

The Children (Scotland) Bill 2019

Balancing the Rights of Parents and Children

Overview and analysis of the current provisions and proposed reforms to the Children (Scotland) Act 1995, Part 1

Report for the Scottish Parliament's Justice Committee

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Chapter 1. Introduction

The focus of this report

This report, produced on 31 October 2019, provides an introduction to two international treaties: the European Convention on Human Rights ([‘ECHR’](#)) and the UN Convention on the Rights of Child ([‘UNCRC’](#)). It explains the impact of both conventions throughout the field of Scottish Family Law.

The report then examines the compatibility of the current provisions of Part 1 of the [Children \(Scotland\) Act 1995](#) (‘the 1995 Act’) with the ECHR and the UNCRC.

The focus of this report is those sections that have raised, or may raise, issues in terms of children’s and/or parents’ rights, and key areas covered in the 2018 Scottish Government [Review](#) of Part 1 of the 1995 Act (‘the Review’) and the [Family Justice Modernisation Strategy](#).

Thereafter, consideration is given to those proposals contained in the [Children \(Scotland\) Bill 2019](#) (‘the Bill’) relating primarily to Part 1 of the 1995 Act. The report evaluates the consequences that the provisions of the Bill may have upon the rights of children and their parents.

Chapter layout

In terms of Chapter layout, the significant influence of both international treaties upon Scottish Family Law is addressed first, with the ECHR being the focus of [Chapter 2](#) and the UNCRC being the focus of [Chapter 3](#).

In [Chapters 4A, 4B and 4C](#), the current provisions of Part 1 of the 1995 Act are considered. Key sections are summarised and set within the context of relevant ECHR and UNCRC discussions and debate to date.

[Chapter 5](#) addresses specific issues relating to Article 3 (child’s best interests) and Article 12 (child’s right to be heard) of the UNCRC.

[Chapter 6](#) is a **Quick Reference** Chapter on current law. This chapter is designed **for those who wish to focus their reading on the proposals in the Bill**, which are considered in the Chapters that follow. It draws brief, overall, conclusions on the current balance struck between the rights of parents and children in Part 1 of the 1995 Act. These conclusions follow on from the more detailed discussion found in Chapters 4A, 4B, 4C and 5.

In [Chapters 7A, 7B, 7C and 7D](#) the main proposals contained in the Children (Scotland) Bill 2019 are outlined and analysed with reference to the rights of parents and children. Finally, Chapter 7D briefly summarises key areas relevant to the rights of parents and children that the current Bill does not address.

Full references have been given in footnotes (and [hyperlinks](#) used wherever possible) rather than in a bibliography.

Chapter 2. The ECHR: overview and impact throughout Family Law

2.1 The ECHR and the Human Rights Act 1998

The [ECHR](#)¹ was ratified by the UK in 1951 and was directly incorporated into UK Law through the Human Rights Act 1998 ('1998 Act'). Incorporation means that domestic courts and public bodies should act in a way that is compatible with the provisions of the ECHR.² Since the ECHR is the only human rights treaty ratified³ by the UK to be incorporated⁴ in our legal system it is the only such treaty to be directly enforceable nationally.

Both the Human Rights Act 1998 and the Scotland Act 1998 require that all UK-wide and Scottish law is 'read and given effect to' in a manner compatible with human rights 'so far as it is possible to do so'.⁵

Any person in the UK can ask UK courts to uphold their human rights and/or seek a remedy where they believe their human rights have been or are being violated – or are threatened with violation.⁶

There are a number of different ways in which human rights arguments can be raised in UK court proceedings. For example, it is possible to ask a court to interpret an existing statutory provision so that it is compatible with the ECHR. If this cannot be done then the appropriate court can issue a 'declaration of incompatibility'.⁷ It is also possible to bring legal proceedings asking the court to review the conduct of a public body⁸ where there are concerns that the body has breached human rights.

Courts can grant a wide range of orders to provide 'just and appropriate'⁹ relief to victims of human rights breaches. **Even if a litigant has not specifically raised the issue of his or her human rights, courts should still give consideration to such rights because, unless it is not feasible, all of our national law must now be construed in a manner compatible with human rights.**

¹ ETS No.005. The ECHR was drafted in 1950 and came into force on 3 Sept 1953, comprises a list of numbered articles guaranteeing specific human rights and freedoms to individuals living in signatory states. All 47 Council of Europe member states are contracting parties to the ECHR. The Council of Europe is a separate body from the European Union. A number of States have taken steps to incorporate the ECHR within their legal system including, e.g., the UK and France.

² Section 6(1). Section 6(2) provides that this does not apply to an act where the public authority 'as the result of ... primary legislation, could not have acted differently' or the 'primary legislation... cannot be read or given effect in a way that is compatible with Convention rights'.

³ Ratification by a State of an international treaty usually follows signature and is a formal indication by the State of its consent to be bound by the terms of that treaty. It is a clear commitment to give effect to the terms of that treaty in national (i.e. domestic) law over time.

⁴ The UK has ratified 11 human rights treaties in total to date but has only directly incorporated the ECHR.

⁵ Human Rights Act 1998, s 3(1). The Scotland Act 1998, s 29(2)(d) also provides that it is also outwith the legislative competence of the Scottish Parliament to pass any devolved provision that is 'incompatible with any of the Convention rights'. It is sometimes said that there are three ways a court may seek to interpret legislative provisions to ensure compatibility with the ECHR: (i) reading in (adding words to legislation/expanding meaning); (ii) reading out (removing words from legislation); (iii) reading down (restricting broad words/meanings to ensure compatibility), 'Human Rights in the UK' 2nd Ed, Hoffman D & Rowe J, 2006, p 61.

⁶ The 1998 Act, s 7(1), provides that only 'a person... who is (or would be) a victim' of any human rights breach can bring proceedings under the Act. Article 34 of the ECHR provides that 'victim' includes 'any person, non-governmental organisation or group of individuals' claiming a violation of rights.

⁷ Section 4(2) of the 1998 Act. In civil matters, such as Family Law, only the UK Supreme Court can make such a declaration: s 4(5). Section 4(6) provides that the court does not have the power to change the law. However, once a 'declaration of... incompatibility' is made in respect of any legislative provision it is then for Parliament to decide whether to amend the law concerned (e.g. through a 'remedial order' in terms of s 10 of the 1998 Act).

⁸ In terms of s 6(3) of the 1998 Act, a public body is a court, tribunal or any person whose function is of a public nature including, e.g., local authorities and government departments.

⁹ Section 8: a court or tribunal can make such orders, which might include, e.g., an order for financial compensation or an interdict to prevent a potential or ongoing wrong (ss 8(1)).

2.2 The ECHR and Scottish Family Law cases

Since October 2000, when the 1998 Act came into force, human rights arguments have become a common feature of family litigation. The three articles of the ECHR generally considered most relevant to Family Law cases about parents and children are:

- I. **Article 6 (the right to a fair hearing):** this article gives family members the right to a fair hearing before an independent and impartial court within a reasonable time.¹⁰

In *NJ v Lord Advocate*, in 2013, two mothers won their case after they petitioned the Court of Session for a judicial review of the decisions of their local authorities to seek emergency court orders to remove their children from them immediately after birth. The mothers were given no notice of the earlier court hearings that took place and so had no opportunity to be heard before the courts made their decision. They argued that their Article 6 and Article 8 (see below) rights had been violated.¹¹

- II. **Article 8 (right to respect for private and family life):** this article provides for the right to enjoy family relationships without undue interference by public authorities. Broadly speaking, a family relationship is one in which 'a bond amounting to family life' exists.¹² Over the years, it has been established through litigation in the UK and in other European countries that 'family life' can include relationships between children and parents, step-parents, siblings, grandparents and wider relatives.¹³

The degree of protection afforded by Article 8 depends on the strength and reality of existing family ties. So, e.g., a relative who has rarely seen a child would be afforded less protection under Article 8 than one who has enjoyed regular contact.¹⁴

Article 8 is also relevant where the State fails to provide a timely or appropriate redress in the event that one individual prevents another from enjoying family life.¹⁵ A related article supporting Article 8 in this regard is **Article 13**, the right to 'an effective remedy before a national authority' in the event that human rights are violated.

¹⁰ Article 6 extends to court and tribunal hearings. It also provides for the absence of a public hearing in cases about 'private life', such as family cases heard under the 1995 Act.

¹¹ [2013] CSOH 27: In some emergency child protection cases such local authority conduct is permissible. However, Lord Brailsford was 'satisfied', given the extreme nature of the orders sought and the lack of urgency in this case, 'that a failure to involve the petitioners in the process infringed their rights under art.8 ECHR' (para [33]). However, at para [32], he did not consider that their Article 6 right to a fair hearing had been violated since a 'failure to be informed of a hearing which might affect a person's rights' was not in itself an interference with that right.

¹² *Keegan v Ireland* (1994) 18 EHRR 342, para [40]. Considerable case law exists on what amounts to 'family life' which, to some extent, depends upon the facts and circumstances of each case.

¹³ It is settled, e.g., that 'family life' can include the following common scenarios: (i) parents and children where children are born within or outwith marriage (*Marckx v Belgium* (1979-80) 2 EHRR 330); (ii) step-parents and step-children (*Soderback v Sweden* [1999] 1 FLR 250); (iii) children and their extended family, such as grandparents, aunts and uncles (*Marckx*, para [45]); (iv) siblings (*Boughanemi v France* (1996) 22 EHRR 228); (v) children born following assisted reproduction where the 'donor' has assumed a legitimate interest in the child (*Anayo v Germany* 2012 55 EHRR 5).

¹⁴ European Court of Human Rights: *Guide on Article 8 of the ECHR*, Part III.A.

¹⁵ E.g., in *Elsholz v Germany* (2002) 34 EHRR 58, the German authorities were found to have violated the Article 6 and 8 rights of an unmarried father whose previously good relationship with his son was thwarted by the child's mother. The family courts failed properly to investigate the father's concerns and national law itself did not provide him with access to a robust remedy. This case has been cited by Scottish courts (see e.g., *M v K* [2015] CSIH 54).

The Article 8 right is qualified. It can be interfered with if that interference is lawful, necessary and ‘proportionate’,¹⁶ having regard to a legitimate aim. Protecting the rights and interests of other family members can amount to a legitimate aim.¹⁷

Article 8 considerations routinely arise in cases involving the provisions of Part 1 of the 1995 Act. For example, in *AH v CH*,¹⁸ in 2016, the Court of Session considered an intractable dispute about contact. The child, aged 9, who lived with his mother, told the psychologist appointed by the court that he did not wish to see his father. While the court accepted that the child had expressed a ‘genuine’ view, the influence of his mother was considered to be such as to prevent that view from being ‘independently formed’.¹⁹ The court accordingly granted the father contact, referring to:

***‘the general principle in support of family life enunciated in art.8 ECHR and the frequently judicially expressed view that contact with both parents should be achieved, unless there are very cogent reasons why this should not occur’.*²⁰**

- III. **Article 14 (right not to be discriminated against):** where there is an argument that a family member has been unjustly treated due to personal status, Article 14 is sometimes raised in addition to Article 8.

For example, in *Principal Reporter v K*, in 2010, an unmarried father challenged statutory provisions concerning ‘relevant persons’,²¹ and which had the effect of excluding him from a children’s hearing about his daughter. He would not have been excluded had he been married father. He argued that the provisions were incompatible with Articles 6, 8 and 14 of the ECHR.

The **UK Supreme Court** held that the father’s Article 8 rights had been breached (it did not ultimately use either Article 6 or 14 as a basis for its decision²²). **The court’s decision however reiterated the need for the State to ensure that all family legislation is drafted in such a way as to enable all those recognised as parents:**

¹⁶ Considerable case law exists concerning principle of ‘proportionality’ (i.e. balancing interferences with an individual’s human rights against wider community aims). The proportionality test in respect of Article 8 was reiterated in *The Christian Institute and Others (Appellants) v The Lord Advocate (Respondent)(Scotland)*[2016] UKSC 51. Various groups challenged the ‘named person’ scheme in Part 4 of the Children and Young People (Scotland) Act 2014. The Supreme Court decided that the Scheme, and the information-sharing regime it would create, created a risk of ‘disproportionate interference’ with the Article 8 rights of family members. The legislative provisions were held to be outwith legislative competence and as such could not be brought into force.

¹⁷ Legitimate aims include public interests (e.g., national security, protection of health and morals) and private interests (e.g. protecting the rights and freedoms of others): *The Exceptions to Articles 8 and 11 of the European Convention on Human Rights*, Council of Europe, 1997.

¹⁸ 2016 Fam LR 186.

¹⁹ Para [27]. Having regard to the child’s views will be discussed further below.

²⁰ Lord Brailsford para [42].

²¹ [2010] UKSC 56. These were contained in Part 2 of the Children (Scotland) Act (s 93(2)(b)(c)). The provisions of the 1995 Act concerning relevant persons have since been replaced by the Children’s Hearing (Scotland) Act 2011, ss 81, 200. The 2011 Act similarly provides for the inclusion in children’s hearings of those who have participated in the upbringing of the child(ren) concerned.

²² Paras [67], [70] and [para 49]: the court ruled that the Article 8 incompatibility of the existing relevant provisions of the 1995 Act could be cured by reading them as including all persons appearing to have ‘established family life’ with the child concerned. The court made some observations on Article 14, including referring to *McMichael v UK* (20 EHRR 205), a previous challenge to the Children’s Hearing System by an unmarried father who argued that being treated differently from a married father was discriminatory in terms of Article 14.

‘to play a proper part in the decision-making process before authorities interfere with their family life with their children’.²³

The above examples of UK court decisions demonstrate that a range of human rights arguments and outcomes are possible. These depend on: (a) the circumstances of the individual case; (b) the ECHR articles upon which decisions are made; and (c) how the particular court exercises its discretion in giving effect to human rights in national law.

As might be expected, where a number of articles are raised in Family Law litigation (e.g. Articles 6, 8 and/or 14) Article 8 (right to respect for private and family life) often dominates the court’s rationale in reaching its decision. Article 12 (right to marry and found a family²⁴) is primarily concerned with cases involving adults, and so is not addressed in this report.

Since Article 8 is qualified, the individual’s right to respect for his or her family life requires to be balanced by the court against other considerations. These considerations include the rights of those who will be directly affected by that decision. **This can result in tension between the rights of parents and their children in cases brought under Part 1 of the 1995 Act.**

2.3 The ECHR and European Court decisions in family cases

The European Court of Human Rights ([‘ECtHR’](#)) has an ongoing role in monitoring human rights compliance. One way the ECtHR does this is by deciding cases raised by people (‘applicants’) against contracting States.²⁵ Such cases may only be brought when all national remedies have been exhausted.

In determining such cases, the ECtHR recognises what is called **‘the margin of appreciation’**,²⁶ or permissible latitude, regarding any State restrictions on particular human rights. This margin is not fixed, and it is often dependent upon mainstream views in contemporary society. **States will be allowed more latitude in cases in which there is not an agreed view throughout Europe on the interpretation of a particular right.**

The ECtHR can decide that a State restriction oversteps the acceptable margin of appreciation. If so, then that restriction will constitute a violation of the applicant’s human rights. Reported decisions of the ECtHR carry great weight. When UK courts consider human rights issues arising in cases they must take account of any relevant ECtHR decisions.²⁷

Where respect for parents’ private and family life is concerned, the margin of appreciation can be relatively narrow. This means that States can have little discretion to restrict Article 8 rights.

²³ Para [41].

²⁴ Article 12 of the ECHR provides that ‘men and women of marriageable have the right to marry and to found a family...’ The 2003 English case of *Bellinger v Bellinger* [2003] UKHL 21 arguably remains the leading example in family law of a successful article 12 challenge in national courts. The case involved a transgendered person who was unable, under UK law at the time, to marry in her acquired gender (see also *Goodwin v United Kingdom* (2002) 35 EHRR 447). The Gender Recognition Act 2004 followed.

²⁵ This includes the UK and all other Council of Europe member states (see note 1 above).

²⁶ The margin is a recognition of different cultural and political climates among member states and allows for some divergence between states on appropriate human rights observance. As with proportionality, there is considerable case law/ discussion as to what might fall within/outwith the margin. Generally, where there is little or no consensus among Council of Europe members on an issue or where there are strong public interest arguments (e.g. abortion), the acceptable margin of State conduct will be wider.

²⁷ Section 2(1) of the 1998 Act states that this includes, e.g., ‘any judgment, decision, declaration or advisory opinion’ of the ECtHR or the Commission.

In particular, States must be able to demonstrate in private family court actions (such as those raised under the 1995 Act, Part 1) that ‘a fair balance has been struck’ between the rights and interests of each parent.²⁸ Yet, in conducting this balancing exercise, the ECtHR has said that:

*‘...particular importance must be attached to the best interests of the child... parent[s] cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child’s health and development.’*²⁹

In other words, **safeguarding a child’s best interests (or ‘welfare’,³⁰ the broad Scottish synonym for best interests) is a necessary and legitimate aim, capable of justifying State interference with parental Article 8 rights.**³¹ So, for example, in the case of a violent or abusive parent, the court can rely on the qualified nature of Article 8 as a basis for restricting that parent’s involvement in his or her child’s family life.

As the [Scottish Human Rights Commission](#) (‘SHRC’) has stressed, **any assessment by the ECtHR, or indeed a Scottish or UK court, as to the compatibility of legislation with the ECHR ‘involves an element of judgment’.**³² This leaves room for uncertainty of outcome in cases involving ECHR rights.

As family members, children also have rights in terms of Article 8 of the ECHR. This means that they too are entitled to be appropriately ‘involved in any decision-making process capable of affecting [their] family life [and]... interests.’³³ Next, in Chapter 3, the report considers the position of children more specifically with regard to the growing impact of the UNCRC on Scottish Family Law.

²⁸ *Elsholz v Germany* (2002) above at para [50].

²⁹ As above.

³⁰ ‘Welfare’ is the broad term used in Part 1 of the Children (Scotland) Act 1995. The terms ‘welfare’ and ‘best interests’ are used interchangeably by Scottish courts in family cases. For further discussion see Sutherland EE & Barnes Macfarlane L-A, Implementing Article 3 of the ‘UN Convention on the Rights of the Child: Best Interests, Welfare and Well-being’, 2016, CUP, Chapter 1.

³¹ The nature of the interference must be lawful and proportionate to that aim. See notes 16 and 17 above. Article 8(2) specifically refers to ‘the protection of the rights and freedoms of others’ as forming a basis for a necessary interference, in accordance with law, of the right to respect for family life.

³² Open letter from ‘SHRC’ to Public Petitions Committee, Scottish Parliament (‘Consideration of Petition PE1362’), dated 19 Nov 2010. Note: the content of this letter predated the UK Supreme Court’s decision in *Principal Reporter v K* 2010 UKSC 56. As discussed in the main text above, the UK Supreme Court overturned the Scottish court’s previous decision in this case and held that the statutory provisions concerned violated the father’s Article 8 rights. See also 2012 report by SHRC ‘[Getting it right? Human Rights in Scotland](#)’, A Miller *et al*, Chapter 3.5.

³³ Janys Scott QC, ‘Hearing children: ‘my dad says if we stay with him we can have a dog’, 2015, [Westwater Advocates](#).

Chapter 3. The UNCRC: overview and impact throughout Family Law

3.1 The UNCRC and Scottish Law

The UN Convention on the Rights of Child ('UNCRC'³⁴) is the most widely ratified human rights treaty in the world. It is a comprehensive statement of the human rights of all children (those aged 18 or younger).³⁵ This year marks the 30th anniversary of the adoption, by the United Nations, of the UNCRC.³⁶

Ratification means that a State has committed itself to taking steps to implement an international convention into its national laws, policies and practices. **Scotland has yet to fully incorporate the UNCRC into national law.**

So, unlike the ECHR, it cannot be said that all of the rights contained in the UNCRC are directly enforceable in national courts. Nor is there an international Children's Rights court monitoring State compliance comparable to the European Court on Human Rights. Instead, **the UN Committee on the Rights of the Child ('the UN Committee'), a body of international experts, monitors implementation of the UNCRC.³⁷**

All States must submit regular reports (usually every five years) to the UN Committee.³⁸ The Committee examines these reports and provides detailed feedback and recommendations to States in its **Concluding Recommendations.**³⁹ The Committee also publishes detailed guides to the interpretation of articles of the UNCRC called **General Comments.**⁴⁰

The approach in Scotland to date where children's rights are concerned has been to incorporate certain specific UNCRC rights in relevant statutory provisions.⁴¹ Scottish courts have also on occasion referred to the UNCRC when making decisions about children and young people.⁴² Yet, without incorporation, there is no requirement that national courts or authorities consider or apply the UNCRC. In a wider sense, this means there is currently no guarantee that the rights of children will be given proper regard when decisions affecting them are made.

³⁴ 1577 UNTS 3, 20 Nov 1989, entered into force Sept 1990. To date, 196 states have ratified the UNCRC, with the exception of the USA.

³⁵ The UNCRC has 54 articles, of which 41 narrate the rights of children (the range of rights is wide-ranging, including e.g. the right to life, to express a view, to play, to medical treatment etc.) and 13 articles detail implementation measures. All the UK's 'Reservations' to the UNCRC, seeking to exclude particular provisions from applying to UK law, have now been withdrawn. Original UK declarations/reservations available [here](#).

³⁶ The UK signed the UNCRC on 19 April 1990, ratified it on 16 December 1991. It came into force on 15 January 1992.

³⁷ At present 18 international experts sit on the Committee.

³⁸ The Committee also monitors State compliance with Optional Protocols to the Convention containing additional State responsibilities. Cases can also now be brought by individuals against States signatories to *the 3rd Optional protocol* to the UNCRC. This protocol has not yet been signed by the UK, however cases decided under this Protocol might still be referred to by individuals in the UK.

³⁹ Concluding Recommendations for the UK's most recent periodic report available [via this link](#).

⁴⁰ General Comments published to date available [here](#).

⁴¹ E.g. Adoption and Children (Scotland) Act 2007, ss 2, 9.15, 20, 31, 32, embedding aspects of Articles 3, 12, 7, 9, and 21. Children's Hearing (Scotland) Act 2011, ss 25, 26, 186, relating to the child's welfare, views and consent to medical treatment, embedding Articles 3, 5, 12 of the UNCRC.

⁴² E.g., *Dosoo v Dosoo*, No.1, 1999 SLT (Sh Ct) 86, reference to UNCRC by Defender; *White v White* 2001 SC 689, Articles 3 & 9 referenced by the Inner House; *Shields v Shields* 2002 Fam LR 37, Article 12 UNCRC described by court as being the 'proper starting point' for any consideration of the child's views' [para 6-09]; *O v City of Edinburgh Council*, [2016] CSIH 30, appellants argued there had been a violation of Articles 3, 9 and 10 of the UNCRC; *F v H* [2014] 7 WLUK 556, Article 3 of ECHR considered. In *Christian Institute v Lord Advocate*, 2016 UKSC 51, the UK Supreme Court observed at para [72]: 'As is well known, it is proper to look to international instruments, such as the United Nations *Convention on the Rights of the Child*... as aids to the interpretation of the ECHR'.

3.2 Scottish Government commitment to incorporating the UNCRC

The Scottish Government has been unambiguous in its commitment to incorporating the substantive provisions of the UNCRC into domestic law. This is a step that has already been taken by a number of other jurisdictions.⁴³ The Scottish Government's commitment to incorporation was reinforced in its 2019-2020 publication, *Protecting Scotland's Future: The Government's Programme for Scotland*, which said:

'We are committed to incorporating the United Nations Convention on the Rights of the Child (UNCRC) into Scots Law. We will deliver the legislation needed to do this by the end of this Parliamentary term.'⁴⁴

To that end, the Scottish Government recently launched a consultation seeking views on the best way to do this.⁴⁵ **Full incorporation into Scottish Law of the UNCRC is therefore widely, and imminently, anticipated.**

3.3 The UNCRC and Scottish Family Law

The UNCRC was drafted in recognition of a number of widely accepted values, including:

- Childhood as a period of life 'entitled to special care and assistance'.
- Every child's entitlement 'to all... rights and freedoms' existing.
- The 'protection and assistance' owed to the family as 'the fundamental group of society and the natural environment for the growth and well-being of... children'.⁴⁶

The preamble (i.e. introduction) of the UNCRC provides that the rights it narrates are 'equal and inalienable' and most commentators are reluctant to acknowledge any rights as being more or less important than others.⁴⁷ This holistic approach recognises that all of the rights children hold are valuable, and all of those rights should be respected.

Nevertheless, four articles of the [UNCRC](#) are seen as having special importance because they are considered to represent the founding values, or 'General Principles', of the whole Convention. They are also sometimes called 'core principles', and they are:

- Article 2 (all children to be guaranteed UNCRC rights without discrimination⁴⁸);
- Article 3 (the focus on the child's best interests);
- Article 6 (the child's right to life⁴⁹);
- Article 12 (the child's right to express a view).

⁴³Including, e.g., Belgium, Norway and Spain. For a detailed consideration of different State approaches to incorporation/implementation see *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries*, L Lundy, U Kilkelly, B Byrne & J Kang, 2012.

⁴⁴ See *Protecting Scotland's Future: The Government's Programme for Scotland 2019-2020* (2019), p 18.

