

159. The Scottish Government notes the recommendation and aims to ensure that sibling contact is an area that is prioritised by implementation of Scotland's Care Promise²⁶. In addition, Scottish Government will be seeking secondary legislation to strengthen the existing obligations on local authorities to keep siblings together. The Scottish Government will explore the link between the sibling duties and other aspects of the Care Promise to understand the full extent of cost implications.

Para 570 The Scottish Government should work with COSLA and others, such as Stand Up For Siblings, to assess what measures are required in the short term to implement section 10 of the Bill. This should include an assessment of any additional resources required by local authorities.

160. The Scottish Government notes the recommendation and will continue to engage with COSLA, Stand Up for Siblings and other key organisations to identify solutions to any anticipated implementation issues in the short term.

Para 572 The Scottish Government should amend the Bill at Stage 2 to remove the "practicable" qualification from section 10.

161. The Scottish Government aims to ensure that local authorities are able to meet their duties. Including the 'practicable' qualification does not excuse local authorities from meeting their duty to act in the welfare of the child where it is appropriate, and possible to do so. There are a number of circumstances where the flexibility provided by the qualification is necessary. For example, children may have siblings who live far away from them who are in some cases unable to participate in any form of meaningful contact with a child.

Para 574 The Scottish Government should amend the Bill at Stage 2 to remove references to "half-blood" and "whole-blood" from section 10.

162. The Scottish Government notes the recommendation and will consider whether there is benefit to varying the language as drafted, and whether this would have any adverse impact on existing legislative provisions.

²⁶ <https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf>

Rights of unmarried fathers

Para 607: The Scottish Government should before Stage 2 respond to the conclusions in Dr Barnes Macfarlane's report on PRRs for unmarried fathers and, in particular, provide further details as to whether it considers that the current law complies with its human rights obligations under the ECHR and UNCRC.

163. The Scottish Government notes this recommendation and that the Committee does not consider that it would be appropriate for the Bill to extend automatic PRRs to unmarried fathers or require compulsory joint birth registration.
164. The Scottish Government considers that the law as regards PRRs for unmarried fathers is compliant with the relevant human rights obligations under both the ECHR and the UNCRC.
165. The 1995 Act is interpreted to apply a broad 'assumption' (or general principle) that it will normally be beneficial for children to have an ongoing relationship with both parents. Automatic conferral of PRRs for all fathers is not a necessary condition for compliance with the ECHR or the UNCRC.
166. The principle of the best interests of the child is prominent in the 1995 Act and there may be cases where automatic PRRs for all fathers may well not be in the interests of the child (e.g. child of rape, where the mother is the victim of domestic abuse, or where the father has shown no interest in bringing up the child).
167. This reflects Article 3 of the UNCRC which provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Automatic conferral of PRRs on all fathers may not always be in the best interests of the child.
168. General Comments by the UN Committee on the Rights of the Child made under the Convention do not determine the state's obligations, but may be helpful in some cases in establishing a consensus as to the meaning of UNCRC requirements.
169. Paragraph 67 of General Comment 14²⁷ on the primacy of the best interests of the child, states: "...shared parental responsibilities are generally in the child's best interests. However, in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. In assessing the child's best interests, the judge must take into consideration the right of the child to preserve his or her relationship with both parents, together with the other elements relevant to the case."

²⁷ https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

170. As referred to in Dr Barnes MacFarlane's report, the UK Supreme Court held in other similar contexts that an initial legal distinction between unmarried and married fathers can be justified because of the wide variations in the actual relationships between unmarried fathers and their children.

171. In *Principal Reporter v K* [2010] UKSC 56²⁸ at paras 36 and 53, the Supreme Court held, albeit in the context of unmarried fathers taking part in children's hearings, that where such a father has established family life with the child that:-

"...the initial allocation of parental rights and responsibilities to mothers alone can be justified because of the wide variations in the actual relationships between unmarried fathers and their children".

172. The Scottish Government notes that under the current law 95-96% of fathers obtain PRRs.

Para 608: The Scottish Government should also consider whether a discretionary power for the courts to order DNA testing would provide a useful mechanism to address some of the issues identified in Dr Barnes Macfarlane's report, including ensuring that a child's right to know his or her identity is respected.

173. The Scottish Government notes this recommendation on whether a discretionary power for the courts to order DNA testing would address some of the issues identified in Dr Barnes Macfarlane's report.

174. A key argument against is that under section 70 of the Law Reform (Miscellaneous Provisions) Scotland Act 1990 (the 1990 Act), the court may draw from a refusal or failure to consent to the taking of a DNA sample from a child such adverse conclusion as seems to it to be appropriate.

175. There are also concerns that obtaining a DNA sample without consent could be deemed a physical intrusion, and enforcing mandatory DNA testing would not be straightforward.

176. The Scottish Government recognises that the fact a person is the parent of a child may provide useful genetic information for the child and social information for the child on their background. However, the fact that a person is the parent of a child does not necessarily mean that they are the best person to bring the child up, as this depends on the precise circumstances.

177. If a person (such as the mother) does not consent to DNA testing of the child in relation to any action for declarator of parentage or non-parentage, there is the provision in section 70 of the 1990 Act. It is the Scottish Government's view is that this is sufficient.

²⁸ <https://www.supremecourt.uk/cases/docs/uksc-2010-0128-judgment.pdf>

Language associated with parental responsibilities and rights

Para 610: The Scottish Government should before Stage 2 respond to the concerns raised about the current terminology associated with PRRs.

178. The Scottish Government notes this recommendation on the concerns raised about the current terminology associated with PRRs. In particular that use of the terms "residence" and "contact", could wrongly imply that one parent has a closer relationship with a child or more decision-making powers than the other parent, and that the term "contact" is inappropriate for describing a child's relationship with a parent.
179. The Bill does not propose to change the terms "contact" and "residence". The current terms were chosen after careful consideration by the Scottish Law Commission in their report on Family Law in 1992²⁹. These terms have been in use for some time and have gradually gained acceptance and become understood. The Scottish Government also believes that these are useful descriptors of the orders in question under section 11 of the 1995 Act.
180. In the consultation on Review of the 1995 Act the Scottish Government sought views on whether to change the terms "contact" and "residence" and introduce an alternative, such as a "child's order". The responses were equally divided for and against, and of those in favour of changing the terminology views were mixed on using the term "child's order". Some respondents felt that the term "child's order" wasn't clear and could create confusion.
181. Other alternatives were suggested (e.g. child arrangements order, shared residence order, parenting order, family order, child's best interest order), but there was a lack of consensus amongst respondents as to a preferred term.
182. The view of several of the respondents was that the change would make no real difference to the rights and wellbeing of the child. Any change could be seen as an attempt to provide balance for the adults involved, but may not be in the best interests of the child (e.g. it could negatively impact on a child's understanding of where they live and their sense of belonging).

The Scottish Government
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²⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235744/0004.pdf