⁴⁵ 'Children's Rights: Consultation on incorporating the UNCRC into our domestic law', quote from p 11. The consultation ran from 22 May-28 August 2019. Consultation questions and responses are available [here](#).

⁴⁶ All bullet point quotations from UNCRC Preamble.

⁴⁷ As Sutherland points out, this is due to the fear that 'rights ranking lower in [any] hierarchy would simply be forgotten'. She observes nonetheless that 'there is no escaping the fact that some issues', e.g., the right to life and medical treatment, 'are simply more pressing than others' in particular situations: Sutherland, E.E., 'The Child's Right to Life, Survival and Development: Evolution and Progress', *Stellenbosch Law Review* 26(2), 2015, p293.

⁴⁸ Article 2 requires States Parties to 'respect and ensure' all UNCRC rights for 'each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

⁴⁹ Article 6 provides that State parties shall recognise the child's right to life survival and development. It is worth noting that Article 6 provides that the right to life is 'inherent' (i.e. fundamental), whereas the right to survival and development should be ensured 'to the maximum extent possible', allowing more room for State discretion as to how, e.g., 'development' is interpreted and achieved.

To attain threshold compatibility with the UNCRC, any legislation requires, at the very least, to uphold the above core rights. So, for example, statutory provisions that discriminated against certain groups of children (e.g., children separated from siblings due to family breakdown) may well be incompatible with Article 2. Failure to provide children with appropriate mechanisms to enable them to be heard in family cases is likely to be incompatible with Article 12, and so on.

Of the four core articles above, Article 3 (child's best interests) and Article 12 (child's right to express a view) feature most prominently in discussions about Scottish Family Law. This is because, in family cases, the law seeks to find the appropriate balance between doing what adults believe is best for children while genuinely listening to what children want for their day-to-day living arrangements.

One important aim of the 1995 Act, Part 1, was to incorporate Article 3 and Article 12 into Scottish law. There are concerns about the extent to which the 1995 Act, and the mechanisms supporting the operation of the 1995 Act in practice, currently achieve this aim. These concerns are discussed in Chapter 5.

First, Chapters 4A, 4B and 4C provide a broad overview of those sections of the 1995 Act most relevant to discussions about ECHR and UNCRC compatibility.

Chapter 4A. Current law and rights: parents, children and ‘PRRs’

The 1995 Act, Part 1 came into force on 1 November 1996. Part 1 of the 1995 Act contains 15 sections. The final section (section 15) is an interpretation section providing definitions of important words and phrases. This report focuses on the sections most relevant to the Bill and the sections that raise issues relating to the rights of parents and children.

Various amendments and insertions have been made to the 1995 Act to date. However, the overall shape of Part 1 remains largely as enacted in 1995. The two most significant amendments so far made to Part 1 of the Act were made by the [Family Law \(Scotland\) Act 2006](#) (‘the 2006 Act’) and are:

- Section 3: amended to provide PRRs for unmarried fathers (discussed in more depth in Chapter 4B), and
- Section 11 (7A-E): inserted to provide protection from abuse provisions (discussed in Chapter 4C).

In Chapters 4A, 4B and 4C, the key sections of the 1995 Act are examined in numerical order. Key sections are considered to be sections that (a) have generated ECHR and/or UNCRC debate to date and/or (b) fall within the main areas consulted upon in the 2018 Scottish Government [Review](#).

Here in Chapter 4A, sections 1, 2 and 3 of the 1995 Act are examined.

4A.1 Definitions: ‘parent’ and ‘child’

The main individuals involved in cases brought under the 1995 Act, Part 1, are parents and children, although siblings and wider family members may also be involved. The terms ‘parent’ and ‘child’ are not uniformly defined throughout Scottish Family Law – different definitions are given in different statutes and for different purposes.⁵⁰

The definition of ‘**parent**’ in the 1995 Act, Part 1, is broad. It includes anyone, ‘regardless of age’, who is the ‘genetic father or mother’ of a child as well as adoptive parents and those deemed to be parents under legislation providing for assisted and donor reproduction.⁵¹

As explained below, most (but not all) Scottish parents currently hold ‘parental responsibilities and rights’ (‘PRRs’). PRRs is the term used in the 1995 Act to describe the possession of legal authority for the care and upbringing of children. Usually (although not always) parents hold PRRs in respect of their children.

⁵⁰ E.g., a person is a ‘child’ until the age of 25 in terms of the Family Law (Scotland) Act 1985, s 1(5), in certain cases for the purpose of financial maintenance. Like many other countries, Scottish Law can be complicated and fragmented where regulating various aspects of parentage, parenthood and parenting is concerned.

⁵¹ Section 15(1), which is the interpretation section, specifically includes adoptive parents (see Chapter 3, Adoption and Children (Scotland) Act 2007) and deemed parents in terms of UK-wide legislation regulating assisted reproduction (see Part, Human Fertilisation and Embryology Act 2008).

For the purposes of the 1995 Act, Part 1, a ‘child’ is generally defined as any person under the age of 18 years.⁵² This matches the definition of ‘child’ in the UNCRC.⁵³ Nonetheless, virtually all of the orders that the court has the power to make in cases brought under Part 1 of the 1995 Act can only be granted where a child is under the age of 16 years.⁵⁴

So, cases brought under Part 1 of the 1995 Act are almost always concerned with children below the age of 16 years. This recognises the child’s developing maturity as he or she approaches adulthood. It is also supported by the generally held view that seeking to impose court orders against the expressed wishes of any child or young person, particularly a teenager, would in many cases be inappropriate and damaging.⁵⁵

There is an ongoing debate about exactly when young people should be considered to have reached full maturity. The debate is wide-ranging, complex and evolving.⁵⁶ However, by creating a regime whereby court orders are not granted in respect of those above the age of 16 years, Part 1 of the 1995 Act can be interpreted as respecting the notion of evolving capacity. This broad approach is in turn consistent with the spirit of the UNCRC.⁵⁷

4A.2 Sections 1 and 2: parental responsibilities and rights (‘PRRs’)

Sections 1 and 2 of the 1995 Act provide an overview of what the law expects of parents, and how they should behave in relation to their children. Section 1 outlines ‘parental responsibilities’, while section 2 outlines the corresponding ‘parental rights’.

The exercise of parental responsibilities and rights (‘PRRs’) should always be directed towards safeguarding and promoting ‘the child’s health, development and welfare’.⁵⁸

Much of the language of these sections comes from the text of the UNCRC. In particular, the provisions in section 1(1) of the 1995 Act quote Article 5 of the UNCRC, which provides for the balancing of parental responsibilities and rights (‘PRRs’) with the child’s rights. Article 5 outlines the parental responsibility to provide ‘appropriate direction

⁵² Section 15(1) of the 1995 Act. Where parental responsibilities are concerned, a young person remains a ‘child’ until the age of 18 in respect of the exercise of parental guidance only. A young person remains a ‘child’ in terms of Part 1 of the 1995 Act until he or she is 16 years old where all other parental responsibilities and all parental rights are concerned (ss 1(2); 2(7)).

⁵³ UNCRC, Article 1, states that ‘a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.’

⁵⁴ 1995 Act, ss 1(2); 2(7). All parental rights fall away at the age of 16 years. Only the parental responsibility to provide guidance continues until the child is 18 years of age. While an order concerning the parental responsibility of guidance in respect of a 16 - 18 year old could technically be granted, it is unlikely to be enforceable, particularly against the teenager to whom it relates.

⁵⁵ Such cases can include, e.g., intractable contact disputes in which there may also be allegations that one parent has alienated the child(ren) from the other. The judiciary has attempted to resolve this sort of situation in various ways by, e.g., appointing psychologists, referrals to mediation, writing letters direct to children and, in more extreme cases involving younger children, considering a change of residence or finding a parent in contempt of court. For a recent discussion on this complex issue in Scotland, see Barnes Macfarlane, L-A, ‘*Patrick v Patrick and Re A Letter To A Young Person: Judicial Letters to Children – an unannounced, but not an unwelcome, development*’, *Edinburgh Law Review* 2018, Vol 22,(1), 101.

⁵⁶ Increasing concerns have been raised by the UN Committee on the Rights of the Child and other experts about the relative vulnerability of young people aged 16 (and even those above this age): *Concluding Observations on the 5th Periodical Report of the UK and NI (12 July 2016: CRC/C/GBR/CO/5)*. Here (at para 20), the UK was, e.g., criticised regarding the minimum age of marriage (currently 16 years) and recommendations were made concerning increasing the age of protection from abuse of children and young people beyond the age of 16 in certain legislative provisions (para 43). Mainstream thinking, based on contemporary medical and psychological research, also indicates that the transition from childhood to adulthood is both more complex and delayed than previously believed. This has been widely reported. See, e.g., ‘*Is 25 the new cut off point for adulthood?*’, BBC News, 23 Sept 2013.

⁵⁷ ‘Evolving capacities’, has been described as the ‘recognition that, as children acquire enhanced competencies, there is a greater capacity to take responsibility for decisions affecting their lives’: quote from Abstract of *The Evolving Capacities of the Child*, Lansdown, G, UNICEF Innocenti Insights (2005).

⁵⁸ Section 1(1)(a),

and guidance', always 'in a manner consistent with the evolving capacities of the child'.⁵⁹ Parents are also empowered in section 2(1) to act as the legal representative of their child where that child lack capacity to act on his or her own behalf.⁶⁰ This is also consistent with the terms of Article 5 of the UNCRC.

The parent's responsibility to 'maintain personal relations and direct contact' found in section 1(1)(c) of the 1995 Act is a direct quote from Article 9(3) of the UNCRC. For many years Scottish courts have interpreted this duty on parents in a particular way. **Specifically, courts apply a broad 'assumption' (or general principle) that it will normally be beneficial for children to have an ongoing relationship with both parents.**⁶¹

By interpreting the 1995 Act in this way, the practice of the Scottish courts is consistent with Article 18 of the UNCRC, which imposes an obligation on States to recognise the common, or shared, nature of parenting. This is described in Article 18(1) as 'the principle that both parents have common responsibilities for the upbringing and development of [their] child'.

It is significant that section 2 of the 1995 Act states that parental rights exist *only* 'in order to enable [parents] to fulfill... parental responsibilities'.⁶² **This means that the law places the emphasis on parental responsibilities (i.e. duties), not parental rights (i.e. powers).**

The enforcement of PRRs will always depend upon the exercise of those PRRs being consistent with the best interests, or welfare, of the child.⁶³ This is compatible with Article 3 of the UNCRC ('best interests': this Article is discussed more fully in Chapter 5 below). PRRs are always subject to this important caveat.

4A.3 Section 3: who holds PRRs?

Before considering section 3, it is worth noting that a man is *presumed* to be a child's father in Scottish law where he is: (a) married to the child's mother, (b) registered as the child's father or (c) in possession of a declarator of paternity from the court.⁶⁴

These presumptions are long-standing in Scottish Law. Broadly, they operate as a starting point in any legal dispute about paternity. They predate the provisions of the 1995 Act and the era of DNA testing. In practice, the presumptions are assumed to represent the

⁵⁹ Article 5 provides that States 'shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family... or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of [his or her] rights.'

⁶⁰ 1995 Act, s 1(3). The Age of Legal Capacity (Scotland) Act 1991, s 2, outlines the legal position regarding a child's capacity in Scotland, with specific reference to, e.g., medical decisions and instructing a solicitor.

⁶¹ *White v White*, 2001 SLT 485, at para 15 per Lord President (Rodger). The court said that this view was an assumption (i.e. a commonly held belief) rather than a presumption, which is a more formalised rule of law requiring evidence to disprove (or rebut) it. In para 15, the Lord President quoted from the earlier judgment in *Sanderson v McManus* 1997 SC (HL). There, the House of Lords 'deprecated the use of the term "presumption" to describe an assumption or general principle [that a child benefits from contact with both parents]' and said it is instead 'simply a working hypothesis born of human experience... And indeed the power of that particular assumption can perhaps be gauged by imagining the outcry if a judge were to declare that she would take as her starting point the opposite assumption, that normally a child would not benefit from contact with his absent parent.'

⁶² Section 2(1).

⁶³ See *Sanderson v McManus* 1997 SC (HL) 55, a decision predating the coming into force of the 1995 Act but which is still today referred to as the enduring authority for settling the matter in Scottish Law that any 'notional' parental right for contact must always come second to the child's welfare. See also *Osborne v Matthan* (No 2) 1998 SLT 1264.

⁶⁴ These presumptions are now found in the Law Reform (Parent and Child)(Scotland) Act 1986, s 5(1).

accurate position unless steps are taken to rebut (i.e. overturn) them through an application to court.

Unmarried fathers (as defined by the 1995 Act) are those fathers who are not married to their child’s mother at the time of the child’s conception or subsequently.⁶⁵

The rationale for the difference in position between married and unmarried fathers is archaic, deriving from a time when the law sought to discourage any intimate relationship other than heterosexual marriage.⁶⁶ One way it did this was to ensure that ‘illegitimate’ children were treated less favourably in Scottish Law and society than those born to married parents.⁶⁷ The status of illegitimacy has now been abolished⁶⁸ and the majority of births (just over half⁶⁹) in Scotland are to unmarried parents.

Unmarried fathers were treated differently from other parents when the 1995 Act originally came into force – and they still are today. As outlined above, Article 8 is a qualified right, requiring a careful balancing act between the (at times competing) rights and interests of those involved in family litigation. The ECtHR has increasingly criticised States for allowing marital status to impact upon the status of parenthood, stressing that:

*‘Very weighty reasons need to be put forward before a difference in treatment on the ground of sex or birth out of or within wedlock can be regarded as compatible with the Convention.’*⁷⁰

The margin of appreciation historically afforded to States in terms of treating family members less favourably because of gender and/or marital status is receding.

4A.4 Unmarried fathers and PRRs: a timeline

An overview is provided below of the position of unmarried fathers from November 1996 (when Part 1 of the 1995 Act came into force) to date:

- I. From 1 November 1996 – 4 May 2006:** under the original section 3 of the 1995 Act, unmarried fathers could only acquire PRRs either by marrying the child’s mother, entering into a formal agreement with the child’s mother⁷¹ or by seeking a court order under Part 1 of the 1995 Act. One commentator observed that this was ‘in clear breach of [the UK’s] international obligations’.⁷²

⁶⁵ Section 3(1)(a). Sometimes the term ‘non marital fathers’ is used.

⁶⁶ For discussion of this historic approach to the regulation of relationships, see, Norrie K McK, *The Law Relating to Parent and Child in Scotland*, 3rd ed., W Green, 2013, p 71-72. The development of the law is discussed further in Barnes Macfarlane, L-A, ‘Family Law: Past, Present and Future’, chapter in ‘*A Compendium of Scottish Ethnology*’, Edinburgh University Press (2012).

⁶⁷ Less favourable treatment of unmarried parents, and their children, by States has for decades been discouraged (and regularly ruled a violation of Articles 8 and 14) by the ECtHR and other courts. See, e.g., *Marckx v Belgium* (1979-80) 2 EHRR 330 and more recent decision of the UK Supreme Court, *Principal Reporter v K* 2010 UKSC 56, discussed above in Chapter 2.

⁶⁸ This was finally accomplished by s 21 of the Family Law (Scotland) Act 2006 (‘the 2006 Act’), which amends the Law Reform (Parent and Child)(Scotland) Act 1986 s 1 by providing that ‘No person whose status is governed by Scots Law shall be illegitimate...’

⁶⁹ Most recent National Records of Scotland Statistics available [here](#). In 2018, 49% of children were born to married parent; 51% to unmarried parents.

⁷⁰ *Schmidt v Germany* (1994) 18 EHRR 513, at para 24. See also, e.g., *Sporer v Austria*, Application no 35637/03; [2011] 1 FLR 2134 and *Schneider v Germany* (2012) 54 EHRR 12.

⁷¹ Section 4 of the 1995 Act provides a seldom used mechanism whereby a ‘natural’ (i.e. an unmarried) father could, with the agreement of a child’s mother, share parental responsibilities and rights if done using the correct form and method of registration prescribed by Regulations to the 1995 Act.

⁷² Norrie K McK, *Children (Scotland) Act 1995*, 2nd ed, 2004, W Green, p 14.

II. **From 4 May 2006 – date (current law):** section 3(1) was amended by section 23 of the Family Law (Scotland) Act 2006 ('the 2006 Act'). The amendment is now well known. **The current section 3 of the 1995 Act places unmarried fathers of children in the same position as mothers and married fathers, but *only if*:**

- they are 'registered as [their] child's father', and
- the birth is registered on or *after* 4 May 2006.⁷³

The amendment was not retrospective and applies only to children who have their births registered after 4 May 2006, when the 2006 Act came into force. In practice, this means that the 2006 amendment affects Scottish children aged 0 – 13 years of age, leaving those aged 13 – 18⁷⁴ years governed by the original PRR provisions in section 3.

Currently, there are two regimes operating in Scotland governing the status of unmarried fathers and, significantly, that of their children. Purely based on their age, siblings with the same unmarried father, who is registered as the father of each of them, could have a different legal status. The younger children (i.e. those under 13 years) would have two legally recognised parents, while the older children would have only one.

The amendments made by the 2006 Act to section 3 undoubtedly improved the legal position of many unmarried fathers and their children. In that regard, the amendments were a step forward in terms of ECHR and UNCRC compliance. The UK Supreme Court said in 2010 that an initial legal distinction between unmarried and married fathers could be justified.⁷⁵ However, it is perhaps worth considering whether, in 2019, section 3 represents the best fit for contemporary family life in Scotland.

4A.5 Section 3: ECHR and UNCRC concerns

There is a difference between possessing PRRs and exercising a parenting role. As noted in Chapter 2 of this report, the degree of protection afforded by Article 8 of the ECHR (right to respect for private and family life) depends on the strength and reality of the existing family relationship.

This means that a father (or mother) in possession of PRRs who has never, or rarely, exercised these PRRs throughout the years would be unlikely to be afforded any degree of protection under Article 8.⁷⁶ Courts can also 'remove or regulate PRRs'⁷⁷ belonging to any parent in the event that that parent's involvement is, or becomes, contrary to their child's welfare.

Drawing a legal distinction between unmarried fathers and other parents was contrary to the recommendation of the Scottish Law Commission ('SLC'). The SLC produced the draft

⁷³ Section 3(1)(b)(ii), as inserted by s 23(3) of the 2006 Act.

⁷⁴ Although almost all court orders sought under Part 1 of the 1995 Act concern those children below the age of 16 years, s 15 of the Act broadly defines children (as noted in the main text above) as those under 18 years of age.

⁷⁵ In *Principal Reporter v K* 2010 UKSC 56, discussed in Chapter 2.2 above, the Supreme Court observed, at para 53, that 'The case law suggests... 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.' This judgment is now almost a decade old.

⁷⁶ See, e.g., *Lebbink v Netherlands* (2005) 40 EHRR 18, [37] and *Schneider v Germany* (2012) 54 EHRR 12, [80]: 'a mere biological kinship between a natural parent and a child, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of art 8.'

⁷⁷ *Report on Family Law*, (Scot Law Com No 135), 1992, Edinburgh HMSO ('*Report on Family Law*'), Para 2.41.

Children (Scotland) Bill in their comprehensive 1992 [Report on Family Law](#). The SLC bill, as revised,⁷⁸ later became the Children (Scotland) Act 1995.

In their 1992 report, the SLC recommended simply conferring automatic PRRs at birth upon all parents, '*on the basis of parentage alone, subject to any court decree to the contrary*'.⁷⁹ Any dispute about paternity could still be resolved, as before, through blood/genetic testing (with or without court proceedings).⁸⁰ The SLC proposed that section 3 of the 1995 Act should read as follows:

*'3(1) The parental responsibilities and parental rights of a parent shall not be dependent on that parent being or having been married to the other parent of the child concerned.'*⁸¹

This proposed section was clear and concise. Its focus was genetic parentage, rather than birth registration. It proposed that unmarried fathers acquire PRRs at birth, in the same way as all mothers and married fathers. The ordinary acquisition of PRRs by unmarried fathers would not then have depended (as it currently does) on an administrative process found in a different statute that was not drafted for the purpose of conferring PRRs.

The current approach of the Scottish Law has generated various issues, addressed in Chapter 4B below. Importantly, the rationale for the proposed SLC section – in 1992 – was that the Law of Scotland no longer sought to penalise some adults and children simply because they belonged to a family in which no marriage had taken place. The SLC found that there was little justification in Scottish Law for treating unmarried fathers:

*'less favourably than fathers who are or have been married to the child's mother: and... less favourably than unmarried mothers...'*⁸²

The SLC stressed, as have Scottish courts to date, that PRRs exist for the benefit of children – not parents. The SLC report continued:

*'It can also be argued that the law discriminates against children born out of marriage by denying them a father with the normal legal responsibilities and rights.'*⁸³

These may be considered persuasive arguments. They were expressed by the SLC before the Human Rights Act 1998 incorporated the ECHR into UK Law. The arguments in favour of treating all parents equally at birth can be seen as stronger today in view of increasing observance of the ECHR and the UNCRC in Scotland. They are discussed in more depth in Chapter 4B.

⁷⁸ Various proposed sections in the SLC Bill such as, e.g., those giving PRRs to all fathers and rights on separation to cohabitants were not enacted in the 1995 Act.

⁷⁹ At para 2.37 (referring to genetic parentage).

⁸⁰ Paternity cases and genetic testing are discussed more fully in Chapter 4B. While assisted reproduction cases are beyond the scope of this report there are provisions governing parentage in most cases. The UK-wide Human Fertilisation and Embryology Acts of 1990 and 2008, and a range of connected regulations, have created a broad framework for regulating parentage when, e.g., a child is born following the provision of donated eggs and/or sperm in a licensed clinic. Surrogacy regulation is currently the subject of joint review by the Scottish and English Law Commissions.

⁸¹ *Report on Family Law*, p 166.

⁸² Para 2.34 of the *Report on Family Law*, the Scottish Law Commission stressed, in 1992, that giving all parents PRRs was 'in line with current social thinking'. For a more detailed discussion see Sutherland EE, *Child and Family Law*, 2nd ed., 2009, Thomson/Green, p398-403.

⁸³ Para 2.44.

Chapter 4B. Current law: wider rights issues surrounding section 3

This Chapter considers the operation of section 3 of the 1995 Act in respect of families in which parents are not married to each other.

As noted in Chapter 4A above, **the current wording of [section 3](#) of the 1995 Act places the emphasis on registration of paternity rather than on paternity itself.** This may be problematic when considering the rights of unmarried fathers and their children in terms of Article 8 of the ECHR (right to respect for private and family life) and Article 14 (non-discrimination).

4B.1 Birth registration and acquisition of PRRs

Joint birth registration is common but it is not mandatory in Scotland. An unmarried father can only be registered as his child's father on the child's birth certificate if:

- the birth registration is a joint one with the mother following acknowledgment by him of paternity, or
- the mother registers the birth after he and the mother sign declarations that he is the father, or
- the father registers the birth on the production of a declaration by the child's mother that states that he is the child's father.⁸⁴

The effect of the above provisions is that without the co-operation of the child's mother, unmarried fathers cannot (a) register their child's birth or (b) be registered as their child's father. If a mother does not name the father on the child's birth certificate then the father can apply to court for a declarator of paternity. Litigation over paternity may be costly and time-consuming.

In the event that the court grants a declarator of paternity, the next steps seem confusing and administratively laborious – for all those involved.⁸⁵ On the face of it, the statutory process for recording paternity on the child's birth certificate after such a court order is granted still requires the mother's participation.⁸⁶

However, if a court decree is granted declaring paternity and the child's mother refuses to co-operate it seems that there is a solution. The court is empowered to notify the Registrar General of the declarator of paternity and, in turn, the registrar can then correct the birth certificate to show the father's name.⁸⁷

At present, just over 4% of unmarried fathers in Scotland are not registered as such on their child's birth certificate.⁸⁸ While this is a small percentage of parents, it is possible to

⁸⁴ Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 18(1) ('the 1965 Act'). Where a father makes a request for registration with the production of the mother's declaration, he will then be treated as a 'qualified informant concerning the birth of the child'. He is otherwise not such an 'informant' (s14(5)).

⁸⁵ The technicalities of the law in this area are complex and were discussed at paras 12.24 – 12.26 of the 2018 Review of Part 1 of the 1995 Act. There the Government indicated that the Statutory Instruments regulating the operation the 1965 Act 'may need to be amended so that a father who has a declarator of parentage and has PRRs can [himself] re-register the birth showing him on the birth certificate'.

⁸⁶ Sections 18(1)(b), 18A, 20 of the 1965 Act.

⁸⁷ Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 18(2) says that the Registrar General 'may record that [father's] name and surname by causing an appropriate entry to be made in the Register of Corrections'; s 18A(1) and (2) which provide: 'Where it appears to the Registrar General that the import of a decree notified to him... does not correspond with the entry in the register of births in respect of any person to whom the decree relates he shall cause an appropriate entry to be made in the Register of Corrections Etc.'

⁸⁸ Scottish birth statistics available [here](#). In 2018, 4.2% of births were sole registrations (Table 3.02).

argue that the requirement that unmarried fathers are registered as such in order to acquire PRRs at birth like other parents violates Article 8 and Article 14 of the ECHR.

There are very strong arguments put forward against requiring a mother to name her child's father if she is the victim of rape. Similarly, a mother may wish to withhold the father's name in order to protect herself or her child from violence.⁸⁹ One respondent to the Review of Part 1 of the Children Scotland Act 1995, however, expressed a counter argument to the latter point by saying that:

'The answer is to have proper protections against domestic violence, rather than to use [the acquisition of] PRR as a mechanism to reduce its incidence for it disadvantages some men who have not been violent'.⁹⁰

It could also be argued that the children of unmarried fathers are discriminated against on the basis of their father's sex and marital status. This can be seen as contrary to the terms of Article 2 of the UNCRC (non-discrimination based on child's birth status).⁹¹ It is also hard to view the approach towards unmarried fathers' PRRs in the 1995 Act as consistent with Article 18(1) of the UNCRC, which requires that States:

'ensure recognition of the principle that both parents have common responsibilities for the upbringing and development' of their children.⁹²

In other words, it is the duty of States and public bodies to promote the active engagement of both parents in their child's lives unless there is a good reason to the contrary. For example, Scottish courts can, after consideration of the circumstances of the case concerned, remove the PRRs of violent or abusive parents.⁹³

Further concerns arise based on other articles of the UNCRC, such as Article 7 (the right to birth registration, 'name ... and, as far as possible... to know and be cared for by... parents') and Article 8 (the child's right to identity).⁹⁴

Taken together, Articles 7 and 8 are often used to support the argument that all children should have the right to possess basic information about who they are and who their parents are.⁹⁵ This way, children can know, understand and preserve fundamental aspects of themselves, their family background and culture.

One way to address the above issue might be to remove the link section 3 creates between birth registration and acquiring PRRs. This could be done, e.g., by providing, as the SLC

⁸⁹ Such circumstances have been recognised England, e.g., in s 56/Sch 6 of the Welfare Reform Act 2009 (not yet in force), which provides that a child's father's name should be given by the child's mother on registration of birth. However, the section also provides a list of circumstances in which the mother is not required to provide such information. These include, e.g., cases in which the mother does not know the father's identity or the father has died and cases in which 'the mother has reason to fear for her safety or that of the child if the father is contacted in relation to the registration of the birth': Sch 6, Part 1. See note 114.

⁹⁰ Consultation response 63648951, Professor K McK Norrie, answer to Question 19. The current provisions of the 1995 Act concerning protection from abuse – and the proposals to improve the protection of vulnerable witnesses and parties in family cases, are discussed in Chapters 4C and 7D respectively.

⁹¹ Article 2(1) provides that States must ensure that the child does not suffer discrimination based on 'his parent's... sex... or other status'.

⁹² The UK issued a 'declaration' on ratifying the UNCRC stating that it would interpret any references in the UNCRC to 'parents' to mean 'only those persons, who, as a matter of national law, are treated as parents'. A 'Declaration' is a statement as to a State's understanding of some aspect of an international treaty, such as how it will interpret a particular provision.

⁹³ Section 11(2)(a).

⁹⁴ Article 8(1) provides: 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.'

⁹⁵ In this regard, it may be worth noting that, as the Scottish Law Commission observed, at para 2.41 of their 1992 *Report on Family Law*, 'the interests of the child are not necessarily identical to those of the parent who has care of the child'.

recommended in 1992, that all parents hold PRRs, regardless of marital status. It is possible that doing so might lead to an increase in disputes about paternity. The following section discusses the manner in which the law currently resolves disputes about paternity.

4B.2 Applying to court for a declarator of paternity – and DNA testing issues

Without the consent of the child's mother's, an unmarried father seeking to register as his child's father would have to apply to court for a declarator of paternity. **Court cases about paternity (or non-paternity) are uncertain in outcome.** This is because, under current law, no-one can be compelled to provide a blood or DNA sample in Scottish family law cases. Nor can a parent with PRRs (e.g. a mother) be compelled to consent on behalf of a child too young to decide for himself or herself.⁹⁶

The lack of co-operation by a parent or child in paternity litigation need not prevent a court from making an order about paternity. **Since litigation about paternity is dealt with by civil (rather than criminal) law the standard of proof used is the 'balance of probabilities'**.⁹⁷ This means that a court has only to be satisfied, on balance, that a man is the father of a child in order to grant a declarator of paternity.

Also, courts currently have the discretion to draw an 'adverse inference' from a person's refusal to consent to testing.⁹⁸ Courts can opt to reach a decision on paternity (or non-paternity) without an individual's co-operation by making reference to the broad facts and circumstances of the case.⁹⁹ In other words, the court is entitled – but not required¹⁰⁰ – to view failure to co-operate as an attempt to withhold the truth. This makes the process and outcome of such actions uncertain.

One option for greater certainty would be to use DNA testing in such cases.¹⁰¹ This can be a non-invasive procedure. Nonetheless, DNA testing – and whether courts should order such testing – raises complex questions and is the subject of academic discussion. **For example, is it more important for families (and children) to know the genetic**

⁹⁶ A child of sufficient age and understanding can themselves consent in terms of the Age of Legal Capacity (Scotland) Act 1991, s 2(4). It is generally understood in Scotland that the right to consent carries with it a right to refuse to consent. No specific age is given for medical consents – the test is whether the child was 'capable of understanding the nature and possible consequences of the procedure'. Any person with PRRs, or with 'care and control' of the child can consent to the taking of a sample on behalf of that child but, as Sutherland observes, this power 'probably does not enable such a person to override a competent child's refusal to have a sample taken: *Child and Family Law*, 2nd ed., 2009, Thomson/Green, p 213.

⁹⁷ Where civil proceedings are concerned, a court need only be satisfied that the likelihood, or balance, of probability has tipped in favour of one party. This means that a court could (in theory at least) make a decision in favour of a party even the court was only 51% satisfied by the arguments/evidence produced. The standard of proof in criminal cases is higher (requiring the court is satisfied beyond reasonable doubt).

⁹⁸ Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, s 70(2). The court is not bound to draw an adverse inference (*Smith v Greenhill* 1993 SCLR 944).

⁹⁹ In e.g., *CS v KS* 2014 SLT (Sh Ct) 165, a man asked his local sheriff court to grant a declarator that he was not the father (a declarator of 'non-paternity') of the teenager, aged 17 years, that he had previously believed to be his son. Neither the teenager nor his mother participated in the proceedings, nor did either co-operate with requests made that they provide DNA samples. The court drew a negative inference from this conduct and on balance (with reference to evidence about skin and eye colour, at paras 22, 23, 32 and 39) found that the boy was not the man's son. The implications of the decision are discussed in Black G, 'When is a parent not a parent? *CS v KS and JS* and the question of genetic parentage or social parenting', *Edin LR* 2015, 19(2), 263.

¹⁰⁰ It has been persuasively argued that this amounts to yet another 'obstacle' for unmarried fathers if a mother refuses to allow him to register as father or to co-operate by providing a sample in litigation: Sutherland E E, *Family Law: Still Scope for Reform*, *JLSS*, 17 July 17. See also Norrie K McK, *The Law Relating to Parent and Child in Scotland*, 3rd ed., (2014), W Green, p 90-93.

¹⁰¹ It is widely accepted that DNA testing can now conclusively prove paternity. E.g., Cellmark.co.uk, a body accredited by the Ministry of Justice to carry out parentage tests as directed by the civil courts in England And Wales' states that their DNA testing results will 'normally provide proof of paternity with a confidence level of at least 99.99% and usually greater than 99.9999%'.

truth than it is to preserve what may be the ‘stability and privacy of an established family unit’?¹⁰²

Some academics¹⁰³ suggest that revealing the genetic truth of a child’s parentage should be viewed purely as a factual matter. Others argue that the issue should depend upon a more nuanced consideration of whether doing so serves a child’s best interests.

Different States adopt different approaches to DNA testing in paternity cases.¹⁰⁴ Recent decisions from the ECtHR suggest that States retain the freedom to adopt the approach they consider best in respect of ordering such testing.¹⁰⁵ The human rights focus is whether that State approach operates in an arbitrary or unbalanced way.¹⁰⁶ In other words, has the State given proper consideration to the competing rights and interests of the individuals involved?

Currently, there is no duty upon Scottish courts to consider the child’s best interests (i.e. whether it would be better for the child to know the truth or not) in granting an order relating to paternity. Arguments based on the ECHR and UNCRC have been advanced on both sides of the DNA testing dispute.

In terms of Article 8 of the ECHR, compulsory DNA testing in family cases could be viewed as an intrusion into private and family life (both for parents and children). This concern must, though, be balanced against the child’s overall best interests (Article 3, UNCRC) and also the child’s basic right to birth registration, ‘name ... and, as far as possible... to know his or her parents’ (Article 7, UNCRC).

The right to possess information about birth identity is being increasingly recognised in connected fields of Scottish and UK-wide law, such as adoption. This information is not necessarily, however, made available throughout childhood.¹⁰⁷

In England, for example, the [Family Law Reform Act 1969](#) empowers courts to order scientific testing (including DNA tests) in paternity disputes, although courts can refuse to make such an order.¹⁰⁸

¹⁰² See Sutherland EE ‘Parentage and Parenting’, chapter in *Family Dynamics: Contemporary Issues in Family Law*, Scoular J, Butterworths, (2001), and Sutherland EE, *Child and Family Law*, 2nd ed., 2009, Thomson/Green, pp 215-217 for a clear overview of this complex debate.

¹⁰³ Some literature is more historic (e.g. K O’Donovan, ‘Right to know one’s parentage’ 1988 Int’l J of Law & the Fam 27; Fortin J, ‘Children’s rights to know their origins – too far, too fast?’ (2009) 21 *CFLQ* 336) and other publications contemporary (e.g., Black G, ‘Identifying the legal parent/child relationship and the biological prerogative: Who then is my parent?’ 31 *Jur Rev* 2018 (1), 22). The ECtHR has acknowledged the importance for an individual of knowing who his or her parent is while also noting that the rights of others must be considered in such disputes: *Yosef v Netherlands* [2003] 1 FLR 2010; *Jaggi v Switzerland* (2008) 47 EHRR 30. See also Bainham A, ‘Truth will out: Paternity in Europe’, 2007 *CLJ* 278.

¹⁰⁴ E.g., in Norway, mothers cannot refuse consent to DNA testing: Children Act 1981, §§ 5 and 25; in South Africa, the court applies a best interests test applies when considering whether to order testing: *YM v LB* 2010 (6) SA 338 (SCA). In America, DNA test kits are freely available in pharmacies in many States.

¹⁰⁵ There are, e.g., valid Article 8 arguments that can be advanced for DNA testing (e.g. the right to know the truth about one’s parentage) and against (e.g., the right to privacy, and not to be forced to consent to testing).

¹⁰⁶ See, e.g., *Doktorov v Bulgaria*, App 15074/08 ECHR (2018); *Mifsud v Malta* (App 62257/15) ECHR 041 (2019). In both of these cases the ECtHR focused on whether the legal provisions and processes enabled the rights and interests of the men who brought the cases to be duly regarded rather than whether the law itself supported one broad legal approach or another.

¹⁰⁷ E.g. the Adoption and Children (Scotland) Act 2007, s 55(4) allows a person who has reached the age of 16 access his or her adoption records or (possibly) earlier if the court orders (s 5(1)(a)). Donor conceived people aged 16 and over are entitled to similar information in terms of the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004/1511. Those born after 1 April 2005, when the 2004 regulations came into force, can ask for their donor’s name, date of birth and last known address.

¹⁰⁸ Section 20. Section 21(1)-(4) of this English Act makes it possible for a child under the age of 16 years to be tested against his or her will. A parent holding ‘parental responsibility’ (the English equivalent of PRRs) can consent instead to the test. Such an approach cannot be seen as consistent with the child’s broad rights under the UNCRC (and, e.g., in *Re P* [2011] EWCA Civ 795 an English court refused to test a 16 year old against her wishes).

Providing Scottish courts with a similar power to exercise discretion over whether DNA testing should be ordered might be one possible way to balance the competing human rights claims on the issue of testing. This would enable the issue to be considered by courts on a case-by-case basis.¹⁰⁹

4B.3 Section 3: ongoing debate

The position of unmarried fathers in Scotland has generated a number of debates and petitions.¹¹⁰ **It is likely to continue to do so.**¹¹¹ In 2014, for example, a Public Petition ('[PE01513](#): Equal Rights for Unmarried Fathers') asked the Scottish Parliament to review section 3 of the 1995 Act. The petition itself, described as 'the latest in a long line of attempts to reform Scots law on parentage and parenting', attracted criticism for being:

*'all about adult rights when the paramount concern of Scots law is – and should remain – the best interests of children.'*¹¹²

However, several issues arising from the petition were considered by the Scottish Parliament in 2014. These included:

- whether current law should be amended to give PRRs to all fathers, irrespective of whether the birth was a sole or joint registration;
- whether such an amendment should be backdated;¹¹³
- whether joint birth registration should (subject to a series of statutory exceptions) be mandatory;¹¹⁴
- whether courts should be empowered to order or compel DNA testing in family cases.

The Public Petitions Committee also clarified the approach in England on the above issues. Views were sought from various organisations, including, e.g., the Law Society of Scotland and Scotland's Commissioner for Children and Young People. The majority of those providing views did not support a change in the law at that time. The mechanisms

¹⁰⁹ Nonetheless, there is still some room for debate about the grounds on which a court would exercise such discretion – i.e. on the basis of the child's best interests, or on some other public policy ground?

¹¹⁰ See, e.g., PE01529: this related to the enforcement of court orders relating to child contact (closed Nov 2014); PE01528: this sought amendment of the child contact laws to provide that there should be near to 50/50 contact for both parents if parents are fit and proper to parent (closed May 2015); PE01570: the petitioner wanted a review of the law that governs PRRs and its implementation in practice (closed Feb 2016); PE01589: this petition sought an independent review of all the processes involved in arranging post-separation child contact (closed Feb 2016). More recent petitions were closed due to the Scottish Government's commitment to undertaking its 2018 Review of the 1995 Act (discussed in the main text below).

¹¹¹ In 2010 the Scottish Human Rights Council noted with regard to unmarried fathers: 'our understanding of family life develops and changes over time... legislation that represented the Scottish Parliament's view of family life at [the] time it was enacted... may need to be updated'.

¹¹² 'It's a wise father...', Sutherland E.E, [JLSS](#), 16 June 2014.

¹¹³ In the 2018 Scottish Government Review of the 1995 Act, question 20 asked whether or not any amendment giving all fathers PRRs should be backdated. Arguments about backdating such an amendment raise human rights issues, notably in terms of Article 8 of the ECHR (right to respect for private and family life). As the Faculty of Advocates (response 549963817) said, backdating would 'mean that parents would be faced with consequences to their action (registration) that they did not intend at the time... [so] backdated changes risk being categorised as arbitrary and unfair.'

¹¹⁴ In England, the Welfare Reform Act 2009 provides for compulsory joint registration of births, but the section was not (and is not yet) fully in force: Welfare Reform Act 2009, s 56; Schedule 6. Exceptions to joint registration have been included – see note 89 above. According to the English academic, Jonathan Herring, the UK Government indicated in 2014 it would not be bringing those sections into force (discussed in *Family Law*, 9th ed., Herring J, Pearson, 2019, p 366). The Welfare Reform Act 2009 (Commencement No. 10) Order 2016/913 brings parts of s 56 into force but not those concerning compulsory birth registration (see in particular Sch 6, paras 4 & 19 concerning duties of unmarried mothers regarding registration, which are not in force).

under existing law whereby unmarried fathers without PRRs can apply to court seeking an award of PRRs were cited.¹¹⁵

These issues were discussed again in 2016.

4B.4 Justice Committee: 2016 post-legislative scrutiny of the 2006 Act

In 2016, the Justice Committee carried out a [post-legislative Scrutiny](#) of the impact of the Family Law (Scotland) Act 2006. The report was published in March 2016.¹¹⁶

The Justice Committee heard evidence in support of the current automatic acquisition of PRRs by unmarried fathers registered as such on their child's birth certificate. It was noted that that this amendment to the 1995 Act, made by section 23 of the 2006 Act, was 'now widely accepted as part of the legal landscape'¹¹⁷ in Scotland.

The Committee then considered whether, notwithstanding this, unmarried fathers remain unfairly disadvantaged in Scottish law. A range of views were taken regarding compulsory DNA testing in family litigation, mandatory joint birth registration and backdating the birth registration amendment made by section 23 of the 2006 Act. No clear agreement emerged among those giving evidence on these issues.¹¹⁸

The Scottish Government has taken a number of steps towards ensuring respect for the rights of all parents and children. In particular, the respective position of parents was addressed in the [National Parenting Strategy](#).¹¹⁹ However, the current Scottish Law, and section 3 of the 1995 Act in particular, may be vulnerable to a challenge based on the ECHR and/or the UNCRC for the reasons discussed above.

The remaining key provisions of the 1995, Part 1, are considered in Chapter 4C.

¹¹⁵ This can be done in terms of s 11(2) & 11(3) of the 1995 Act, see main text below. See SPICe [Petition Briefing](#), dated 24 April 2014 by Sarah Harvie-Clark. Concern over backdating such provisions, which would have the effect of changing the legal status of individuals retrospectively, was also expressed by those who gave their views to the Committee.

¹¹⁶ *Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006* (17 March 2016: hyperlink in main text).

¹¹⁷ As above, para 48.

¹¹⁸ Paras 48 – 55. Consultation responses to the Scottish Government Review of Part 1 of the 1995 Act also show no clear agreement on these issues among those who responded.

¹¹⁹ See also [report](#) of Equal Opportunities Committee on 'Fathers and Parenting', published 18 May 2014.

Chapter 4C. 'Major decisions', court orders, protection from abuse

In this Chapter the focus is section 6 (the views of children) and section 11 of the 1995 Act. Section 11 is a lengthy provision. It provides a framework for courts when deciding whether or not to make orders about PRRs. Sections 6 and 11 are discussed at 4C.1 and 4C.2 below.

Importantly, section 11(7A) – 7(E) inserted by the 2006 Act, also imposes specific duties on courts in respect of protecting children from abuse or the risk of abuse. These duties are discussed at 4C.3.

4C.1 'Major decisions' and children's views: section 6

Section 6 provides for the child's general right to express a view when any 'major decision' is made about that child. This section is modelled on Article 12 of the UNCRC (the child's right to be heard, addressed in Chapter 5 below). Section 6 is largely concerned with decisions made at **home** rather than with formally seeking a child's views in the context of litigation. The latter is provided for by section 11(7) of the 1995 Act, considered below.

The term 'major decision' in section 6 is not defined in the 1995 Act, nor has it been defined by Scottish courts. A house move, school change or relocation are all decisions that might fall within the ambit of Section 6.¹²⁰ There is some dispute as to whether this section is 'symbolic', rather than 'enforceable'¹²¹ in nature, intended to embed the child's right to be heard into Scottish home life and culture.

Also, it should be noted that (as with section 11(7)(b) discussed at 4C.2 below, which concerns the **court's** duty to have regard to the views of children in family cases) an age presumption applies. Section 6(1)(b) currently provides that a child 12 years or older 'shall be presumed to be of sufficient maturity to form a view'. As explained in Chapter 5 below, such an age presumption is problematic when it comes to UNCRC compliance.

4C.2 Court orders relating to parental responsibilities etc.

Section 11 of the 1995 Act is concerned with court orders relating to parental responsibilities and rights.¹²² The section:

- Sets out the kinds of court proceedings in which courts can make what have become known as 'section 11 orders'
- **Provides for the court's wide discretion to make 'such order... it thinks fit', including** the orders listed in section 11(2), the main orders being:
 - an order '**depriving**' a person of PRRs or '**imposing**' PRRs upon a person. Neither of these orders removes or confers the actual status of parenthood upon the person concerned. Imposing some or all of the PRRs

¹²⁰ Sutherland EE, *Child and Family Law*, 2nd ed., 2009, Thomson/Green, p 589.

¹²¹ Norrie K McK, *Children (Scotland) Act 1995*, 2nd ed, 2004, p 21. See however persuasive discussion of the value of s 6 in Sutherland EE, 'Listening to the child's voice in the family setting: from aspiration to reality?' (2014) 26(2) CFLQ 152, p 168-172.

¹²² Section 11(1) of the 1995 Act sets out the proceedings in which what are usually termed 'section 11 orders' may be made. Orders relating to guardianship and administration of the child's property are also listed in s 11(1), but the vast majority of orders made by courts relate to PRRs and issues surrounding residence and contact.

- on a person, e.g., a grandparent, confers upon that person the responsibilities and rights that a parent would usually be expected to have,
 - a **'residence order'**, stating where and/or with whom a child will live,
 - a **'contact order'**, regulating arrangements for maintaining personal relations/direct contact between a child and the parent with whom he or she is not living,
 - a **'specific issue order'**, regulating any specific issue that has arisen (e.g. a dispute over a health or educational issue).¹²³
- **Lists those individuals who can apply for a section 11 order**, the main categories for noting being:
 - **A person¹²⁴ who does not have PRRs, never having had,¹²⁵ but who 'claims an interest'**. Claiming an 'interest' means satisfying the court that there is a legitimate interest being shown in the child who is the subject of the litigation. Those claiming such an interest might include, e.g., unmarried fathers who have no PRRs, step-parents, grandparents, wider relatives and siblings.

Although courts have decided that siblings¹²⁶ can seek orders under section 11 of the 1995 Act, there is no specific provision for this in the Act. The 1995 Act has been increasingly criticised (as have other family law statutes) for failing to underline the importance of the relationships that many children have with their siblings.¹²⁷

Support for sibling contact accords with the child's Article 8 right to respect for private and family life as well as various rights underpinning family relationships set out in the UNCRC.¹²⁸ This is particularly true for siblings who live in different households or do not live with their families. Accordingly, **many Children's Rights experts¹²⁹ argue that siblings should be named as persons with entitlement to apply for section 11 orders.**¹³⁰

- **Those who already have PRRs¹³¹** (i.e. mothers, married fathers and unmarried fathers with PRRs, and any person in possession of a previous court order granting him/her PRRs).
- **The child¹³²** who is himself or herself the subject of the proceedings.

¹²³ All orders listed found in section 11(2) of the 1995 Act (other, less routinely sought, orders can also be found in s 11(2)).

¹²⁴ A 'person' does not include a local authority: s 11(5). Separate statutory provisions set out the orders local authorities can seek.

¹²⁵ Generally those who have lost their PRRs through a public law process, such as adoption, cannot seek a section 11 order. However, some relief is afforded here, e.g., by s11(3)(aa) (an amendment to the 1995 Act through later Adoption legislation), which allows an individual who has had his or her PRRs 'extinguished' through the adoption process to apply for PRRs 'with the leave of the court'.

¹²⁶ In *D v H* 2004 SLT (Sh Ct) 73 the court was reluctant to allow a sibling (age 15) to seek a section 11 order but in *E v E* 2004 Fam LR 115 the court allowed a sister (age 14) to seek a section 11 order in respect of her younger siblings.

¹²⁷ This criticism was one theme emerging from the 2018 Review consultation responses (see, e.g., 'Stand Up For Siblings' response 555351740; CLAN Childlaw, response 173982533). Recent Nuffield Foundation study on sibling contact available [here](#).

¹²⁸ E.g., Articles 3 (best interests of child); 5 (rights and responsibilities of parents and wider family); 16 (no arbitrary and unlawful interference with ... family); 20 (rights of child temporarily deprived from family).

¹²⁹ A number of specialist family lawyers, academics, and Children's Rights groups responding to the Scottish Government Review of the 1995 Act were in favour of a statutory statement to make explicit support for siblings seeking, e.g., contact.

¹³⁰ Issues surrounding siblings using the 1995 Act were raised in evidence when the Justice Committee conducted its post-legislative review of the Family Law (Scotland) Act 2006 discussed above in main text (see para 60-61).

¹³¹ Section 11(3)(ii).

¹³² Section 11(5).

- **Sets out the test courts must use when ‘considering whether or not to make an order’.** This is sometimes called **‘the welfare test’**. It comprises **three overarching principles**, namely:

1. **The child’s welfare is paramount (section 11(7)(a)):** the court ‘shall regard the welfare of the child as its paramount consideration’. This is concerned with Article 3 of the UNCRC and is discussed more fully in Chapter 5 below.
2. **The court shall only make any order if to do so is better for the child than making no order (section 11(7)(a)):** This is sometimes called the ‘non intervention’ or ‘no order’ principle.¹³³ It exists to prevent unnecessary regulation by the State of the parent-child relationships. This approach seems to be broadly consistent with respect for private and family life in terms of Article 8 of the ECHR.¹³⁴ However, there has been some dispute since 1995 about the operation of no order principle.

The general impact of this principle was clarified by the Inner House of the Court of Session in 2001 in the leading case of [White v White](#).¹³⁵ Here it was confirmed that **the no order principle is not designed to act as a barrier to, e.g., a non-residential parent seeking a contact order**. Instead, it is intended to ‘give effect to Parliament’s view’ that children’s lives should be ‘regulated’ by agreement between their parents ‘without the intervention of the court’ wherever possible.¹³⁶

So, if parents cannot reach agreement about their child’s living arrangements then an application can be made to the court to impose, regulate or remove PRRs. Once this is done the court then has wide discretion to make any order it thinks fit to resolve the dispute.

Scottish courts have generally endorsed the above interpretation of section 11(7)(a) which, certainly on the face of it, complies with the Article 8 of the ECHR (right to respect for family life) for family members.¹³⁷ This also accords with the State responsibility in terms of the UNCRC Article 18 to respect the ‘common responsibilities’ of ‘both parents... for the upbringing and development of [their] child’.¹³⁸

3. **The child’s right to be heard (section 11(7)(b)):** the court shall give the child (‘taking account of the child’s age and maturity’) an opportunity to express a view. The wording of this provision, which is intended to reflect Article 12 of the UNCRC, is discussed in Chapter 5 below. In Chapter 5, it is noted that the current age presumption (i.e. that children 12 years and older are mature enough to express a view) is not supported by the

¹³³ Discussed in depth in Sutherland EE, *Child and Family Law*, 2nd ed., 2009, Thomson/Green, p443-447.

¹³⁴ The court in *White v White*, 2001 SC 689, stated at para 25 that there was sufficient support for the view that the section ‘complies with the requirements of art 8 since it respects family life and contains provisions enshrined in legislation for balancing the competing interests of the various members of the family’.

¹³⁵ 2001 SC 689. The Inner House of the Court of Session (often simply called ‘the Inner House’) is, among other things, Scotland’s highest civil court.

¹³⁶ As above, at para 21, per Lord President (Rodger).

¹³⁷ See, e.g., *JM v PK* [2015] CSIH 54, at para 18.

¹³⁸ Article 18(1).

UNCRC.¹³⁹ Further issues surrounding the child's participation are also discussed in Chapter 5.

It is worth noting here that **disputes have historically arisen in family litigation about the extent to which a child's views might be kept confidential (at the request of the child) from one or both parents.**¹⁴⁰ Courts have the power to direct that a child's views are 'sealed in an envelope marked "Views of the child-confidential"'.¹⁴¹

Disputes about whether parents should be made aware of their child's views has raised particularly problematic issues in terms of compliance with Article 6 (the right to a fair hearing) and Article 8 (the right to respect for private and family life). It remains the case that it is a 'fundamental principle' that parents are:

*'entitled to disclosure of all materials as the starting point' in their case although the court can consider 'whether disclosure of [that] material would involve a real possibility of significant harm to the child.'*¹⁴²

The power of the court to refuse to disclose the child's views is considered to apply to those cases in which where there is a risk of 'significant harm' to the child in disclosing that view. This will generally mean that a parent seeking to know what their child has said will be given that information. Significant harm is, though, a high benchmark.

While it is certainly the case that parental Article 6 and 8 rights in the ECHR require to be given great weight, it is arguable that imposing a 'significant harm' test on children is too high a threshold. Applying the Article 3 'best interests' test to whether or not the child's views are revealed to parents may be more UNCRC compliant. The best interests benchmark is also well understood throughout Scottish family law (see Chapter 5 below).

4C.3 Protection from abuse, and co-operation (section 11(7A) – 7(E))

In addition to the three-part test outlined above, courts must also direct their minds to any issues of abuse within the family before making court orders. This is because section 24 of the 2006 Act inserted section [11\(7A\)-\(7E\)](#) into of the 1995 Act.

Protection from abuse

Section 11(7A)-(7E) expressly requires the court to have particular regard to the need to protect children from abuse or the risk of abuse. Abuse is defined widely, and includes

¹³⁹ Sections 11(7)(a) and (b); 7(10).

¹⁴⁰ See, e.g., *Dosoo v Dosoo*, No 1., 1999 (SLT Sh Ct) 86; *McGrath v McGrath* 1999 SLT (Sh Ct) 90; *Oyeneyin v Oyeneyin* [1999] 11 WLUK 342: in these cases, the courts discussed whether or not the views expressed by children in the course of family litigation should be withheld.

¹⁴¹ For this provision (as it concerns cases raised in the Sheriff court) see Rule 33.20 (2)(a) of the relevant Court Rules (Chapter 33 'Family Actions').

¹⁴² *McGrath v McGrath* 1999 SLT (Sh Ct) 90, per Sheriff Principal Bowen, referencing the principles of 'natural justice' discussed by Lord Mustill in *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593.

'any... conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress'.¹⁴³ Conduct includes speech or 'presence in a specified place'.¹⁴⁴

The State has an overarching duty to safeguard and promote the child's best interests in terms of Article 3 of the UNCRC. **The UNCRC also requires States to put in place measures to ensure children's 'survival and development' (Article 6) and to protect children from 'all forms of physical or mental violence, injury or abuse... while in the care of parents' (Article 19).**

The 2016 [Power Up Power Down](#) project is an example of the commendable work undertaken in Scotland (involving children themselves) in seeking to improve children's voices being heard in family cases. Other national,¹⁴⁵ and international,¹⁴⁶ provisions give information about measures required to address domestic abuse and violence.

There is ongoing discussion regarding whether the Scottish legal system provides sufficient protection for victims of domestic abuse.¹⁴⁷ One significant criticism is the lack of interaction between criminal and civil (i.e. family) courts where there are allegations of domestic abuse.¹⁴⁸ The measures proposed in the Bill concerning vulnerable witnesses etc. are discussed in Chapter 7D below.

In terms of broad ECHR and UNCRC compatibility, the current provisions of the 1995 Act, Part 1, are directed towards a crucial¹⁴⁹ aim: protecting children from abuse in the family.

Section 11(7A)-(7E) was a focus of Post-Legislative Scrutiny by the Justice Committee in 2016. As discussed above, the purpose of that review was to 'was to take stock of the effectiveness of aspects of the Act',¹⁵⁰ including the anti-abuse provisions set out in that section.

Throughout the scrutiny it was noted in evidence that these provisions are 'not a counter-balance' to the three-part test ('the welfare test') discussed at 4B.2 above. Instead, they represent 'matters to be compulsorily taken into account in applying the welfare test'.¹⁵¹

¹⁴³ Section 11(7C)(a).

¹⁴⁴ Section 11(7C)(a) and (b).

¹⁴⁵ See, e.g., Scottish Government policy pages concerning [Violence against Women and Girls](#), which provides links to the 'Equally Safe' strategy and the national action plan.

¹⁴⁶ See e.g., the [Convention on the Elimination of All Forms of Discrimination against Women](#), signed by the UK on 22 July 1981 and ratified on 7 April 1986; Article 19 UNCRC (protection of child from all forms of violence, injury and abuse, while in the care of parents), Article 39 (State duty to promote recovery of child from any form of abuse).

¹⁴⁷ The recent [Domestic Abuse \(Scotland\) Act 2018](#), which creates a specific offence of engaging in an abusive course of behaviour against a partner or ex-partner, represents a significant step forward in addressing controlling behaviour in addition to physical abuse and has been described as the 'gold standard' in domestic abuse law.

¹⁴⁸ This area, noted to be complex and multifaceted, was addressed in depth in the Scottish Government 2018 Review of Part 1 the 1995 Act. See also Scottish Government publication [Domestic abuse courts: report](#), (3 September 2019), examining the effectiveness of Integrated Domestic Abuse Courts ('IDACs') that use a 'One Family, One Judge' model. Government-funded research is currently being undertaken by Professor Jane Mair, University of Glasgow, concerning 'Domestic abuse and child contact: the interface between criminal and civil justice'. This project is examining the interrelationship between the investigation and prosecution of domestic abuse in criminal justice and parallel child contact cases. The aim is to produce recommendations for measures to more closely align practice in both contexts.

¹⁴⁹ Most recent Domestic Abuse in Scotland statistics (2017-18 incidents recorded by the Police in Scotland) available [here](#).

¹⁵⁰ Para 1, report

¹⁵¹ As above. Evidence provided to the committee suggested that such matters already formed part of the court's broad duty to afford the child's welfare paramount consideration. As such, the sections were described, at para 65 of Evidence as more 'symbolic' in nature.

Two main concerns have been raised to date about section 11(7A)-(7E). These concerns, which were raised during the 2016 [Justice Committee Scrutiny](#) and again in some responses to the 2018 Scottish Government Review, are:

- **First, it has been argued that the protection from abuse provisions, as inserted into section 11(7A)-(7E), represent an ‘untidy’¹⁵² and incomplete ‘welfare checklist’.¹⁵³**

The existing checklist can be viewed as incomplete because it does not refer to any other significant factors that are, or might be, relevant to a child’s welfare. Other factors could include, e.g., the need to consider the child’s physical, emotional and educational needs, his or her wishes and the capacity of a parent to meet those needs.¹⁵⁴

In their 1992 *Report on Family Law*, the SLC considered, but ultimately did not recommend, a welfare checklist. They took the view that it would be challenging to ensure any such list contained everything that might be an important welfare factor in every case. They also considered that courts might feel pressured to adopt a ‘mechanical’ approach to the checklist and to decision-making. Such an approach, they thought, might in turn be more focused on minimising ‘the prospect of a successful appeal’ than on the child’s best interests.¹⁵⁵

On the other hand, the UN Committee on the Rights of the Child has said that such checklists are ‘useful’.¹⁵⁶ However, neither the ECHR nor the UNCRC require States to create a statutory welfare checklist for family cases. So, it can be said that **it is neither right nor wrong in terms of human rights to create a statutory welfare checklist**. However, an incomplete or an unbalanced checklist could lead to important elements being disregarded or irrelevant matters being afforded too much weight.

- **Secondly, reference has been made to a ‘dearth of evidence’¹⁵⁷ as to the impact of section 11(7A)-(7E) in practice.** This was drawn to the Justice Committee’s attention in the post-legislative review in 2016. Different reasons for a shortage of evidence as to impact were offered.¹⁵⁸ In referring

¹⁵² Para 66 of 2016 Scrutiny report, per Professor K McK Norrie.

¹⁵³ Such statutory checklists have been adopted by other states (e.g. England) and they most often set out a number of factors, relating to the child’s best interests, that courts should consider before make a decision. See Sutherland E E, *Family Law: Still Scope for Reform*, *JLSS*, 17 July 17, in which the author observes: ‘arguably having a partial checklist is worse than having none at all’.

¹⁵⁴ These are, e.g., factors appearing in the English statutory welfare checklist, found in s 1(3) of the *Children Act 1989*. This checklist is discussed further in Chapter 7C.

¹⁵⁵ SLC report, para 5.22.

¹⁵⁶ *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (art 3, para. 1), CRC/C/GC/14 (2013), para 50 (now referred to as ‘*General Comment No 14 on Best Interests*’). This will be discussed in Chapter 7C, which considers the checklist proposed in the Bill.

¹⁵⁷ Para 69 of 2016 Scrutiny report, per Professor Jane Mair.

¹⁵⁸ There were strong differences in opinion expressed throughout the Scrutiny. One group giving evidence suggested that the protection from abuse provisions were ‘vulnerable to casual and opportunistic abuse’ by mothers wishing to frustrate contact arrangements (Families need Fathers, at para 68). However, Scottish Women’s Aid gave evidence (at para 67) that the problem was not the provision itself, but rather a ‘failure of implementation that has resulted from institutional reluctance to change’ and that the ‘absence of an awareness of the dynamics and impact of domestic abuse’ has contributed to the lack of impact of s 11(7A)-(7E). Scottish research has identified issues surrounding (i) ‘how well professionals implement’ these protection from abuse provisions and (ii) the extent to which children themselves are heard in contact disputes where there has been domestic violence: Morrison F, *After Domestic Abuse: Children’s perspectives on contact with fathers*, *Edinburgh: Centre for Research on Families and Relationships, Research briefing CRFR*, April 2009. Current research, funded by the Scottish Government, is being undertaken by Assoc. Professor Richard Whitecross, of Edinburgh Napier University, exploring lawyers’ attitudes towards, and perspectives on, these provisions by examining how they are understood and implemented in practice.

to a lack of change in court practice¹⁵⁹ following the enactment of section 11(7A)-(7E), one commentator said:

*'There have been very few judicial discussions of the provision... I can understand people who argue that the provision promised more than it delivered... My response to that is that, if we look carefully at the wording, we see that it did not actually promise much.'*¹⁶⁰

Despite the laudable intention of addressing incidences of domestic abuse and violence in family law cases, the insertion of section 11(7A)-(7E) has generated a mixed response.¹⁶¹ In its concluding comments following the 2016 scrutiny the Justice Committee noted the:

*'lack of evidence as to the extent to which the amendment... has made children any safer.'*¹⁶²

Nevertheless it must be noted that Scottish Women's Aid, the group most experienced in supporting women and children who are victims of domestic abuse, consider that section 11(7A)-(7E) is essential. They view the provision is necessary 'to uphold the safety and wellbeing of vulnerable children and young people'¹⁶³ and refer to their experience of "a crisis around child contact and domestic abuse" reflected in unsafe decisions by the justice system.¹⁶⁴

Regardless of differing views about the drafting and impact of section 11(7A)-(7E), the importance of ensuring that statutory provisions afford protection to victims of domestic abuse cannot be understated.

There is evidence to suggest that domestic abuse allegations are made in around half of all family disputes that go to court.¹⁶⁵ There can be no dispute that **the provision of a safe environment for children, and vulnerable adults, must be at the forefront of the court's consideration in family cases.**

¹⁵⁹ To date, there are around 12 reported cases in which courts have specifically addressed s 11(7A)-(7E). In these cases, courts have made a range of observations, from a judicial perspective, about the operation and impact of the section: see, e.g., *Treasure v McGrath* 2006 Fam LR 100 (the first reported case addressing the section), *R v R* 2010 Fam LR 123 and more recently *Woods v Pryce* 2019 SLT (Sh Ct) 115. In terms of consideration by the higher courts of the section, e.g., the UK Supreme Court gave only minimal consideration to s 11(7A)-(7E) in *B v G* [2012] UKSC 21, at para 31. Instead, the Supreme Court focused on other elements of significant delay and cost (strongly criticising the Scottish family court system) in the case, *B v G* is mentioned again in note 314, in Chapter 7C, below.

¹⁶⁰ Para 65 of 2016 Scrutiny report, per Professor K McK Norrie.

¹⁶¹ See, e.g., Faculty of Advocates response (549963817) in the negative to question 34 of the 2018 Review which asked whether s 11(7A)-(7E) should be retained. The Senators of College of Justice also supported the removal of the section (response 924975631) as did CLAN Childlaw (response 173982533). Here two things should be noted: First, many respondents were in favour of retaining s 11(7A)-(7E). See, e.g., the Family Law Association (response 839357756), the Children and Young People's Commissioner for Scotland (response 570240422) and the Law Society of Scotland (response 964849955), the latter of which favoured the retention of the section as part of a wider checklist. Secondly, the Bill does not remove the protection from abuse provisions. Instead it is proposed that the current s 11(7A)-(7E) is re-enacted, with some changes to the wording, to form part of a checklist (discussed in Chapter 7C).

¹⁶² Para 86 (Conclusions and Recommendations section) of 2016 Scrutiny report. The Committee continued by noting the 'conflicting views as to whether there is a significant problem of court orders under section 11 putting children at the risk of abuse.'

¹⁶³ Quote from Scottish Women's Aid response (54268858) to question 2 of the 2018 Review.

¹⁶⁴ Justice Committee 2016 Scrutiny report, quoting Scottish Women's Aid at para 67.

¹⁶⁵ Mackay K, *The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse*, Scotland's Commissioner for Children and Young People (2013). See also Mackay K, 'Voice of the child', *Journal of Law Society of Scotland*, 13 Aug 2018 for discussion of methods currently used to ascertain children's views and their effectiveness based on the author's own research, in which the author notes that, while a very small percentage of contact disputes proceed to court, domestic abuse was alleged in '49% of cases' studied by her, a figure noted to be 'strikingly high'.

As discussed above, both the ECHR and the UNCRC require that States put in place effective measures to protecting adults and children from such abuse. Keeping victims of domestic abuse safe is a key priority of the Scottish Government.¹⁶⁶

The Children (Scotland) Bill 2019 creates a new statutory checklist. The Bill removes the existing protection from abuse provisions in section 11(7A)-(7E), and re-enacts those provisions on very similar terms in that checklist. The checklist is discussed in Chapter 7C below.

It should also be noted here that the protections given by the current to **vulnerable witnesses under the [Vulnerable Witnesses \(Scotland\) Act 2004](#) are not tailored to family law cases** and do not extend to Child Welfare Hearings (unless, unusually, evidence is given). Child Welfare Hearings are hearings in family cases where the court tries to identify the issues in dispute and where both parties are present in court. Most family court cases are resolved in the course of Child Welfare Hearings, rather than proceeding to a final hearing where evidence is required to be given by the parties. At present, the parties sit across the table from each other at Child Welfare Hearings, even when there have been allegations of (or a conviction for) abuse.

The Bill also contains proposed measures to protect 'vulnerable witnesses and parties'.¹⁶⁷ These are discussed in Chapter 7D below.

Co-operation

Section 11(7D) requires the court to consider 'co-operation'. Broadly speaking, it provides that when the court is deciding whether or not to make an order about PRRs, it needs to focus on the issue of parental/adult¹⁶⁸ co-operation before doing so.

Some concern has been expressed about the enactment of this statutory provision. This is because it indicates that a person might, by being unco-operative, prevent a court from making an order that is in the child's best interests.¹⁶⁹ There is also a lack of clarity about what is meant by 'co-operation' itself. Does it mean that adults should have the ability or the desire to co-operate?

Section 11(7D) could be interpreted as an additional 'non-intervention' provision. Might a parent seeking, e.g., a contact order be denied that order on the grounds that the residential parent is simply refusing to co-operate? If so, it has been observed that this might send a 'worrying message'¹⁷⁰ to parents since it suggests:

¹⁶⁶ This is an ongoing commitment: on 15 October 2019 the Government announced that it 'will introduce a Bill to Parliament which will create new protective orders (which, initially, the police will be able to impose) to keep a suspected perpetrator away from the household of someone at risk of abuse.'

¹⁶⁷ Quote taken from heading to ss 4-7 of the Bill.

¹⁶⁸ Section 11(7E) defines those adults, each called a 'relevant person', as those with PRRs in respect of the child concerned and any parent without PRRs. Accordingly, while the section applies to unmarried fathers who do not have PRRs it does not extend to other adults. So, in *R v R* 2010 Fam LR 123, Sheriff Holligan noted, at para 28, that 'the co-operation' provision' did not apply to a man who was exercising a parental role in respect of a child but was not that child's biological father (even though the child believed that he was).

¹⁶⁹ The wording of s 11(7D) has presented some difficulty. Norrie K McK, *The Law Relating to Parent and Child in Scotland*, 3rd ed., W Green, 2013, observes, at p 336, that 'the clear implication [of this provision] is that the court ought not to make that is likely to be ineffective for that reason'. The writer goes on to suggest that the provision does not allow 'one or other of the parties' to determine the dispute. Rather, s 11(7D) means that 'the court should attempt to structure the order that it has determined to be in the interests of the child in such a way as minimises the risk of non-co-operation.'

¹⁷⁰ Sutherland EE, *Child and Family Law*, 2nd ed., 2009, Thomson/Green, p 446.

*'that if one is sufficiently stubborn, one has the chance of getting one's own way [which], effectively, rewards intransigence.'*¹⁷¹

If this is a consequence of section 11(7D) then there is potential vulnerability in particular in terms of Article 8 of the ECHR (respect for private and family life). There is little reported case law on section 11(7D) although the issue of non-co-operation may on occasion be more complex than it at first appears.¹⁷² This suggests that courts should carefully consider the reason(s) given for non-co-operative attitudes.¹⁷³

Chapters 4A, 4B and 4C have provided an overview of the key provisions of Part 1 of the 1995 Act, and set those within the context of significant and ongoing ECHR and UNCRC discussion and debate.

In the next Chapter, the extent to which the current provisions of the 1995 Act incorporate Articles 3 and 12 of the UNCRC is discussed in more depth.

¹⁷¹ As above.

¹⁷² See *Treasure v McGrath* 2006 Fam LR 100 in which Sheriff Morrison made no order for contact, referring at para 45 to the Pursuer father's alleged 'controlling and bullying' behaviour towards the mother. The Sheriff referred, at para 44, to the child's distress at the prospect of a contact order being granted, noting that she was 'frightened and on occasion distressed' by her father's conduct. At para 54, the Sheriff observed that the lack of co-operation was not 'one-sided'. However, he was referred s 11(7D) by the mother's lawyers, who argued that it was the father's responsibility in such circumstances to suggest 'strategies' for how 'co-operation could be achieved' were an order to be granted. For an example of a recent judgment referring to the provision, see *Woods v Pryce* 2019 SLT (Sh Ct) 115.

¹⁷³ The generic term 'family courts' is sometimes used to refer to Scottish civil courts when they are making decisions in family cases. This issue is often viewed as being connected to the enforcement of family court orders. The power of courts to enforce family court orders was canvassed in the 2018 Review of Part 1 of the 1995 Act and the proposed provision in the Bill is discussed in Chapter 7D.

Chapter 5. Specific UNCRC considerations: Articles 3 and 12

Articles 3 and 12 of the UNCRC require a more detailed consideration because the 1995 Act specifically sought to incorporate both articles into Scottish law. These two articles are also a central focus of the Bill. An overview and analysis of the extent to which this has been achieved by the current provisions of the 1995 Act is provided in this Chapter.

5.1 Article 3: Best interests (welfare)

Article 3 of the UNCRC provides that the child's best interests shall be 'a primary consideration' in:

*'all actions concerning children' undertaken by any 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'.*¹⁷⁴

The remit of Article 3 is very broad. It applies to all decisions affecting children made in every field of law. It does not mean that the child's best interests must be the most important consideration in every decision made. The article requires that children's best interests must be a 'primary' (i.e. a central or leading) consideration in all decisions concerning children.

In Scottish Family legislation about children the child's best interests (or 'welfare', a broad Scottish synonym for best interests¹⁷⁵) are stated to be the court's 'paramount'¹⁷⁶ consideration. This is a higher standard than being 'a primary consideration'. It means that a child's welfare is the court's most important, and overriding, consideration. The statutory principle of the paramountcy of the child's welfare as embodied in the 1995 Act, Part 1, is deeply embedded in Scottish Family Law and court practice.¹⁷⁷

In the 1995 Act, the paramountcy of the child's welfare also translates into a positive obligation upon courts to grant only orders that are beneficial to children. Section 11(7)(a) provides that the court:

'shall not make any order unless it considers that it would be better for the child that the order be made than that none should be made at all'.

As discussed in Chapter 4C.2 above, this section of the 1995 Act does not alter the long established 'assumption' that children will normally benefit from continuing contact with both parents.¹⁷⁸

¹⁷⁴ Article 3(1). Article 3(2) and 3(3) go on to provide for the child's best interests, taking into account the rights and duties of parents, in child protection and care scenarios.

¹⁷⁵ For further discussion see Sutherland EE & Barnes Macfarlane L-A, Implementing Article 3 of the *UN Convention on the Rights of the Child: Best Interests, Welfare and Well-being*, 2016, CUP, Introduction; Chapter 1.

¹⁷⁶ E.g. the 1995 Act, s 11(7): the court 'shall regard the welfare of the child concerned as its paramount consideration...' The nature of the paramountcy obligation varies throughout family legislation as appropriate. See, e.g., Adoption and Children (Scotland) Act 2007, s 14(3): 'the court/adoption agency 'is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration'; Children's Hearing (Scotland) Act 2011, s 25(2): the children's hearing/pre-panel hearing/court 'is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration' (italics added).

¹⁷⁷ In *White v White* 2001 SC 689 (an early case interpreting and applying the provisions of the 1995 Act in practice, discussed in Chapter 4C.2), the Inner House of the Court of Session stated, at para [14], that 'no-one can doubt' that the 1995 Act requires that the court must 'regard to the welfare of the child concerned as its paramount consideration.'

¹⁷⁸ *White v White* 2001 SC 689, at para [16].

Section 11(7)(a) elevates the child's welfare above every other judicial consideration. It should never be interpreted so as to prejudice a positive relationship between the child and his or her non-residential parent.¹⁷⁹ To do so would undermine the Article 8 right to respect for family life set out in the ECHR as well as the concept of parental responsibilities and rights. It is also inconsistent with the UNCRC Article 9 right of any child separated from a parent:

*'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest.'*¹⁸⁰

Arguably, by specifying that the child's welfare is 'paramount', the 1995 Act has exceeded the benchmark imposed by Article 3 of the UNCRC. However, the UN Committee on the Rights of the Child ('the UN Committee')¹⁸¹ has stressed that **any 'assessment of a child's best interests must include respect for the child's right to express his or her views'**.¹⁸²

5.2 Article 12: the right to be heard (participation)

Article 12 requires that States Parties assure the child '**capable of forming his or her own views the right to express those views freely in all matters affecting the child**'. Article 12 goes on to provide that the views of the child must be '**given due weight in accordance with the age and maturity of the child**'. This is sometimes called the child's the right to be heard, or to participate.¹⁸³

Neither Article 12, nor the guidance issued on the article by the UN Committee, specifies a minimum age limit for expressing a view. Importantly, the Committee has stressed in written guidance published for State Parties that Article 12:

'... imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice'.¹⁸⁴

The rationale for this is that full implementation of Article 12 requires respecting all children as rights-holders from the earliest stages in life.

Even very young children can use a wide range of communication methods to convey 'understanding, choices and preferences'.¹⁸⁵ Research also confirms that biological age is not the sole determining factor of capacity, or ability, to form a view. Many other factors (including e.g., experience, environment, levels of support provided) can affect a child's ability to form or express a view.¹⁸⁶

¹⁷⁹ In *White v White* the court quoted, at para 8, from *In re K.D.* [1988] 1 AC 682, at p 825A-B per Lord Oliver of Aylmerton: 'the single common concept that the natural bond and relationship between parent and child gives rise to universally recognised norms which ought not to be interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it.'

¹⁸⁰ Article 9(3) of the UNCRC.

¹⁸¹ The UN Committee is the body of international experts responsible for monitoring the interpretation and implementation of the UNCRC by States Parties. See Chapter 3 above.

¹⁸² *General Comment No 14 on Best Interests*, para 43.

¹⁸³ A large body of international research and guidance exists concerning how to take the best steps to ensure that children can meaningfully participate in decisions made concerning them. See, e.g., *Every Child's Right to be Heard: A Resource Guide* on the UN Committee Rights of the Child General Comment No. 12', G Lansdown (2011), UNICEF & Save the Children.

¹⁸⁴ *General Comment No 14 on Best Interests*, para 21.

¹⁸⁵ As above: the UN Committee also makes reference, at para 21, to careful observance of 'non-verbal' forms of communication, such as play, body language, facial expressions. See Lansdown G., *'The evolving capacities of the child'*, Innocenti Research Centre, UNICEF/Save the Children, Florence (2005).

¹⁸⁶ See Lansdown, G, Section 2 ('Child Development and the Evolving Capacities of the Child') for overview of international body of research on this subject.

It is central to Article 12 that all children who can form a view and wish to express that view are, regardless of age, are able freely to do so and, importantly, are listened to. Once a child has expressed a view, then the weight given to that view will to some extent depend upon the maturity of the child. The UN Committee has said that this means that ‘the views of the child have to be assessed on a case-by-case’ basis, and that:

‘Maturity is... the capacity of a child to express her or his views on issues in a reasonable and independent manner.’¹⁸⁷

Section 11(7)(b) of the 1995 Act provides that when deciding ‘whether or not to make an order’ courts must (while ‘taking account of the child’s age and maturity’ and ‘so far as practicable’) do the following:

- ‘[G]ive [the child] an opportunity to indicate whether he wishes to express his views’
- ‘[I]f he does so wish, give him an opportunity to express his views’
- [H]ave regard to such views as he may express.¹⁸⁸

The above provisions of the 1995 Act have been broadly modelled on the UNCRC, lifting some phrases and words directly from Article 12. **However, section 11(10) specifies that a ‘child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view’.**¹⁸⁹ A presumption of this sort is a legal starting point in a case.¹⁹⁰ Broadly, it means that the 1995 Act creates an expectation that most children of 12 years or older are able to express a view.

The 1995 Act came into force before the UN Committee on the Rights of the Child issued its General Comment, discussed above, discouraging States from imposing any age limit on the right to be heard. The age presumption in the 1995 Act has been increasingly criticised by experts in Childhood Studies and Children’s Rights for undermining, or ‘sidelining’, the views of children younger than age 12 in family cases.¹⁹¹

5.3 Expressing a view: approach of courts in family cases

Regardless of the presumption in Part 1 of the 1995 Act that children aged 12 and over are presumed sufficiently mature to express a view, **Scottish courts often take account of the views of younger children** when making orders in family cases.

In the leading case of *Shields v Shields*, in 2002,¹⁹² the Inner House decided that a child, aged 9 years at the date of the final hearing in a parental dispute over his residence, should have been asked his views about a possible relocation abroad. Also, because the court

¹⁸⁷ *General Comment No 14 on Best Interests*, above, at paras 29 & 30: the Committee write that ‘[m]aturity is difficult to define’ and note that this definition is for the purposes of Article 12.

¹⁸⁸ Section 11(7)(b), (i), (ii), (iii). The section 6 duty obligation to hear the child within the family is discussed at Chapter 4C above.

¹⁸⁹ This includes instructing a solicitor. Sections 6(1)(b); 11(9); 11(10). See also Age of Legal Capacity (Scotland) Act 1991, s 2(4A). The age benchmark of 12 years, while seemingly arbitrary, is used in various fields of Scottish law and to some extent reflects the more dated Roman Law age of majority (12 for girls and 14 for boys). See, e.g., Age of Legal Capacity (Scotland) Act 1991; Adoption and Children (Scotland) Act 2007, s 32; Age of Criminal responsibility (Scotland) Act 2019 [as passed, May 2019].

¹⁹⁰ Presumptions are formal rules of law, starting points for the court in deciding cases. Normally if a presumption exists, a court cannot overturn that presumption unless evidence is produced to rebut (i.e. disprove) the presumption.

¹⁹¹ Tisdall, E.K.M. and Morrison, F. (2012), ‘Children’s Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences’, Chapter in Freeman M (ed), *Law and Childhood Studies*, Open University Press (pp156-173), from p 172.

¹⁹² 2002 Fam LR 37; see paras 6-09-11, referring to the UNCRC and criticising the terms of section 11 of the 1995 Act.

case about him had been ongoing for over two years, his views should have been sought on more than one occasion throughout this period. This reflected his growing maturity, and evolving capacity, to express a view.

The court in *Shields* said it was **part of the court's 'continuing duty'** to check whether (a) a child who did not express a view at the start of ongoing litigation later becomes mature enough, or wishes, to do so and/or (b) a child's views may have changed in the course of prolonged litigation.¹⁹³ Where practicalities are concerned, the court noted that there are many ways a child's views can be ascertained and said:

'[H]ow a child should be given such an opportunity will depend on the circumstances of each case and, in particular, on his or her age. At one extreme, intimation in terms of [the child's] Form F9 may be appropriate whereas, at the other extreme, a much less formal method will be appropriate'.¹⁹⁴

Less formal **methods of ascertaining views** are not set out in Part 1 of the 1995 Act which does not provide for procedural court rules and practice. Some methods of ascertaining children's views have evolved in practice. **Methods used include, e.g., 'seeing a child in [judicial] chambers', involving 'a private individual... well known to the child' or 'a child psychologist'.**¹⁹⁵ A child might also instruct his or her own solicitor, although this is relatively uncommon in practice.¹⁹⁶

Article 12 of the UNCRC requires respect for the child's right to express a view if he or she wishes to do so. The continuing duty upon courts to ascertain whether a child wish to express a view under the 1995 Act should not therefore be exercised where asking children to express a view is causing them **distress**.¹⁹⁷ Nor should very **young children** be asked to express a view on complex matters about which they can be expected to know or understand little.¹⁹⁸ This does not, however, mean that the general views of younger children should not be appropriately sought when decisions are being about them by courts.¹⁹⁹

Where a child expresses views then section 11(7)(b)(iii) of the 1995 Act, provides that the court must 'have regard to such views'. Various factors such as age, illness, parental influence, family background can affect how much weight the court places upon expressed views.²⁰⁰ However, none of these factors negate the court's obligation to listen to and carefully consider any views expressed by children who are the subject of family litigation.

¹⁹³ *Shields*, para 6-16. See also decision this year following *Shields: Woods v Pryce* 2019 SLT (Sh Ct) 115.

¹⁹⁴ *Shields*, para 6-16. The Form F9, the standard form by which 1995 Act proceedings are intimated on children, has recently been revised by the Scottish Civil Justice Council. This is discussed in the main text in this Chapter below.

¹⁹⁵ *Shields*, para 6-16.

¹⁹⁶ Age of Legal Capacity (Scotland) Act 1991, s 2(4A) provides a presumption that a child of 12 years or more will be mature enough to instruct his or her own solicitor. See also Whitecross, R, *Child Welfare Hearing Reports: A Scoping Study on the Commissioning, Preparation and Use of Bar Reports*, (2010), Scottish Government, Chapter 5.

¹⁹⁷ See *C v McM* [2005] 75 Fam LB 6 (two children aged 6 and 8 years were reportedly distressed by attempts to ascertain their views).

¹⁹⁸ *S v S* [2012] CSH 17, at para 36, in which a 6 year old was held to be too young to bear the full weight of being asked to express a view on relocation abroad, a dispute about which he knew nothing. Doing so, the court reasoned, 'risked causing further distress, and perhaps lasting harm, to a young child'.

¹⁹⁹ It is noted in the Policy Memorandum accompanying the Bill, at para 24, that all of the children's organisations 'were in favour of removing the presumption and replacing it with a new one that all children are capable of expressing a view'. The proposals in the Bill to remove the age presumption are supported by the rationale, found at para 29 of that Memorandum, that the 'Scottish Government considers that the majority of children are able to express their views in [family court cases].'

²⁰⁰ See, Barnes, L-A, "'A child is, after all, a child": ascertaining the ability of children to express views in family proceedings', *Scots Law Times*, 2008, 18, 121; Barnes L-A, 'Moral actors in their own right': consideration of the views of children in family proceedings, 2008 SLT (News) 139.

5.4 Current children's rights concerns – supporting children

Article 12 provides that the **child can be heard 'either directly, or through a representative or appropriate body'**.²⁰¹ **The UN Committee guidance on Article 12 expands on this by focusing on the steps required to implement the child's right to be heard.**

The guidance says that: (a) 'the method [for hearing the child's views] should be chosen by the child';²⁰² (b) 'wherever possible, the child must be given the opportunity to be directly heard in any proceedings';²⁰³ and (c) if the child's views are passed on to the court through another individual 'it is of utmost importance that the child's views are transmitted correctly'.²⁰⁴

Notwithstanding the overarching duty in the 1995 Act to listen to children, there are **no mechanisms currently in place to give children options** as to how they might prefer to express a view in family cases. Research to date indicates that few children express their views directly to the judiciary:²⁰⁵ most speak to a Child Welfare Reporter or return a form F9 to the court.²⁰⁶ Reported cases indicate that **hearing the views of young children may present a particular challenge** within the current family court system.²⁰⁷

Available research also reveals general a **dearth of infrastructure** to support, guide and inform children involved in Scottish family cases.²⁰⁸ **Children are also unlikely to be told by professionals involved in their case how the court reached its decision** or what impact their views had on that decision.

Finally, there are **no established processes through which children can ask for information, feedback** or make a complaint about their experience of the family court system.²⁰⁹ The need to ensure that an environment exists in which children feel safe,

²⁰¹ Article 12(2).

²⁰² *General Comment No. 12, The right of the child to be heard* (art 12), CRC/C/GC/12 (2009) (50 (now referred to as 'General Comment No 12, right of the child to be heard'), para 36.

²⁰³ *General Comment No 12, right of the child to be heard*, para 35: 'directly' in this context means that there is no intermediary between the child and the decision-maker.

²⁰⁴ *General Comment No 12, right of the child to be heard*, para 36. There is research indicating that when adults (whether parents or professionals) relay children's views to the court on behalf of a child those views can be used strategically by the adult to support the adult's position. See, e.g., Trinder, L, Jenks, C & Firth, A, 'Talking Children into Being in Absentia? Children as a Strategic and Contingent Resource in Family Court Dispute Resolution', *CFLQ*, 22(2), 234-257, 2010.

²⁰⁵ 'Understanding Child Contact Cases in Scottish Sheriff Courts', K Laing & G Wilson, Scottish Government Social Research (2010), p 3. See also Mackay K, *The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse*, Scotland's Commissioner for Children and Young People (2013). This empirical research was based on the treatment of 155 children from 97 contact cases between parents in which there were allegations of abuse, at p iv: 'only 1% of children spoke to a sheriff and only one child had their own solicitor.' It was also observed at p v that, of the children considered, 'only 45% had a contact outcome that was consistent with their views.'

²⁰⁶ Whitecross, R, *Child Welfare Hearing Reports...* (2010), cited at note 196 above, Chapter 5. F9 forms themselves have been the subject of much criticism: *X v Y* 2018 SLT (Sh Ct) 215, in which the court referred (at para 26) to the 'far from uncommon' complaints about the 'effectiveness of forms F9'.

²⁰⁷ See, e.g., *M v F* 2016 Fam LR 70, in which, at para 3, the court did not seek to ascertain the views of a child aged 4 ½ years of age on the basis that the 'parties... were agreed... given M's young age and level of maturity it would be inappropriate'.

²⁰⁸ Currently there is little comprehensive Scottish research on how children's views are facilitated in family actions. Research is currently being undertaken into 'Children's Participation in Family Actions: Probing Compliance with Children's Human Rights' by Dr Fiona Morrison, Professor Kay Tisdall and Clan Childlaw. Early findings from this research, shared at a research event relating to the Bill on 2-10-19, point to inconsistent practices across Scotland concerning children's participation and a need for a national system of child advocacy and support in family cases.

²⁰⁹ Such processes are considered essential by the UN Committee on the Rights of the Child. See, e.g., *General Comment No. 5, 'General Measures of Implementation for the Convention on the Rights of the Child'*, 2003 (CRC/GC/2003/5). See also 'Every Child's Right to be Heard: A Resource Guide on the UN Committee Rights of the Child General Comment No. 12', G Lansdown (2011), UNICEF & Save the Children, Chapter 5 which sets out clear State 'Obligations relating to judicial and administrative proceedings'.

secure and supported in expressing a view was stressed in responses to the 2018 Consultation by various children's organisations.²¹⁰

5.5 New form F9 for children and Court Rules in 1995 Act cases

Lastly, it is also worth noting that the Scottish Civil Justice Council ('SCJC') recently produced **a new version of the form F9 form**.²¹¹ The form F9 is used by courts to intimate litigation under Part 1 of the 1995 Act to children who are the subject of that litigation. The form is normally sent by post and invites children to express a view. The new form F9, which had been the subject of a lengthy review, has been used since 24 June 2019.

Revised Court Rules also came into effect on 24 June 2019. These rules indicate that children below the age of 12 should be sent the form F9 unless *'it would be inappropriate to do this (for example, where a child is under 5 years of age)'*²¹²

The explicit reference to the younger age of 5 years in the new Court Rules seems rather arbitrary of itself. Nonetheless, **it is a further indication that the existing higher age benchmark of 12 years in Part 1 of the 1995 Act is considered unhelpful in practice.**

Next, in Chapter 6, the current balance of the 1995 Act, Part 1, on parents' rights and children's rights is concluded upon.

²¹⁰ One theme that emerged was that children, and their views, are seen as something incidental (i.e. bolted on) to an adult process which has not given enough thought to their well-being or general understanding of what is happening as the court case about them progresses. See, e.g., responses from CLAN Childlaw (response 173982533, in answer to question 2 CLAN state that 'Currently the system in family actions in court does not place the child at the centre.') and the Children and Young People's Commissioner for Scotland (response 570240422).

²¹¹ The new form F9 replaced the former form on 26 June 2019: see Scottish Civil Justice Council supporting [documentation](#).

²¹² New rule 33.7A(2) of the Ordinary Cause Rules, inserted by Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Court Rules 1993 Amendment)(Views of Child) 2019.

Chapter 6. Parents' rights and children's rights and the 1995 Act, Part 1: the current balance

This is a **Quick Reference Chapter**. Here, conclusions are provided on the current balance struck between the rights of parents and children in Part 1 of the 1995 Act. These conclusions are based on detailed consideration of the 1995 Act in Chapters 4A, 4B and 4C above.

6.1 Overall balance of rights currently in the 1995 Act, Part 1

The 1995 Act, Part 1, embedded the concepts of children's rights,²¹³ and parental responsibilities and rights ('PRRs'), into Scottish family legislation. As with most legislation, the impact of the 1995 Act has been heavily dependent upon its interpretation and application by courts.

Part 1 of the 1995 Act has remained largely intact for 24 years, a period during which much of Scottish Family Law has been reformed or rewritten. **This can be seen as a tribute to the overall robustness of Part 1. It created a sound and broadly child-focused framework for decision-making in Scottish family law cases.**

It was observed in Chapter 4C that the law does not currently provide protections for **vulnerable witnesses and parties** that are tailored to family cases (including Child Welfare Hearings²¹⁴).

Also, in Chapter 5 the child's best interests (Article 3, UNCRC) and the **child's right to be heard** (Article 12) were discussed. As has long been observed by the international human rights community, simply:

"putting the law in place" is inadequate to achieve... effective implementation of children's rights.²¹⁵

A number of concerns were expressed in Chapter 5.4 regarding the operation of section 11(7)(b), which sets out the duty to 'have regard' children's views in family cases.

Where **parents' human rights** are concerned, Part 1 of the 1995 Act has either weathered, or been amended to address, concerns raised to date about ECHR compatibility.²¹⁶ Various sections of the original 1995 Act have been revised over the years. As discussed in Chapters 4A, 4B and 4C, the most significant amendments to date were those made by the Family Law (Scotland) Act 2006.

The vast majority of family disputes about the exercise of PRRs are resolved without going to court.²¹⁷ **It can still be said that the overarching principles found in Part 1 of the 1995 Act provide an appropriate framework for:**

²¹³ Notably Articles 3 and 12 of the UNCRC, although other references throughout Part 1 of the 1995 Act to the UNCRC have also been discussed in Chapters 3, 4A and 4C above.

²¹⁴ See brief discussion of Child Welfare Hearings in Chapter 4C.3 above. As per note 165 above, there is evidence to suggest that domestic abuse allegations are made in around half of all family disputes that go to court.

²¹⁵ 'Comprehensive and Holistic Legislative Reform on Behalf of Children's Rights', N Perrault, UNICEF (2008), at p1. See also, e.g., S Goonesekere, 'Protecting the world's children: Impact of the Convention on the Rights of the Child in diverse legal systems', UNICEF, CUP (2007).

²¹⁶ See, e.g., with regard to Article 8 (right to respect for private and family life), see discussion of UK Supreme Court decision in the 2010 case, *Principal Reporter v K*, in Chapter 2.2 above.

²¹⁷ The *Growing Up in Scotland Non-Resident Parent report* (2009) estimated that only 5% of couples bring contact disputes to court. See also, albeit dated, the Scottish Government, *Scottish Child Contact Survey* (March, 2008), Part 4.

- **Lawyers advising clients about their rights** and remedies in family disputes, and
- **Courts balancing the rights of parents and children** in the family disputes that escalate and become disputes within the court system.

However, some specific provisions of the 1995 Act appear outdated when scrutinised with reference to current understanding of the rights set out in the ECHR and the UNCRC.

6.2 Specific ECHR and UNCRC vulnerabilities in Part 1

As discussed in Chapter 2, there is always an element of judgment involved in assessing the human rights compatibility of legislation. Even though legislation is potentially challengeable, where there is not yet an agreed view throughout Europe on the interpretation of that right, the margin of appreciation (i.e. acceptable State latitude²¹⁸) is wider.

Nevertheless, **two areas** in which the existing provisions of Part 1 of the 1995 Act may be vulnerable to a rights-based challenge are:

- **Section 3: acquisition of PRRs by unmarried fathers.** In 2018, just over half of Scotland's children were born to unmarried parents.²¹⁹

As explained in Chapters 4A and 4B above, the law still treats unmarried fathers differently from other parents. This less favourable treatment derives from a time when the law sought to discourage any intimate relationships other than heterosexual marriage.

A combination of legal provisions (of which section 3 forms an integral part) disadvantage unmarried fathers and, most importantly, their children. Some of these legal provisions also seem unnecessarily complicated and confusing. The provisions raise some concerns about compliance with Article 8 of the ECHR (right to respect for private and family life) and, significantly, Article 2 (child's right not to be discriminated against based on the child's birth status).

- **Sections 11(7)(b) and 11(10): age presumption about the child's ability to express a view.** This is discussed in Chapter 5.2 – 5.4 above.

Currently, the 1995 Act states that children twelve years or older are presumed (i.e. broadly assumed) to be mature enough to form a view. This does not match current court practice or the recently introduced Court Rules concerning the expression of views by younger children.

Article 12 (child's right to express a view) does not mention age, and the UN Committee on the Rights of the Child discourages imposing age limits on the child's right to be heard. Accordingly, the current provisions are vulnerable to a challenge based on Article 12 of the UNCRC.

²¹⁸ The margin of appreciation is discussed at Chapter 2.3 above.

²¹⁹ In 2018, 51% of children were born to unmarried parents. Scottish birth statistics available [here](#).

This **Quick Reference** chapter has drawn conclusions about Part 1 of the 1995 Act. These conclusions focus on what the 1995 Act currently addresses, rather than what it might have addressed.

Next, in Chapters 7A – 7D, the focus of this report becomes the Children (Scotland) Bill 2019. Proposals that might, if enacted, impact on the current balance of rights between parents and children are considered.

Chapter 7A. Children (Scotland) Bill 2019: aspirations and broad approach

This Chapter sets the Children (Scotland) Bill 2019 ('the Bill') within the broader context of Scottish Family Law and practice. It also outlines the purpose and scope of the Bill with reference to the rights of children and parents.

7A.1 Aspirations for reform: what the law says and how the law is applied

At the conclusion of its 2016 scrutiny of the 2006 Act the Justice Committee astutely observed that:

'the way in which the Scottish legal system handles Family Law cases involving children raises strong and conflicting views... it may be time for a wholesale review, focussed as much on how the law is applied, and the mechanism used to resolve disputes, as on what the law says'.²²⁰

In the Bill, the Scottish Government is seeking to do just this: improve and update both the legal principles and the practical processes governing cases brought under the 1995 Act.²²¹

Accordingly, the **Bill** is wide-ranging in scope. While some of the sections propose changes to the substance of the 1995 Act (i.e. what the law says²²²) many of the sections propose overarching changes to the operation, or ongoing management, of family cases (i.e. how the law is applied²²³).

7A.2 Family justice modernisation, ongoing work and key aims of the Bill

The Bill, introduced on 3 September 2019, follows an extensive **Review** by the Scottish Government in 2018 of Part 1 of the 1995 Act and connected areas of procedure and practice. The Bill was published simultaneously with the **Family Justice Modernisation Strategy**. The Strategy outlines the Scottish Government's broad commitment to update and improve the family court system in Scotland.

The Strategy also emphasises that **primary legislation (such as the Bill) 'is only part of the work needed'** to achieve the comprehensive goal of family court modernisation.²²⁴ Other work is currently ongoing in respect of, e.g., revising the related Court Rules that will fill in the detail of the changes proposed to the management of family cases.²²⁵

This other work is required because most of the procedures that regulate the way family cases progress through our courts are currently found in Court Rules,²²⁶ rather than in the

²²⁰ Justice Committee Scrutiny report, para 89.

²²¹ The Bill also makes some amendments to other related legislation such as, e.g., the Vulnerable Witnesses (Scotland) Act 2004 and the Children's Hearings (Scotland) Act 2011. Where these other amendments are relevant to family cases determined under Part 1 of the 1995 Act they are discussed in Chapters 7B, 7C and 7D below.

²²² E.g. removal of the statutory presumption that children over the age of 12 are mature enough to express a view (section 1 of the Bill) and the creation of some new welfare-based factors for the court to consider in the proposed section 11ZA checklist.

²²³ E.g. provisions concerning greater regulation of child welfare reporters and the requirement that courts only make contact order referrals to newly 'regulated' child contact centres (sections 8 and 9 of the Bill).

²²⁴ Family Justice Modernisation Strategy ('Strategy'), p 2.

²²⁵ The changes proposed to the Court Rules include, e.g., replacing 'options hearings' with 'Initial case management hearings', which will determine next steps and impose tighter timescales for resolution of cases.

²²⁶ The current Court Rules, e.g., governing sheriff court family actions are found in the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, No 1956/223, Rule 33, as amended Rules (Chapter 33 'Family Actions').

1995 Act itself. For example, Court Rules set out (a) how and when children's views may be sought and recorded,²²⁷ (b) the terms under which a child welfare reporter can be appointed in ongoing cases,²²⁸ (c) certain broad timeframes, types of hearings and procedural steps to be followed.²²⁹

Since these Court Rules essentially dictate how family court cases are managed on a day-to-day basis, they also have considerable impact on the experience of family members involved. If the proposals in the Bill are to improve the way family cases progress, then related amendments to the Court Rules, and wider practice, will also be required. **In other words, the infrastructure supporting the 1995 Act also needs to change.**

The key stated aims of the Bill are to (a) place children's best interests at the heart of family cases and (b) ensure their views are heard in accordance with their rights set out in the UNCRC. This policy approach is consistent with our State²³⁰ obligations in terms of the UNCRC. In particular, these two aims accord with Article 3 (consideration of the child's best interests) and Article 12 (child's right to express a view) of the UNCRC. The significance of these two articles is discussed in Chapter 5 above.

The Bill also has other key aims: (c) to improve support for victims of domestic abuse and (d) to contribute to the strengthening of family justice as a whole. An important theme of the Bill is the regulation both of professionals and services working with parents and children using the family court system. Significant rights relevant to protecting victims from domestic abuse were canvassed in Chapter 4C.3 above.²³¹

Taken together, Articles 6 and 8 of the ECHR also provide for the right of family members to an effective remedy before a national authority.²³² This means that improvements made to family case management will be compatible with these Articles – as long as those improvements appropriately balance the rights of all parties involved.

On the face of it, the key aims of the Bill can be viewed as compliant with the rights set out for parents and children in the ECHR and UNCRC.²³³

Next, this report will examine the structure and sections of the Bill.

7A.3 Structure of the Bill

The Bill is broadly organised by topic. In terms of significant amendments proposed to Part 1 of the 1995 Act, **key sections** include:

²²⁷ Rule 33.19; 33.20.

²²⁸ Rule 33.21. Child welfare reporters (professionals appointed to seek the views of children and/or undertake enquiries into the case) are discussed in Chapter 7D below.

²²⁹ See, e.g., Rule 33.22A (concerned with the timeframe within which Child Welfare Hearings should be fixed, with the purpose of such hearings being to 'secure the expeditious resolution of disputes in relation to the child'); Rule 33.36 (Attendance of parties at a hearing called an 'options hearing' to determine the next steps); 33.28 (Evidence required in event that no-one defends the court action).

²³⁰ The UK Government signed and ratified the UNCRC, and so those State obligations are also binding on the Scottish Government.

²³¹ The rights include, e.g., Article 6 (child's right to life, survival and development), Article 19 UNCRC (protection of child from all forms of violence, injury and abuse, while in the care of parents), Article 39 (State duty to promote recovery of child from any form of abuse).

²³² Article 13(1) of the ECHR also provides for an effective remedy in the event that a person's human rights are violated. See Chapter 2.2 above for discussion of overarching rights often relied upon in family court cases involving children.

²³³ The Articles of the ECHR and UNCRC considered most relevant to family cases have been summarised in Chapters 2, 3 and 5 above.

- **Section 1(2) and 1(3)**, which remove the age presumption for children expressing a view in the context of both private family life and family law cases. The age presumption is retained for the purpose of instructing a solicitor. Section 1(3) also repeals sections 11(7)(a) and (b) of the 1995 Act (these are the sections that currently set out the well-established ‘welfare test’ discussed in Chapter 4C).
- **Section 1(4)** sets out the first part of a checklist of factors for courts to consider before making an order in family cases. The first two parts of the current welfare test are broadly re-enacted, and feature in the section setting out the new checklist. Section 1(4) also enacts a re-worded version of the current section 11(7)(b), which provides for the child’s right to express a view. This new provision is a stand-alone section and does not form part of the new checklist.
- **Sections 4 – 7** make greater provision for vulnerable individuals involved in family cases, with most of these changes being made to the Vulnerable Witnesses (Scotland) Act 2004 rather than the 1995 Act itself.
- **Sections 8 – 9 and 13** enable Scottish Ministers to create regulatory frameworks and fee structures for: (i) child welfare reporters and (ii) curators ad litem (both professionals appointed in family court cases) and also (iii) for child contact centres.
- **Section 12** lists two further provisions to be found in the list of factors for the court to consider. One of these factors requires the court to consider ‘the child’s important relationships’. This ties into **section 10**, the public family law provision intended to promote contact between looked after children and their siblings.²³⁴
- **Section 15** creates a new obligation to explain (most) decisions to (most) children.
- **Section 16** imposes a new duty to investigate failure to obey court orders.
- **Incidental amendments:** these include, e.g., clarification about certain orders relating to PRRs (**section 11**), and ‘conferral of PRRs where [a child’s] birth is registered outwith the UK’ (**section 19(2)**).

While the Bill seeks to achieve a number of positive outcomes, the content of the Bill is not easy to absorb. It contains many insertions, deletions and amendments (including amendments to the amendments already proposed²³⁵).

If Part 1 of the 1995 Act is amended as proposed by the Bill then that statute will also become considerably more complicated in layout than it currently is. This is, in part, due to the elaborate reorganisation, numbering and alphabetising proposed by the Bill.

²³⁴ Section 12, which is concerned with private family law cases brought under Part 1 of the 1995 Act, does not mention siblings specifically. Section 10 of the Bill (which is concerned with public family law provisions) does. Section 10(2) imposes a legal duty upon local authorities. It provides that ‘they must take active steps to promote ‘on a regular basis, personal relations and direct contact between [a looked after] child... a sibling’ [whether half or whole-blood,] and ‘any other person with whom the child has lived or is living and with whom the child has’ a sibling-like relationship. This provision is supported by the child’s right to, e.g., respect for his/her private and family life (Article 8, ECHR) and best interests (Article 3, UNCRC) and also by a range of research findings.

²³⁵ E.g., a new section 11ZA is added to the 1995 Act by the Bill section 1(4). That provision is itself then amended by section 12(2) of the Bill, and then amended again by section 21(2) of the Bill.

In addition, some of the amendments in the Bill add further layers of complexity to the already rather crowded section 11, and related sections, of the 1995 Act. For example, a crucial provision in the Bill which sets out the checklist of factors for courts to consider would become an entirely new 'section 11ZA' of the 1995 Act. The content of that proposed checklist is also split between two sections in the Bill itself.

Early verbal feedback on the structure of the Bill from academics, family lawyers and third sector organisations indicates that accessibility is a significant and commonly held concern.²³⁶ Some asked how Part 1 of the 1995 Act, if amended as proposed by the Bill, could be explained simply to members of the public (including children) seeking advice about a family law dispute.

7A.4 Approach adopted in Chapters 7B, 7C and 7D

Next, in Chapters 7B, 7C and 7D, specific sections of the Bill are considered with reference to the rights of children and parents. The focus is those sections that may be likely to have an impact on the balance of the rights in family cases.

Where possible, these sections are generally addressed in the order in which they appear in the Bill (i.e. following the structure above). However, where several sections relate to the same or closely connected topics these sections are grouped together in this report for ease of reference.

The language used in the proposed sections is not commented on in this report unless the wording itself is considered to generate potential issues regarding the rights of parents and/or children.

To avoid repetition, reference will sometimes be made to the detailed discussion of current law in the preceding chapters.

²³⁶ The feedback was provided at an event held on the Bill in the Quaker Meeting House, Edinburgh, on 2-10-19 to which the Chatham House Rules apply. 'Incomprehensible' and 'alphabet soup' were phrases used in reference to the Bill.

Chapter 7B. Analysis of key reform proposals: children’s rights provisions relating to participation (Article 12)

This Chapter focuses on key provisions in the Bill relating to the child’s views and their welfare (i.e. best interests).

First, at 7B.1, the proposed removal of the age presumption relating to the expression of views by children is considered. Then, at 7B.2, the proposed section requiring courts to explain decisions (in most cases) to children is discussed.

7B.1 Removal of the age presumption for expressing a view (sections 1 – 3)

The current age presumption found in Part 1 of the 1995 Act was discussed in Chapter 5. There it was noted that the existing statutory presumption that children of 12 years and older are mature enough to express a view: (a) is not supported by the wording of Article 12 of the UNCRC, (b) is contrary to guidance issued by the UN Committee on the Rights of the Child, (c) does not match practice in family cases and (d) is contradicted by recently introduced Court Rules. It was concluded that the existing presumption would be vulnerable to a children’s rights challenge.

So, **removing the statutory presumption** that children of 12 or more are mature enough to express a view would clarify the position for everyone using the 1995 Act. It **would also more closely align the 1995 Act both with current judicial practice and with the spirit of the UNCRC.**²³⁷

However, some issues arise with regard to the lack of detail found in the proposed sections in the Bill.

Sections 1-3 of the Bill propose the removal of the age presumption in respect of decision-making at home (section 6, ‘major decisions’²³⁸) and also within the context of a range of family cases.²³⁹ In particular, section 1(4) of the Bill inserts a new section 11ZB into the 1995 Act entitled ‘*Regard to be had to the child’s views*’.

If section 11ZB is enacted then, when deciding whether or not to make, e.g., contact or residence orders,²⁴⁰ courts will require to give children with the opportunity to express ‘views *in a manner suitable to the child*’ concerned.²⁴¹ The court will still be required to ‘*[take] into account the child’s age and maturity*’ when giving weight to the child’s views.²⁴² The duty does not apply where the court is ‘*satisfied that*’ the child concerned is either ‘*not capable of forming a view*’ or is in an unknown location.²⁴³

²³⁷ The main Article concerned is Article 12 (child’s right to be heard). The UN Committee has also observed (as discussed in Chapter 5.1) that any assessment of a child’s best interests, which is the focus of Article 3 of the UNCRC, must also include respect for the child’s right to express a views.

²³⁸ Discussed at Chapter 4C.1 above.

²³⁹ This is intended to create consistency across the broader field of family law. So, e.g., section 1(6) of the Bill inserts a new section 16(2) and (2A) to the 1995 Act to remove the age presumption in the context of cases involving Local Authorities and Children’s Hearing System. Section 2(2) of the Bill removes the age presumption in section 14 of the Adoption and Children (Scotland) Act 2007. Section 3(2) removes the age presumption in the Children’s Hearing (Scotland) Act 2011 by amending section 27 of that Act.

²⁴⁰ Or any other orders noted in the current section 11(1) of the 1995 Act, including those orders relating to parental rights, responsibilities or guardianship.

²⁴¹ Section 11ZB(1)(a).

²⁴² Section 11ZB(1)(b)

²⁴³ In that the court will require to be ‘satisfied’ (i.e. with regard to sufficient evidence being provided) that the child ‘cannot be found’, this provision does not on the face of it raise concerns in terms of the ECHR or UNCRC.

Where family cases are concerned, **two main issues can be noted** with regard to children's rights:

The child's 'opportunity to indicate...'

First, the reference currently made in the 1995 Act to giving the child '*an opportunity to indicate whether he wishes to express his views*' and '*if he does so wish*' take these views into account²⁴⁴ will be repealed by the Bill. Deleting these words does not seem to strike the right tone.

The UN Committee on the Rights of the Child has stressed that '*expressing views is a choice for the child, not an obligation*.'²⁴⁵ It is hoped that the removal of the age presumption makes it easier for younger children to participate meaningfully. In light of this amendment to the current law, particular care must now be taken to ensure that no child ever feels required, or pressurised, to express a view.

The environment in which the child expresses views

The second issue relates to the practicalities, or the environment in which the child expresses a view. The Scottish Government has said it 'considers that the majority of children are able to express [a] view' in family cases.²⁴⁶ While this is generally positive in terms of general compliance with Article 12,²⁴⁷ such a statement also begs various questions for a new culture in which no minimum age is benchmarked for capacity to express a view.

For example, how are courts to be 'satisfied' as to whether children are '*capable of forming a view*'? Will children's views require to be articulated in a particular way to given regard? How, where and when will any assessment of capacity to express a view take place? What skills and training will be provided for undertaking such assessments? Most importantly, how are children to be informed of, and properly supported through, this process?

Similar concerns arise regarding the mechanisms, or methods, through which children might express a view.²⁴⁸ For example, who will decide upon the '*manner suitable*' for the child to express that view? Presumably the sheriff or judge would do this. The next question concerns the mechanisms to be made available for hearing children in each case.

It was noted in Chapter 5 that Article 12 states that a child can be heard 'either directly, or through a representative or appropriate body'.²⁴⁹ **Guidance from the UN Committee on the rights of the child says that 'the method [for hearing the child's views] should be chosen by the child'.²⁵⁰**

²⁴⁴ Current section 11(7)(b)(i) and (ii).

²⁴⁵ *General Comment No 12, right of the child to be heard*, para 16.

²⁴⁶ Policy Memorandum accompanying the Bill ('Policy Memorandum'), para 29.

²⁴⁷ *General Comment No 14 on Best Interests* provides, at para 2, that 'The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention.'

²⁴⁸ The Policy Memorandum states, at para 36, that '[t]here is an option of laying down in primary legislation the specific methods of obtaining the views of the child' thus enabling the decision-maker to consider all potential options. It is also noted there that 'a list of this nature could not be exhaustive' and that there may be occasions when urgency would a limitation of options available.

²⁴⁹ Article 12(2).

²⁵⁰ *General Comment No 12, right of the child to be heard*, para 36.

In the Policy Memorandum accompanying the Bill it was noted that English court directions set out a variety of ways in which children might express a view.²⁵¹ No list of possible methods whereby a child might express a view was included in the Bill.

Providing a clear list of options available for children in primary legislation could create clearer benchmarks for ensuring meaningful participation. Enabling children to indicate their preferred method of expressing a view was also rejected by the Government with the rationale being that doing so might lengthen court cases.²⁵² It is, however, hard to see how offering children clear information and inviting indications of preference would cause undue delay.

Overall, in terms of adopting a holistic approach to the experience of children involved in family cases, the UN Committee guidance on Article 12 of the UNCRC is clear that children need to feel safe and supported, through '*child-friendly*'²⁵³ processes.

Some of the concerns expressed about the current environment supporting children's participation in family cases were discussed in Chapter 5. In recognition of how upsetting family breakdown can be for children, the Government has stressed its responsibility to 'ensure the family justice system is supportive and does not contribute to their distress'.²⁵⁴

The Family Justice Modernisation Strategy also refers to two important projects in connection with hearing children in family cases. The first of these is current Scottish research by Morrison *et al* into children's experiences of participation in family actions. **The research findings to date from this study indicate strong support for 'a system of child advocacy ensuring independent advice, ongoing support and information for children'**.²⁵⁵ The second project is the 'work being undertaken by various parts of the Scottish Government in relation to trained child support workers', and the Government's commitment to consider this option further.²⁵⁶

The [Child Rights and Wellbeing Impact Assessment](#) accompanying the Bill demonstrates that considerable efforts have been made to take into account the rights of Scottish children in drawing together the proposals in the Bill.²⁵⁷ **However, at present, there is a lack of detailed provision in the Bill**²⁵⁸ (and in the supporting documentation) regarding the steps required to better support children.

²⁵¹ Policy Memorandum, para 37 - 38. English options for children, set down in the relevant practice rule, and include speaking with a judge, speaking with a CAFCASS official, writing a letter to the court and/or being represented in the proceedings.

²⁵² Paras 37 -38.

²⁵³ *General Comment No 12, right of the child to be heard*, para 134(e).

²⁵⁴ Community Safety Minister, Ash Denham, Scottish Government website, News release 'Children Bill Published', 3 September 2019.

²⁵⁵ The research ('Children's Participation in Family Actions: Probing Compliance with Children's Human Rights') is referred to in Annex D of the Strategy. This research (publication forthcoming) is being conducted by Dr Fiona Morrison, Professor Kay Tisdall and Clan Childlaw. The research findings to date were shared at an event relating to the Bill at which academics, practitioners, 3rd sector and civil servants were present, at the Quaker Meeting House, Edinburgh, on 2-10-19.

²⁵⁶ Strategy, paras 2.20-22. Para 2.21 says that, notwithstanding some challenges in some cases involving some children (these are outlined in para 2.23), 'the Scottish Government considers that child support workers may be useful in supporting children to give their views or to explain the outcome of decisions to children.'

²⁵⁷ This is in line with existing Scottish Government policy in the area. See, e.g., from para 5 onwards of the Assessment, discussion of the key SHANARRI wellbeing indicators with reference to the Bill: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included.

²⁵⁸ For example, *General Comment No 12, right of the child to be heard* provides, at para 49, that States must '[e]nsure appropriate conditions for supporting and encouraging children to express their views, and make sure that these views are given due weight, by regulations and arrangements which are firmly anchored in laws and institutional codes and are regularly evaluated with regard to their effectiveness.'

Without such provision, the removal of the age presumption is likely to make little difference to the environment in which children express a view. This is concerning, particularly given the key aims of the Bill.

Retention of the age presumption for instructing a solicitor

It is worth noting that the Bill retains the age presumption (of 12 years and older) in respect of the child's competency to instruct his or her own solicitor.²⁵⁹ This presumption is consistent with the Age of Legal Capacity (Scotland) Act 1991 and various other legal provisions that benchmark the age of 12 years for capacity, liability and responsibility.²⁶⁰

While the retention of this presumption is unlikely to affect the current balance of rights, the use of such an age presumption in connection with instructing a lawyer may well be an issue for wider discussion and debate in Scottish law.

Finally, in terms of ECHR compliance and ensuring a fair balance of rights,²⁶¹ removing the statutory age presumption for expressing a view does not on the face of it disadvantage parents. However, the issues raised above in respect of UNCRC compatibility are also capable of impacting upon the child's right in terms of Article 8 of the ECHR to respect for private and family life.

7B.2 Duty to explain decisions to children (section 15)

There is currently no statutory requirement that decisions made under Part 1 of the 1995 Act are explained to the children to whom they relate by professionals involved in the court system.

Section 15(2) of the Bill proposes the insertion of a new section 11E to the 1995 Act entitled 'Explanation of court decisions to the child'.²⁶² It will be the court's duty to ensure an explanation is provided. The inclusion of the proposed section in the Bill represents **a positive step forward in terms of respecting the Article 12 rights of 'all children to be heard and taken seriously'**.²⁶³

The UN Committee on the Rights of the Child has emphasised the importance of ensuring that children receive feedback to:

*'inform the child of the outcome of the process and explain how her or his views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously.'*²⁶⁴

²⁵⁹ Section 11ZB(4) of the Bill.

²⁶⁰ Section 2(4A).

²⁶¹ Relevant rights are, in particular, Article 6 (the right to a fair hearing) and Article 8 (right to respect for private and family life). Both of these rights are summarised in Chapter 2.

²⁶² The Policy Memorandum states at para 179 that 'explaining covers both providing reasons for the decision and also what the decision will mean for the child'.

²⁶³ *General Comment No 14 on Best Interests*, para 2.

²⁶⁴ *General Comment No 12, right of the child to be heard*, para 45. This is something not currently required by statute in cases brought under Part 1 of the 1995 Act.

When the duty exists

The new duty will apply to most of the decisions made by courts that affect most children. In particular, the proposed section 11E will require feedback to be provided by courts in the following scenarios:

- **When courts do or don't make an order:** decisions about 'whether or not' to make an order under section 11(1), so this would include, for example, whether or not to make a residence or contact order,
- **When courts change or terminate court order(s):** the technical term for these decisions is either to 'vary or discharge' orders.
- **When courts decide against changing or terminating the terms of an order – but only if the court thinks it is appropriate to explain that decision to the child.**²⁶⁵ This provision removes the requirement to provide an explanation if, having considered the case, the court does nothing to change a child's current living arrangements.

Restricting the requirement to provide children with feedback in the third scenario above is problematic from a children's rights perspective. It would make the child's right to receive feedback dependent upon whether or not an adult party is successful in his or her application to the court. That case is still about the child, and the child is just as likely to be invested in the court's decision regardless of the outcome.

Content and quality of the explanation given

The next matter to consider in respect of the duty to explain is a crucial one concerning **the quality of the explanation given to the child.** On the face of it, this matter raises two key issues.

The first of these concerns how the explanation is delivered to the child. The new section 11E(2) provides that the court '*must ensure*' its decision is '*explained to the child in a way that the child can understand*'. There is a **lack of detail** here as to what this means, and it is suggested that a more children's rights compliant approach would include reference to '*explaining how his or her views were considered*' and the '*weight given*'²⁶⁶ to those views in line with the UN Committee guidance above.

The second issue relates to who provides the explanation to the child. The Bill states that the court may fulfill its duty to explain the decision in two ways: (a) via the sheriff or judge himself/herself or (b) via the child welfare reporter involved in the case.²⁶⁷

Proposed section 11E(6) also gives Scottish Ministers powers to add, vary or remove descriptions of those who (in addition to court) can explain decisions to children. The Policy Memorandum accompanying the Bill refers to Scottish Government work ongoing

²⁶⁵ Proposed section 11E(c)(i) and (ii): when 'the court decides to decline to vary or discharge' an order the court need only give an explanation to the child if it 'considers it appropriate to explain that decision to the child'.

²⁶⁶ *General Comment No 12, right of the child to be heard*, Part 3. Obligations of States parties, para 48(a) 'Core obligations of States Parties'

²⁶⁷ Proposed section 11E(4). The Financial Memorandum accompanying the Bill indicates (at para 42) that a court welfare reporter (see Chapter 7D.2) may 'relay a final decision or important interim decision to a child'.

in respect of exploring the child support/advocacy worker role.²⁶⁸ It is suggested that discussion and debate is required concerning who might exercise this explanatory role and what the **minimum standards of training and experience** should be.²⁶⁹

When the court is not required to comply with the duty

Finally, there are three circumstances in which the court 'is not required to comply'²⁷⁰ with the duty to provide an explanation to the child. The first two of these circumstances relate to the court being '*satisfied*' that the child is either '*not capable of understanding an explanation however given*' or cannot be found.²⁷¹ The third circumstance where the court need not comply with the duty to explain relates to the child's best interests.²⁷² Each circumstance is addressed in turn below and each requires that **the court is satisfied that:**

- **The child lacks capacity to understand decision.** As with children expressing a view (discussed above), the pressing question is how having a lack of capacity to understand *any* explanation is to be assessed.

The words '*however given*' could potentially be helpful because they suggest that a range of communication methods must be explored in the case of, for example, a very young child or a child with a disability. However, the Bill does not expand on what these methods might be. It might be appropriate, for example, to use pictures and/or photographs for judgments concerning younger children and children with certain disabilities, or even a video message.²⁷³

Accordingly, it is suggested that (while preserving flexibility for courts), **the Bill could contain greater clarification of possible options for explaining decisions to children.** The UN Committee has stressed that the best way to put in place the best methods for hearing children, and feeding back to them is by '*planning, working and developing in consultation with children*'.²⁷⁴

As with choice of how to express a view, **offering children a range of choices** as to how the decision is communicated to them (e.g. by a person, by letter or by email etc.) would more fully accord with the spirit of Article 12.

- **The child cannot be found:** there is no duty on the court to explain its decision to a child if 'the location of the child is not known.'²⁷⁵ Once the child has been found then it is assumed that the court's duty to hear the child would be reinstated.

²⁶⁸ At para 185 of that Memorandum it is noted that there are currently inconsistent practice and training requirements concerning this role.

²⁶⁹ *General Comment No 12, right of the child to be heard*, para 49 refers to the requirement that States parties to the UNCRC 'provide training on article 12, and its application in practice, for all professionals working with, and for, children, including lawyers, judges, police, social workers, community workers, psychologists... teachers at all levels of the educational system.'

²⁷⁰ Proposed section 11E(3)(a)-(c).

²⁷¹ Proposed section 11E(3). No minimum age is given below which an explanation would not be required and para 181 of the Policy Memorandum makes clear the Scottish Government's position that 'even very young children are capable of understanding a decision'.

²⁷² Proposed section 11E(3)(b).

²⁷³ Different methods of communicating outcomes have been used in other sorts of litigation in order to make the court's judgment more accessible to those involved in the case, even in litigation not involving children. See, e.g., *McKendrick v Cumming & Cumming* [2016] SC EDIN 61, in which the court included a number of photographs in its judgment about a contractual dispute illustrating the bases on which the court had made certain findings.

²⁷⁴ *General Comment No 14 on Best Interests*, para 86.

²⁷⁵ 'Cannot be found' is, on the face of it, the least controversial of the circumstances in which the court does not have to explain its decision to the child. The court would be required to be 'satisfied' that the child could not be found, and this would be a matter of evidence. It would be expected in the event of a child who had been abducted, whether to a location within Scotland

- **It is not in the best interests of the child to give an explanation.** This exemption, set out in proposed section 11E(3)(b), may be **problematic from a children’s rights perspective**. The section lacks clarity as to what ‘best interests’ might mean in the context of explaining family case outcomes to children. How would such decisions be made, on what basis, and in which circumstances? Would decisions not to explain family case outcomes to children on the grounds of their ‘best interests’ be a highly unusual practice, or commonplace?

For example, a child may be unwell, or particularly upset by the circumstances surrounding his or her family breakdown. Or, sensitive details about the adults’ relationship may have influenced the court’s decision and it might be thought better not to disclose those details to the child. However, it is hard to see how any of these circumstances would remove the need to give the child some appropriately worded explanation about the decision that has been made.

The welfare of the child is currently the court’s paramount consideration.²⁷⁶ The Bill, if enacted, will ensure that this remains the case.²⁷⁷ In exceptional circumstances, it might be in the child’s best interests that he or she does not receive an explanation of the court’s decision. However, the occasions on which would be inappropriate to give *any* feedback to the child about the court’s decision are likely to be rare.

There is a danger that the best interests test as currently worded in section 11E(3)(b) of the Bill might operate to prevent explanations to children becoming the regular practice of in family cases.

Next, in Chapter 7C, the proposed welfare checklist in the Bill is addressed.

or elsewhere that formal steps would be taken to ascertain that child’s whereabouts (e.g. involving national and international authorities).

²⁷⁶ Section 11(7)(a), as discussed in Chapter 4C above.

²⁷⁷ Proposed section 11ZA(1).

Chapter 7C. Analysis of key reform proposals: paramouncy of the child's welfare and the 'checklist' (Article 3)

In this Chapter, the checklist set out in the Bill is analysed with reference to the impact it might have on the current balance of the rights in family cases.

The amendments proposed by sections 1(4) should be read in conjunction with the amendments proposed in sections 12(2) and 21(2).²⁷⁸ This is because, taken together, they create a **new checklist of factors**²⁷⁹ to which the court must have regard in deciding family cases brought under Part 1 of the 1995 Act. Such checklists are often called 'welfare checklists'.

As observed in Chapter 4C,²⁸⁰ **valid human rights arguments can be made both for and against the creation of a statutory checklist.** Neither approach is necessarily right or wrong in terms of broad compliance with the UNCRC or ECHR.

7C.1 Introducing a checklist: broad considerations

The consultation responses to the Scottish Government Review of Part 1 of the 1995 Act were divided as to whether the introduction of such a checklist might be helpful.²⁸¹ One danger in prescribing a statutory checklist is that it might hamper the wide and long-standing discretion exercised by Scottish courts in family cases to date. Linked concerns include:

- **An unbalanced checklist:** a checklist might be too complex, unbalanced (or even incomplete) leading to too great or little an emphasis being placed on certain factors. This could, in turn, affect the balance of rights in family cases, leading to arbitrary, unfair or even unsafe outcomes.

Such was the experience in Australia when controversial 'shared parenting'²⁸² provisions were included in a statutory checklist created in 2006.²⁸³ The detrimental impact of that poorly drafted checklist²⁸⁴ upon children and families is well

²⁷⁸ A paste of what the checklist will look like, if enacted, can be found in the main text at 7C.3 below.

²⁷⁹ The rationale for this is discussed in the Policy Memorandum, paras 134-148.

²⁸⁰ Chapter 4C.3.

²⁸¹ The range of responses are discussed in the Policy Memorandum at paras 139-141.

²⁸² There is no universally accepted definition of 'shared parenting'. The term is controversial, and it is the subject of a wealth of literature and debate. Its broad premise is that, after divorce or separation, both parents should share the responsibility for the upbringing of their child(ren). Some definitions go further than this, and incorporate within the meaning of 'shared parenting' the notion of shared residence and/or equal or close-to-equal parenting time. Some jurisdictions have in place a broad shared parenting ethos, most with reference also being made to best interests. In England, e.g., section 1(2A) of the Children Act 1989 Act refers to the 'presumption' that 'unless the contrary is shown, [the] involvement of [each] parent in the life of the child concerned will further the child's welfare.' Section 1(2B) in the 1989 Act provides that "'involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time'. Shared parenting possibilities and presumptions were consulted upon as part of the Scottish Government's Review in 2018, but none are being proposed in the current Bill.

²⁸³ The checklist was originally set out in the Australian Family Law (Shared Parental Responsibility) Act 2006 and it amended existing legislation, becoming the new section 60B onwards of the Family Law Act 1975.

²⁸⁴ The checklist was heavily criticised on the grounds of 'complexity' and it led to 'the presumption of equal parental responsibility [being] wrongly taken to mean that there was also a presumption favouring children spending equal time with each parent': Chisholm R, 'Family Courts Violence Review' (2009), p 8.

documented.²⁸⁵ The statute was amended in 2011 to ensure, in particular, that the safety of the child would be prioritised over any parental claim.²⁸⁶

The Australian experience is not unique.²⁸⁷ One of the main challenges in drafting checklists is to enable an appropriate balance of everyone's rights, while ensuring that the child's well-being and safety remains at the centre of decisions made.

Unbalanced, overly-complicated or incomplete checklists are also likely to generate complaints and/or further litigation based on the ECHR or UNCRC.²⁸⁸

- **Delay:** a checklist could also be perceived as creating a hierarchy of factors to be applied, regardless of the circumstances of individual cases. This might become administratively burdensome for courts and generate delay, rather than timely progress, in family cases.

However, the potential merits of introducing a statutory checklist can also be supported by ECHR and the UNCRC.²⁸⁹ The potential merits, which might make a robust and well-drafted checklist attractive, include:

- **Consistency:** all professionals involved in family cases would be considering the same list of factors.
- **Accessibility:** a checklist could also make it easier for family members (particularly children) to understand the rationale for the decisions that have such great impact on their lives.

Some of the arguments for and against checklists have been outlined above. In one sense they all point to the same conclusion: if there is to be a checklist, **getting it right is crucial.**

7C.2 Guidance from the UN Committee on the Rights of the Child, and a snapshot of the English approach

As noted in Chapter 5, the UN Committee on the Rights of the Child is broadly supportive of introducing best interests (i.e. welfare²⁹⁰) checklists. In particular, UN Committee guidance says it is:

²⁸⁵ The checklist was not considered successful in practice. It supported unsafe outcomes for children and vulnerable adults: see, e.g., Cashmore, J et al, 'Shared Care Parenting Arrangements since the 2006 Family Law Reforms', Report to the Australian Government Attorney-General's Department Sydney; Social Policy Research Centre, University of New South Wales (2010). Further reform is being considered in Australia: a report was published this year on the Australian Family Law System.

²⁸⁶ The revisions to the law built on the recommendations in Chisholm's Family Court Violence Review (see note 284 above), p 5, which said that 'family violence must be disclosed, understood, and acted upon... The family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding.' In 2011, Australian law was amended to provide greater statutory protections for children and other family members from violence and child abuse.

²⁸⁷ For a discussion of similar issues concerning keeping children safe in family cases in both Canada and Colorado, see: Bala N, 'Canada's Controversy over Best Interests and Post-Separation Parenting', and Weisberg DK, 'In Harm's Way: The Evolving Role of Domestic Violence in the Best Interests Analysis' both chapters in Sutherland EE and Barnes Macfarlane L-A (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (2016), CUP.

²⁸⁸ Dependence upon such checklists might, e.g., generate violations of Articles 6 (fair hearing), 8 (right to respect for private and family life) and 14 (right not to be discriminated against) of the ECHR. It might also, e.g., violate Articles 2 (non-discrimination), 3 (best interests), 5 (wider family relationships), 18 (common parental responsibilities in upbringing) of the UNCRC.

²⁸⁹ For example, Article 6 of the ECHR (right to a fair hearing) promotes the need for an explanation as to how and why a court has reached a particular decision. A clear checklist could provide a clear overview of decision-making morale. As discussed below in the main text, the UN Committee on the Rights of the Child also considers that Article 3 of the UNCRC (best interests) can be supported by the use of an appropriately drafted checklist.

²⁹⁰ As explained in Chapter 2, welfare is the broad synonym used in the 1995 Act for 'best interests'.

*'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 list should provide concrete guidance, yet flexibility.'*²⁹¹

According to the UN Committee, the 'list of elements' ²⁹² on such a checklist should include the following:

- a) The child's views
- b) The child's identity (e.g. his/her/their 'sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality'²⁹³)
- c) Preservation of the family environment and maintaining relations (and the Committee states it 'is of the view that shared parental responsibilities are generally in the child's best interests'²⁹⁴)
- d) Care, protection and safety of the child
- e) Situation of vulnerability (this includes, e.g., 'disability, belonging to a minority group, being a refugee or asylum seeker' or being a 'victim of abuse'²⁹⁵)
- f) The child's right to health
- g) The child's right to education.

The above 'elements' link directly to many of the important rights set out in the UN Convention itself. The UN Committee has stressed that 'not all the elements [that could be included in a best-interests assessment] will be relevant to every case'.²⁹⁶ Also, further elements might be added to the above list, subject to the caveat that:

*'when adding elements to the list, the ultimate purpose... should be to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child.'*²⁹⁷

So, a robust, flexible welfare checklist of 'elements' that has the child at its centre can support consistency, transparency and accountability in decision-making. Consistency, transparency and accountability are also aims conducive to ensuring respect for the relevant rights held by parents in terms of the ECHR.²⁹⁸

In **England**, for example, the Children Act 1989 ('the 1989 Act') sets out a checklist. That checklist is very similar to the above list provided by the UN Committee.

Section 1(3) of the English 1989 Act creates a statutory list of '*circumstances*' to which courts '*shall have regard*' before making orders. As with the UN Committee list, the first circumstance listed is '*the ascertainable wishes and feelings of the child concerned*'.²⁹⁹ Physical, emotional and educational needs also form part of the list, together with the child's personal circumstances and any harm or risk of harm.³⁰⁰ The capacity of parents

²⁹¹ *General Comment No 14 on Best Interests*, para 50.

²⁹² As above, Part V.A (1).

²⁹³ Para 55.

²⁹⁴ Para 67

²⁹⁵ Para 75

²⁹⁶ Para 80

²⁹⁷ Paras 50-51. Specific factors are then discussed in depth at paras 52- 79.

²⁹⁸ See discussion in Chapter 2, above, of Articles 6 and 8 in particular of the ECHR.

²⁹⁹ Children Act 1989, section 1(3)(a).

³⁰⁰ Section 1(3)(b), (d) and (e).

and carers to meet the needs of the child, together with the likely effect of a change of circumstances on the child also feature on the English checklist.³⁰¹

Some broad observations can be made about the interpretation and application of the checklist found in the 1989 Act by English courts. First, the views of children perceived as being well-informed and ‘mature’ are usually afforded great weight in family cases.³⁰² Secondly, courts favour a continuation of the status quo in terms of the child’s living arrangements unless there is very good reason for disturbing that.³⁰³ Thirdly, decision-making in family court cases is an art rather than a science. This means that, notwithstanding the existence of a statutory checklist, decisions have been made in some family cases that seem (certainly on the face of it) inconsistent with decisions made in other very similar cases.³⁰⁴

Each of the above observations can, however, be made about the decisions that Scottish courts have reached in family cases to date – without a statutory checklist having been enacted.³⁰⁵

If a comprehensive checklist is to be inserted into the 1995 Act, then the checklist model set out by the UN Committee is a valuable point of reference. It also provides a clear – and children’s-rights compliant – checklist template.

7C.3 The checklist proposed in the Bill (sections 1, 12, 21³⁰⁶)

The Bill repeals the current three-part welfare test discussed in Chapter 4C,³⁰⁷ re-enacting part of it in the new section 11ZA, which also contains the new checklist. It may be helpful to set out, below, what the section containing the **checklist** in the Bill would look like if the relevant provision is enacted:

11ZA Paramourncy of child’s welfare, and the non-intervention presumption

(1) In deciding whether or not to make an order under section 11(1) and what order (if any) to make, the court must regard the welfare of the child concerned as its paramount consideration.

(2) The court must not make an order under section 11(1) unless it considers that it would be better for the child concerned that the order be made than that none should be made at all.

³⁰¹ Section 1(3)(c) and (f).

³⁰² An extensive body of case law on the child’s views exists. However, see, e.g., *Re H (Residence Order: Child’s Application for Leave)* [2000] 1 FLR 780; *L v L (Anticipatory Child Arrangements Order)* [2017] EWHC 1212(Fam).

³⁰³ This has long been held to be the case and was reiterated by the UK Supreme Court: *Re B (A Child)* [2009] UKSC 5.

³⁰⁴ See, e.g., *Re H (Residence)* 2011 EWCA Civ 762 (no order made in opposition to wishes of teenager considered to have been heavily influenced by one parent); *Re A Letter to a Young Person* [2017] EWFC 48 (an order was made against the expressed wishes of teenager believed to have been heavily influenced by one parent).

³⁰⁵ E.g., courts following the views of children deemed mature (*City of Edinburgh Council v H* 2001 SLT (Sh Ct) 51, notwithstanding the young age of the child concerned (age 10), he was found mature enough to express a view to which the court gave decisive weight); preservation of status quo (*Breingan v Jamieson* 1993 SLT 186); fact-specific decisions (*Patrick v Patrick* 2017 Fam. L.R. 128).

³⁰⁶ While the proposed section is entitled ‘Paramourncy of child’s welfare, and the non-intervention presumption’ the section is described as being a list of factors in the Policy Memorandum. It can then be assumed that the creation of a ‘checklist’ was the intention.

³⁰⁷ The current sections 11(7)(1), (7A)-(7D) are repealed by section 1(3)(a) of the Bill. Much of the content of these repealed sections is broadly re-enacted and inserted into either the checklist (paramourncy of welfare, non-intervention and protection from abuse) or a free-standing section (child’s views) by the Bill.

(2A) 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.**³⁰⁸

(3) When considering the child's welfare and whether it would be better for the child to make an order than not, the court **must have regard to the following matters in particular—**

(a) the need to **protect the child from abuse, or the risk of abuse**, which affects, or might affect, the child,

(b) the **effect that abuse, or the risk of abuse, might have on the child**,

(c) the **ability of a person to care for**, or otherwise meet the needs of, the child, **where that person has carried out, or might carry out, abuse** which affects, or might affect, the child,

(d) the **effect that abuse, or the risk of abuse, might have on the carrying out of responsibilities** in connection with the welfare of the child by a person who has (or, by virtue of an order under section 11(1), would have) those responsibilities.³⁰⁹

(e) the **effect that the order** the court is deciding whether or not to make **might have on—**

(i) the **involvement of the child's parents** in bringing the child up, and

(ii) the **child's important relationships** with other people.³¹⁰

Repeal and re-enactment of the current three-part 'welfare test'

Three significant sub-sections precede the checklist. As can be seen (and as the title of the section 11ZA indicates), the first two parts of the current welfare test have been re-enacted in section 11ZA, namely:

- **The paramountcy of the child's welfare:**³¹¹ this becomes the new section 11ZA(1), and
- **The no order principle:** this becomes the new section 11ZA(2).³¹²

The above parts of the welfare test currently belong to the same sub-section (section 11(7)(a)) in the 1995 Act. In the new section 11ZA they are separated into two sub-sections. This division reinforces the fact that these are two fundamental, yet distinct, considerations for the court. Having general regard to the human rights of children and parents, this clarity can be viewed positively.

The final part of the current welfare test (**having regard to the child's views**) is also repealed by the Bill. That requirement is re-enacted in the new stand-alone section 11ZB. This new provision was discussed in Chapter 7B, above.

- **Risk of prejudicial delay:** this is a new provision found in section 11ZA(2A). It requires the court to '**have regard to any risk of prejudice to the child's welfare that**

³⁰⁸ Proposed sub-section (2A) inserted by section 21(2) of the Bill. Section 21 of the Bill also proposes similar anti-delay amendments to the relevant sections of Part 2 of the 1995 Act, the Adoption and Children (Scotland) Act 2007 and the Children's Hearings (Scotland) Act 2011.

³⁰⁹ Proposed sub-sections (1), (2) and (3)(a)-(d) inserted by section 1(4) of the Bill.

³¹⁰ Proposed section (3)(e)(i) and (ii) inserted by s 12(2) of the Bill.

³¹¹ The only difference between the wording of the proposed section 11ZA(1) and the current section 11(7)(a) is that the word 'must' is used rather than 'shall'. So the new section provides that 'the court must regard the welfare of the child concerned as its paramount consideration.'

³¹² The difference in wording between the current and proposed sections regarding non-intervention are minimal. In particular, as with the paramountcy provision the word 'must' is used rather than 'shall' in respect of the court's duty. The difference between the word 'presumption', used in the title of the new section, and 'principle', used in the wording of the current and new section is discussed in the main text below.

delay in proceedings would pose.³¹³ The focus of the section is delay that is prejudicial to the child³¹⁴ – rather than unavoidable, or necessary delay in a family case. This is compatible with the key aims of the Bill and is not, on the face of it, inconsistent with ensuring a fair balance of rights.³¹⁵

The factors included in the checklist

The proposed **checklist** is found in section 11ZA(3)(a)-(e). The underlying policy rationale supporting the Scottish Government's choice of factors included on the checklist in the Bill is the desire to:

'build on the existing [sub-sections] of the 1995 Act which focus on domestic abuse to cover equally important areas'.³¹⁶

While the checklist is spread over several sub-sections, it provides **three substantive factors** for courts to consider:

- **Protection from abuse and risk of abuse:** the provisions relating to this are found in sub-sections 11ZA(3)(a)-(d). These sections, broadly, replicate³¹⁷ the content of the current sub-sections 11(7A)-(7C), which the Bill repeals.

There has been some minor re-wording.³¹⁸ It is not clear why the wording has been altered or whether these alterations might have an impact on the protection of victims of domestic abuse. For example, the new version of section 11B (found in proposed section 11ZA(3)(b)) says that the court must have regard to *'the effect that [such' ... deleted] abuse, or the risk of abuse, might have on the child.'* The use of the current word, 'such', when referring to abuse, would seem preferable because it directs the court to focus on the particular effect that the particular form of abuse is having in the circumstances of that case.

Sub-sections 11ZA(3)(c) and (d), which focus on the ability of the adults involved to care for the child, are arguably slightly more clearly set out than in the current provision. This might be valuable if these sub-sections empower the court to look at the whole picture from the victims' perspective. They direct the court to assess risk factors for the child in respect of the perpetrator or alleged perpetrator of abuse. They also require the court to consider the effect, or impact, of abuse or risk of abuse on any person (e.g. the child's mother³¹⁹) carrying out their responsibilities in respect of the child.

³¹³ This sub-section was inserted by section 21(2A) of the Bill and it represented an amendment to an earlier amendment made by the Bill itself. Similar anti-prejudicial delay provisions are inserted by section 21((3), 21(5), 21(6) of the Bill to the relevant legislation governing public family law proceedings, adoption cases and children's hearings.

³¹⁴ One significant reported decision on this point is *B v G* [2012] UKSC 21, in which the UK Supreme Court strongly criticised extensive delay in a Scottish family case raised under Part 1 of the 1995 Act. The case began in 2003 (when the child involved was 3 years old) and ended in 2012 (when the child was 12). The case cost around £1 million (this involved Scottish Legal Aid Board funding).

³¹⁵ Modernising the family justice system is a key aim of the Bill, and Article 6 (right to a fair hearing) is concerned with upholding the human rights of all family members in respect of resolving disputes expeditiously (see discussion of Article 6 in Chapter 2.2 and reference to *Elsholz v Germany* (2002) 34 EHRR 58 in that Chapter).

³¹⁶ Policy Memorandum, paras 142-145, at para 142.

³¹⁷ As above, para 142.

³¹⁸ E.g., proposed section 11ZA(3)(b) is not an exact replica of the current section 11(&B)(i).

³¹⁹ A key point from the most recent *Scottish statistics* available for domestic abuse is that '[w]here gender information was recorded, around four out of every five incidents of domestic abuse in 2017-18 had a female victim and a male accused. This proportion has remained very stable since 2011-12'.

These protection from abuse provisions support one of the key aims³²⁰ of the Bill. They align with the Scottish Government's overarching commitment to combat domestic abuse.³²¹ They remain consistent with safeguarding the right to respect for private and family life of victims of domestic abuse (Article 8) and also with the relevant articles of the UNCRC.³²²

- **The effect that any order the court makes might have on the involvement of the child's parents in the child's upbringing:** this is a new statutory factor, found in sub-section 11ZA(3)(e)(i). This can be seen as compatible with Article 8 (right to respect for private and family life³²³). It is also compatible with various articles of the UNCRC,³²⁴ importantly Article 18. This article, which must always be read in conjunction with Article 3 (the child's best interests), requires States to respect the 'common responsibilities' of 'both parents... for the upbringing and development of [their] child'.³²⁵
- **The effect that any order the court makes might have on the child's important relationships with other people:** this is also a new statutory factor, found in sub-section 11ZA(3)(e)(ii). Requiring the court to have regard to significant relationships in a child's life (likely to include, e.g., grandparent and sibling relationships) can be viewed as a desirable step.³²⁶ This accords both with the Article 8 right to respect for private and family life and with various rights found in the UNCRC, such as Article 5 which broadly underpins the role of parents and wider family members.³²⁷

There is, however, **a lack of clarity in 11ZA(3)(e)(ii) as to whether the court is considering the adults' or the child's perspective** regarding which relationships are 'important'.

The checklist: broad observations

It is not possible to predict every potential human rights argument that might be made based on the proposed checklist, if enacted. One way to evaluate the checklist is to review it with reference to the potential human rights challenges highlighted previously in this chapter.³²⁸ The following broad questions³²⁹ are posed:

Is the checklist unbalanced? Here, considerations might include whether the checklist is likely to generate inequity, or whether too much or little emphasis has been placed on

³²⁰ See [child rights and wellbeing impact assessment](#) accompanying the Bill.

³²¹ Strategy, [Part 4](#).

³²² Where the UNCRC is concerned, these State duties are found in, e.g., Article 3 (best interests), Article 6 (children's 'survival and development' and Article 19 (protecting children from 'all forms of physical or mental violence, injury or abuse... while in the care of parents').

³²³ For an overview of the State's responsibility in connection with this Article, see Chapter 2.2 above.

³²⁴ Including, e.g., Article 2 (non-discrimination against the children of separated parents); Article 5 (responsibilities of parents and wider family/community in accordance with child's evolving capacities), Article 8 (preservation of the child's identity).

³²⁵ Article 18(1).

³²⁶ See note 234 above.

³²⁷ There is no explicit reference to siblings made in section 11ZA(3)(e)(ii). The proposed references to 'the child's important relationships' are also intended to dovetail with other amendments proposed by section 10(2) of the Bill to Part 2 of the 1995 in respect of better promoting sibling contact for children looked after by Local Authorities. That section provides that siblings include siblings by adoption, marriage and civil partnership (whether half or full-blood). It recognises less formalised relationships too, and also includes persons with whom the child has lived or is living with whom there is 'an ongoing relationship with the character of a relationship between siblings'.

³²⁸ See Chapter 7C.1.

³²⁹ The observations are not listed in order of importance.

any particular factor(s). Two of the checklist factors are entirely new to statute, so is difficult to predict how courts would interpret and apply them.

The checklist is ungainly in terms of layout. Arguably, it would be clearer if 11ZA(3)(e)(i) and (ii) formed two sub-sections. This would emphasise that having regard to the child's relationship with parents, and also to his or her wider relationships, are two separate considerations. However, on the face of it (and having regard to the factors that have been included and are discussed above), **the checklist does not appear unbalanced from a human rights perspective.**

Is the checklist incomplete? The answer to this depends on what is considered to be the primary function of the checklist. Section 11ZA(3) directs that the court 'must have regard... in particular' to the matters set out on the checklist. In order to make it clear that there is flexibility in this list of factors, consideration might be given to explicitly stating that the list is 'non-exclusive and non-hierarchical'.³³⁰

With the exception of addressing domestic abuse, the checklist is **largely future-focused**. In other words, it is concerned with the likely impact that the court's order may have on certain aspects of the child's welfare. This is directed towards supporting positive outcomes for the child.

Seeking to ensure the fair, safe and expeditious management of family cases is one of the key aims of the Bill. It is also an aim consistent with, e.g., the right to a fair hearing in terms of Article 6 of the ECHR and various other rights belonging to children and parents.³³¹

However, there is a **dearth of substantive best interests (i.e. welfare) factors** on proposed checklist. While (a) the need to protect children from abuse and (b) maintaining the child's important relationships both feature, there is no explicit reference to any of the other factors found on the UN Committee's list.³³² **This means that deciding what is best for the child is, as before,³³³ left to the discretion of courts.**

Respecting the child's right to express his or her views is an integral part of any best interests, or welfare, based decision.³³⁴ The rationale for not including reference to the child's views in the proposed checklist is that the court's general duty to have regard to the child's views is provided for elsewhere in Bill.³³⁵ However, the **lack of any reference throughout section 11ZA to facilitating the child's expression of a view is conspicuous.**

It also is worth noting that the provision currently in section 11(7D) of the 1995 Act, requiring the court to consider the adults' **co-operation** (discussed in Chapter 4C.3 above), does not feature on the checklist. It has not, however, been repealed by the Bill.

³³⁰ These were the words used by the UN Committee on the Rights of the Child when they set out a checklist template in their *General Comment No 14 on Best Interests*, para 50, discussed in above in this Chapter at 7C.2.

³³¹ See Chapters 2 (ECHR) and 3 (UNCRC) above for outline of key rights.

³³² As discussed at 7C.1 above, these include, e.g., the need to consider the child's views, identity, health, education and emotional/physical needs.

³³³ This has been described as '[d]etermining the indeterminate' by Sutherland. The Memorandum supporting the Bill states, at para 148, that '[t]he Scottish Government considers that the court will already be take [the age, sex and background of the child concerned] into account in all cases.'

³³⁴ *General Comment No 14 on Best Interests*, para 43.

³³⁵ The rationale for the inclusion and rejection of certain factors is provided in the Policy Memorandum from paras 142-148. A table of potential factors not included, with a brief rationale for this, is provided at para 148.

Will the checklist keep children safe? This consideration is **of great importance**, particularly in view of the experiences of other jurisdictions in which poorly drafted ‘shared parenting’ provisions contributed to an environment in which the impact of domestic abuse was minimised and children were placed at risk.³³⁶ Safety is also a fundamental consideration in terms of compliance with the UNCRC.³³⁷

Section 11ZA(3)(e)(i) of the proposed checklist requires the court to consider the involvement of the child’s parents in bringing the child up. **It does not create a shared parenting presumption** and it is not anticipated that Scottish courts would interpret the sub-section in this way. By re-enacting the existing protection from abuse provisions in the proposed checklist, the Bill continues to provide courts with tools to address abuse.

Ensuring better safeguards and outcomes for victims of domestic abuse is a key policy aim. As was noted in Chapter 4C, the impact and operation of the existing provisions are the subject of current research.³³⁸ Research is also being undertaken view a view to producing recommendations for much needed measures to more closely align criminal and family court practice in domestic abuse cases.³³⁹

Research to date involving children indicates that **particular care is required in seeking and listening to children’s views on the issue of contact in cases involving domestic abuse.**³⁴⁰ In view of this, consideration might be given to including specific reference in sections 11ZA(3)(a)-(d) to having regard to any views the child wishes to express in such cases.

One final issue relating to the section 11ZA is addressed below.

7C.4 The ‘non-intervention presumption’

The use of the term ‘non-intervention **presumption**’ in the title of proposed section 11ZA may be problematic from a human rights perspective.³⁴¹ Legal presumptions operate as formal starting places in court proceedings.

When a presumption exists, it can create an additional hurdle for a person trying to overcome that presumption. For example, a child under the age of 12 years who wishes to express a view in a family case would not benefit from the age presumption currently found in the 1995 Act.³⁴²

³³⁶ Some of the research and literature concerning problematic ‘shared parenting’ / ‘friendly parent’ provisions, which were then followed by safety-oriented reform in child contact cases in Australia, Canada and Colorado is referenced at notes 285, 286 and 287 above.

³³⁷ E.g. Articles 3 (best interests), 6 (right to survival and development) and 19 (protecting children from ‘all forms of physical or mental violence, injury or abuse... while in the care of parents’).

³³⁸ Scottish Government-funded research is currently being undertaken by Assoc. Professor Richard Whitecross, Edinburgh Napier University. The research explores attitudes in the legal profession towards the protection from abuse/risk of abuse provisions (at present, section 11(7A)-(7E) of the 1995 Act), examining how the provision are understood and implemented in practice.

³³⁹ This research, ‘Domestic abuse and child contact: the interface between criminal and civil justice’, is being conducted by Professor Jane Mair, University of Glasgow. This work is reviewing the interrelationship between the investigation and prosecution of domestic abuse in criminal justice and parallel child contact cases. The aim is to generate recommendations for potential measures to encourage closer alignment of practice in both contexts.

³⁴⁰ See, e.g., R Hunter et al, ‘Domestic Violence: **Contact and Domestic Abuse**’, *Journal of Social Welfare & Family Law* Issue 4 (40) 2018. For Scotland, see the [Power Up Power Down](#) project. See also Morrison F, *After Domestic Abuse: Children’s perspectives on contact with fathers*, Edinburgh: Centre for Research on Families and Relationships, [Research briefing CRFR](#), April 2009.

³⁴¹ ‘Non-intervention’, a well-used term in Scottish Family Law, requires that courts and public bodies respect the privacy of the family unit unless there is good reason to intervene. This broad approach is compatible with Article 8 of the ECHR (right to respect for private and family life). See discussion of ‘non-intervention’ at Chapter 4C.2 above.

³⁴² This was discussed in Chapter 5.2 above.

Where non-intervention is concerned, reference has already been made in Chapter 4A.2 above to the significant 2001 decision in [White v White](#).³⁴³ There the court considered what has often been called the no-order, or non-intervention, **principle** currently found in section 11(7)(a) of the 1995 Act. The court in *White v White* explained that reference in statute to non-intervention gives ‘effect to Parliament’s view’ that children’s lives should ordinarily, and wherever possible, be ‘regulated’ by agreement between their parents ‘without the intervention of the court’ (i.e. the State).³⁴⁴

In other words (and as is consistent with the spirit of Article 8 of the ECHR³⁴⁵) non-intervention is currently understood as being a general approach for avoiding the State intruding too much in an individual’s private life. It is not a formal legal presumption.

A statutory non-intervention ‘presumption’ might reignite previous legal debate on non-intervention and operate against anyone asking the court to intervene to resolve a family dispute. A non-intervention presumption might cause particular disadvantage to non-residential parents, notably fathers, applying to court for a contact order. While this may seem to be quite a technical point, the difference in terminology might be important in terms of ensuring a fair balance of rights in family cases.

Next, in Chapter 7D, the proposals in the Bill most relevant to enhancing court processes in family cases are discussed.

³⁴³ [White v White](#), 2001 SLT 485. This was a Court of Session Inner House decision, meaning that the decision is binding on lower courts.

³⁴⁴ As above, at para 21, per Lord President (Rodger).

³⁴⁵ Right to respect for private and family life, discussed at Chapter 2.2 above, with particular reference to the ECtHR decision in *Elsholz v Germany* (2002) 34 EHRR 58.

Chapter 7D. Analysis of key reform proposals: safeguards and greater regulation

This Chapter focuses on the sections in the Bill that are intended to improve the management of family cases. Provisions considered likely to impact upon the rights and interests of children and parents are considered. These include provisions in the Bill directed towards ensuring **safe processes and outcomes** and the appropriate **regulation of professionals and professional services**.

The Chapter concludes by briefly highlighting several areas, relevant to the human rights of family members, that have not been addressed in the Bill.

7D.1 Additional safeguards for vulnerable witnesses and parties (sections 4–7)

Sections 4–7 of the Bill propose additional safeguards for vulnerable individuals in family disputes.³⁴⁶ The Bill seeks to achieve this in two main ways. First, it widens the group of individuals who can be deemed vulnerable. Secondly, it creates a new 'special measure' for use in family cases.

Special measures are additional protective steps authorised during court proceedings. Existing special measures include, for example, allowing witnesses to give evidence behind a screen or to bring a 'supporter' to court.³⁴⁷

The Bill amends the [Vulnerable Witnesses \(Scotland\) Act 2004](#) ('2004 Act'). Among other statutory amendments,³⁴⁸ the Bill also inserts two new sections into Part 1 of the 1995 Act: section 11B ('vulnerable parties') and 11C ('special measures').

The proposed amendments are lengthy and complex. Their broad aim is to ensure that certain vulnerable people (in practice, largely women and children³⁴⁹) benefit from increased protections in ongoing family cases. In particular, Child Welfare Hearings would be covered by some of these protections, even where no-one was giving evidence.³⁵⁰ At present, the parties sit across the table from each other at Child Welfare Hearings, even when there have been allegations of (or a conviction for) abuse.

³⁴⁶ Section 4(3) of the Bill creates new sections 11A and 11B in the Vulnerable Witnesses (Scotland) Act 2004. Section 11B(3) and (4) are concerned with deemed vulnerable witnesses in cases brought under Part 1 of the 1995 Act.

³⁴⁷ 'Special measures' is a statutory term for the protective steps already found in the Vulnerable Witnesses (Scotland) Act 2004. In civil proceedings (i.e. non-criminal cases) the current measures are set out in section 18(1) of that Act. They are: (i) taking evidence by commissioner (this provision is sometimes used when, e.g., a witness cannot leave hospital or a remote location to give her/his evidence, so a commissioner, usually an experienced Advocate or solicitor, can be appointed by the court to go and take that person's evidence); (ii) using a live TV link; (iii) using a screen; (iv) bringing a supporter to court. The supporter 'must not prompt or otherwise seek to influence' the vulnerable witness and if this person is also a witness in the case then he or she can't be a supporter before his/her own evidence is given (section 22).

³⁴⁸ Court proceedings arising from children's hearings cases are also covered by section 5 of the Bill which inserts proposed new sections 176A – D in the Children's Hearings (Scotland) Act 2011 designed to protect vulnerable witnesses in such cases. The provisions governing vulnerable witnesses in court proceedings arising from the hearing system are slightly different.

³⁴⁹ The most recent [Scottish statistics](#) for domestic abuse (2017-18) indicate (where gender has been recorded) that in around four out of every five incidents there was a female victim and a male accused. This gender information in the abuse statistics has remained stable since 2011-12.

³⁵⁰ 'Child Welfare Hearings' are hearings in family cases where the court tries to identify the issues in dispute and where both parties are present in court. They were discussed in Chapter 4C.3 above. Civil proceedings already fall within the terms of the 2004 Act, but, in terms of section 11(1) of the 2004 Act, only people who are 'giving or [are] to give evidence'. Section 15 of the 2004 Act, e.g., already makes some specific provision for the application of the Act in family cases. The current provisions do not currently protect people when they are attending, for example, Child Welfare Hearings where oral evidence is not (normally) given by parties or their witnesses but the parties often sit across a table from each other.

These protective sections in the Bill can be seen as (a) addressing concerns³⁵¹ about vulnerability of victims of domestic abuse in court proceedings and (b) compatible with the relevant rights set out in the ECHR and UNCRC discussed in Chapter 4C.3 above.

Deeming as vulnerable

Specifically, the Bill creates a new proposed section in the 2004 Act stating that ‘***the court is to consider a person... to be a vulnerable witness***’³⁵² in a family case where that person is:

- the **subject of a protective civil court order against another party**³⁵³ in the family case,³⁵⁴ or
- the **victim of a ‘relevant offence’, or is the alleged victim in a relevant criminal offence for which another party in the family case is being prosecuted.**³⁵⁵

‘Relevant offences’ include, for example, serious sexual and physical assaults and, significantly, offences under the [Domestic Abuse \(Scotland\) Act 2018](#).³⁵⁶ A person is to be regarded as ‘being prosecuted’ once a prosecutor has initiated these proceedings and as long as the proceedings have not yet concluded.³⁵⁷

Here, various issues arise concerning family cases in which: (i) the police are investigating allegations of a criminal offence but no decision has yet been taken regarding prosecution and/or (ii) domestic abuse is not raised as an issue at the outset of a family case, but becomes an issue at a later stage.³⁵⁸ The Bill contains no catch-all provision, for example, giving courts the discretion to deem a party or witness vulnerable where the circumstances of the case otherwise justify it.

Since 2017, the English [approach](#) to these issues has been to place a duty upon the court to ‘at all stages in the proceedings... to consider whether domestic abuse is raised as an issue, either by the parties’³⁵⁹ or by the relevant professionals involved. English family

³⁵¹ The Policy Memorandum refers, at para 63, to concerns raised at Stakeholder events and in consultation responses to the Review.

³⁵² Proposed section 11B(1) of the 2004 Act. As long as a person satisfied this definition in a family case then the test for the more stringent definition of being a ‘vulnerable witness’ in s 11(1) of the 2004 Act for civil cases does not have to be met.

³⁵³ Some parties who are giving, or are to give, evidence in proceedings can already be viewed as ‘vulnerable witnesses’ in terms of section 16 of the 2004 Act.

³⁵⁴ The new section 11B(3) defines such orders as ‘a non-harassment order, interdict or any similar order or remedy granted by a court prohibiting certain conduct towards the person by a party in the proceedings.’ The section is designed to protect separating partners or spouses against abuse from their former partner in the context of family litigation. An ‘interdict’ is a court order preventing a person from carrying out a specific legal wrong such as, e.g., placing another person in a state of fear and alarm.

³⁵⁵ Proposed section 11B(4)(a) and (b).

³⁵⁶ Section 11B(5) refers to various criminal statutes setting out the offences to which the protections apply. Relevant Scottish offences are set down in the Criminal Procedure (Scotland) Act 1995. Section 288C(2) of the 1995 Act contains a list of serious sexual offences, 288DC(1) covers cases involving domestic abuse in terms of the Domestic Abuse (Scotland) Act 2018 (section 1). Section 288E(3) of the 1995 Act is concerned with serious physical offences, including murder and assault with particular reference to child witnesses under the age of 12 years.

³⁵⁷ Proposed section 11B(5)(b)(ii). It is worth noting that these issues are also being discussed by the Scottish Civil Justice Council in respect of the relevant Court Rules: see [2017 Report](#), at p 13 onwards.

³⁵⁸ Practice Direction 12j - Child Arrangements & Contact Orders: Domestic Abuse And Harm, last updated 8 Dec 2017, para 5.

³⁵⁹ This duty is imposed by the above Practice Direction. The rationale for this can be viewed as deriving from best interests of the child (Article 3, UNCRC): focusing on various general principles including that ‘Domestic abuse is harmful to children, and/or puts children at risk of harm, whether they are subjected to domestic abuse, or witness one of their parents being violent or abusive to the other parent’, at para 4. See also Article 19, UNCRC (Protection of the child from all forms of violence) and *General Comment No. 13 (2011) The right of the child to freedom from all forms of violence (CRC/C/GC/13)*, Part III ‘Violence in children’s lives’; Part IV Legal analysis of Article 19).

courts are also directed to ‘determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse’.³⁶⁰

New ‘special measure’: prohibition on personal conduct of case

Significantly, the Bill also proposes a new ‘special measure’ for family cases. The measure **can be authorised by the court to prevent personal examination / cross-examination by another party (or parties) of anyone deemed a vulnerable party or witness.**³⁶¹ This includes adults and children. Protection of those involved in family cases is a highly topical issue. Various governments have already enacted this preventative measure or have made clear their intention to do so.³⁶²

A similar Scottish provision, focused on domestic abuse, applies in criminal cases and has been in force since 1 April 2019.³⁶³

The prohibition created by the Bill generates some human rights considerations for those subject to a protective civil order or who have been convicted of (or are at the time accused of) committing, certain serious offences. Most notably these relate to Article 6 (right to a fair hearing) and Article 8 (right to respect for private and family life) of the ECHR.³⁶⁴

The Bill, however, seeks to ensure that the proposed special measure does not have a disproportionate impact on the party (or parties) subject to the prohibition. It does this in a number of ways. First, the court must decide that the prohibition is the most appropriate³⁶⁵ special measure for that case (although there is a presumption that it will be³⁶⁶).

Secondly, if the prohibition is authorised, the party must be informed and the prohibition explained.³⁶⁷ Thirdly, the court must ascertain whether any party to whom the prohibition relates has a solicitor and thereafter keep the issue of legal representation under review throughout the case.³⁶⁸

³⁶⁰ Practice Direction 12j, para 16.

³⁶¹ Proposed section 22A of the 2004 Act applies to cases in which orders are being sought under Part 1 of the 1995 Act.

³⁶² For example, in New Zealand, the [Evidence Amendment Act 2016](#) prevents ‘a defendant in a sexual case, or a defendant in or a party to criminal or civil proceedings concerning domestic violence or harassment’ to personally cross-examine the person who has made those allegations or any child who is a witness without the permission of the judge. Other jurisdictions seeking to put in place similar measures include England/Wales and Australia.

³⁶³ Section [288DC](#) of the Criminal Procedure (Scotland) Act 1995 as inserted by section 15(2) of the Domestic Abuse (Scotland) Act 2018.

³⁶⁴ The general import of these articles are discussed in Chapter 2.2 above. For a brief overview of the impact and operation of Article 6, including the provisions that relate generally to civil and criminal court actions (Art 6(1)) and those relating only to criminal proceedings (Article 6(2); 6(3)) see ‘[Justice](#)’ overview.

³⁶⁵ Proposed section 22(C)1. In the new section 11B the Bill would insert into Part 1 of the 1995 Act, the court must take into account the personal characteristics of the victim when deciding ‘whether attending or participating’ in the family case ‘is causing, or is likely to cause... distress’: section 11A(8)(a)-(e).

³⁶⁶ The Bill proposes that this presumption can be rebutted where there might be a risk of prejudice / unfairness in the proceedings (s 22D(4)(a) and (b)). The risk of prejudice to the ‘fairness of the proceedings and interests of justice’ must ‘significantly outweigh’ the risk to the interests of the witness if the special measure is not applied. So, while the court must conduct a balancing exercise, it would appear to be a more onerous presumption to rebut (i.e. displace).

³⁶⁷ Proposed section 22B(5).

³⁶⁸ Proposed section 22B(6). That party can, as with the any other party in the case select his or her own solicitor, and the court duty to appoint a solicitor only applies where the party ‘does not have a solicitor’ and the court is ‘not satisfied that the party intends to engage’ one: s 22B(6)(a) and (b).

Additionally, the court must appoint a solicitor to that party if ‘at any point in the proceedings’ the party is without a solicitor.³⁶⁹ In that case, the court-appointed solicitor must act on the instructions of that party, which failing, in the party’s best interests.³⁷⁰

In terms of section 6 of the Bill, the court-appointed solicitor would be appointed from a list established and maintained by Scottish Ministers.³⁷¹ This provision does raise some issues in terms of compliance with Article 6 of the ECHR.³⁷² In particular, it has been suggested that the prohibition provisions, taken together, might ‘give a huge tactical advantage’ to those deemed vulnerable.³⁷³ However, preventing the family court process from being used as a possible means of perpetuating abuse is undoubtedly a legitimate aim.³⁷⁴

It is also worth noting that the proposed prohibition on personal conduct focuses on examination and cross-examination only. It *‘does not prevent a party to whom it applies from conducting the party’s own case until the beginning of the first hearing in... which a witness is to give evidence’*.³⁷⁵ That party could represent himself/herself for the vast majority of the family case if he or she so wished.

On balance, having regard to the human rights of parents and children in cases brought under the 1995 Act, the proposed provisions can be viewed in a positive light. The Bill introduces protective measures where and when they are much needed in family cases.

7D.2 Regulating professionals and professional services (sections 8, 9, 13)

The provisions below have similar aims and so are grouped together. They are concerned with **(a) the establishment of a register for child welfare reporters, (b) the regulation of contact services (sections 8 and 9) and (c) the regulation of curators ad litem.**

Regulation of child welfare reporters

Child welfare reporters (‘CWRs’) are individuals appointed by courts to undertake specific³⁷⁶ enquiries in family cases. Importantly, part of their role can be to seek the

³⁶⁹ As above.

³⁷⁰ Proposed section 22B(8). The duty to act in the party’s best interests begins if ‘the party gives no instructions, or gives instructions that are inadequate or perverse’.

³⁷¹ Section 6 would insert a new section 22B into the 2004 Act. Section 22B(3) requires Scottish Ministers to consult with the Faculty of Advocates and the Law Society of Scotland before making any regulations regarding requirements for appointment on, and removal from, the list of such solicitors. Such solicitors would be publically funded.

³⁷² It worth noting that Article 6 issues relating to minimum rights (which in a criminal setting are stronger and include, e.g., the Article 6(2)(c) right ‘to defend [your]self in person’) were debated before the provisions restricting self-representation in criminal cases were passed last year (see note 363 above). For a detailed discussion of Article 6 implications in civil cases, see ECtHR ‘Guide on Article 6 of the ECHR (civil limb)’ (up-to-date to 21 Aug 2019). Here it is observed, at 272, that ‘States have greater latitude in civil matters’ in terms of restrictions imposed on parties than in criminal cases.

³⁷³ *Radical Bill would strip parents of a fair hearing in court*, Stirling, J (Partner at Law Firm Gillespie Macandrew), *The Times*, p 24, 24 September 2019. Problems for the party against whom the prohibition operates were said to be ‘the loss of the normal right to represent oneself’, the ‘appointment of a legal aid solicitor who will ‘owe duties to the State as well as the client’, ‘administrative hoops... to jump through’, the inability to ‘sack’ any lawyer the court is required to appointed, such a lawyer may also be situated many miles away. Some of these observations have been made in the past about legal aid generally.

³⁷⁴ As discussed in Chapter 2, Article 8 is a qualified right and its protection can be restricted if that restriction is lawful, necessary and proportionate. As discussed at paras 45-49 of the Policy Memorandum, the majority of responses to the 2018 Review were in favour of restricting self-representation. Those in favour of the restriction included, e.g., all children’s organisations and women’s rights groups, the Law Society of Scotland and law firms. The Faculty of Advocates and Senators of the College of Justice were not in favour of the restriction citing, respectively, the need to balance victim protection with a fair hearing and potential difficulties in defining domestic abuse in the absence of a conviction.

³⁷⁵ Proposed section 22B(4).

³⁷⁶ The Court Rules governing the appointment of child welfare reporters set out clearly the basis on which a reporter is to be appointed and the set out the terms of that appointment (see, e.g., Rule 33.21, an amendment to the original Chapter 33 rules, which came into force on 26 October 2015).

views of children involved and to report back to the court any views expressed by children.³⁷⁷

Existing CWRs names can be found on lists held by the Court of Session and Sheriffs Principals for each of Scotland's Sherifffdoms.³⁷⁸ Currently, there is no mandatory training for CWRs, nor is there a requirement that they undertake continual professional development.

Some concerns have been raised³⁷⁹ about the lack of consistency across Scotland in respect of (a) when and how often CWRs are appointed in family cases, (b) training for CWRs and (c) the fees charged for reports.³⁸⁰

Section 8 of the Bill proposes that the Scottish Ministers 'establish and maintain a register of persons who may be appointed as a child welfare reporter'.³⁸¹ Courts may then 'only appoint'³⁸² persons included on that register. The need to ensure that CWRs receive uniform training on serious issues such as the impact of domestic abuse has been stressed in supporting Policy documentation.³⁸³

The Bill also proposes that Scottish Ministers retain the power to make provision by regulations about various matters.³⁸⁴ The detail of such a scheme will be set out in regulations. These regulations would also be subject to the scrutiny of the Scottish Parliament. **This provision in the Bill fulfills a key aim and, on the face of it, is unlikely to have a negative impact upon the balance of rights in family cases.**

Regulation of child contact services

Section 9 of the Bill proposes the regulation of child contact centres ('CCCs'). CCCs have been described as those venues that facilitate 'conflict-free contact between children, parents and other[s]'.³⁸⁵ The 41 CCCs currently operating in Scotland provide a range of services, including supported contact, supervised contact and child 'handover support'.³⁸⁶ Most CCCs are staffed by volunteers.

³⁷⁷ Currently, CWRs can only be appointed where the appointment 'is in the best interests of the child' and it will assist in resolving issues in the case affecting the child: Rule 33.21(2)(a) 7 (b).

³⁷⁸ Most CWRs are solicitors. The Policy Memorandum says at para 77 that there are currently around 400 child welfare reporters in Scotland.

³⁷⁹ See, e.g., discussion in Policy Memorandum, at paras 82-84, relating to the responses to the 2018 Review consultation from various children's groups, including the NSPCC who were in favour of a 'more joined up system'. The Scottish Government observed at para 89 that over 90% of CWRs are solicitors, and indicated it wishes to encourage non-lawyers (e.g. child psychologists and social workers) to apply for this role.

³⁸⁰ An inequality could be created by, e.g., one party in litigation having his/her report fees funded by SLAB, the body responsible for funding legal advice/representation, while the other party is privately funding the report has also been raised as an access to justice issue (see para 81 of the Policy Memorandum).

³⁸¹ Section 8(2). Appointment would require meeting a minimum standard of training and qualifications as would be set down in regulations (discussed in the Policy Memorandum at para 78). There was also some discussion in the Policy Memorandum as to whether maintaining the register should be a task undertaken by the Lord President or the Scottish Government (paras 92-95).

³⁸² Section 8(1). The regulation will also extend to local authority reporters appointed to report in family cases, and s 14 of the Bill requires that such reporters are also CWRs.

³⁸³ Accordingly, 'CWRs would be funded by the Scottish Ministers rather than by Scottish Legal Aid Board (SLAB) or privately funded': Policy Memorandum, para 81; 85. The Financial Memorandum supporting the Bill, pages 12-22, outlines various anticipated costs connected with the proposed changes to the regulation and role of CWRs.

³⁸⁴ These include who is eligible to be a CWR, mechanisms for inclusion on and removal from the list and making provision for remuneration. Section 8(3)(a)-(e). The costings of the current child and proposed child welfare reporter system (including a timetable for implementation from page 3) are set out in the Financial Memorandum supporting the Bill.

³⁸⁵ Policy Memorandum, para 96. Section 9(5) of the Bill defines such centres as those facilitating contact 'between a child and a person with whom the child is not... living'.

³⁸⁶ Para 96-97: 'supported contact' is essentially the provision of a neutral location for contact to take place; 'supervised contact' involves the constant presence of an independent person; the 'handover service' usually means parents need not see each other when a child is dropped off/collected for contact.

CCCs are not currently subject to specific Scottish Government regulations. The form of regulation proposed by section 9 of the Bill includes the power to make regulations setting minimum standards in terms of accommodation and the appointment and training of staff.³⁸⁷ Regulations will also include the power to *'determine the fees payable in connection with the registration of a contact service provider'*.³⁸⁸

Significantly, section 9(2)(b) of the Bill provides that where courts make orders for contact to take place at a Scottish CCC, *'the court may only require that contact take place at a contact centre operated by a regulated contact service provider'*. **Notwithstanding broad support for the regulation of contact centres, concerns have been raised about ensuring sufficient funding for CCCs and preventing closures.**³⁸⁹

Reducing the availability of conflict-free, safe, spaces facilitating contact for Scottish families raises a concern in terms of ensuring the centrality of the child's best interests in family cases (Article 3, UNCRC).³⁹⁰ As with the power to make regulations about CWRs, regulations concerning CCCs would be subject to the scrutiny of the Scottish Parliament.

Regulation of curators ad litem

In section 13 of the Bill, provision is made for the regulation of curators ad litem ('curators'). Like CWRs, curators are individuals appointed to act by the court in family cases. Unlike CWRs (who may seek the views of children), curators are appointed to safeguard a child's interests.

Among other things, section 13 proposes a register of curators and would require that courts 'only appoint'³⁹¹ curators where necessary, 'give reasons for that appointment' and 'reassess the appointment every 6 months'.³⁹²

The effect of section 13, were it enacted, is likely to be (a) reduction in the number of curator ad litem appointments made in family cases, and (b) a lack of ongoing involvement of curators in family cases. This could have an impact on the best interests (Article 3, UNCRC) of vulnerable children who are particularly in need of support or assistance in accessing court processes.³⁹³

7D.3 Miscellaneous Provisions (sections 11, 16, 19, 20)

In this section, some of the miscellaneous areas addressed in the Bill are discussed. These include:

³⁸⁷ The Scottish Government proposes that CCCs would be governed by an 'independent inspection regime' to ensure minimum standards were met. The Care Inspectorate is currently undertaking a feasibility study as to whether it could assume this role (see Policy Memorandum, paras 107-108). The Scottish Government proposes that the 3 independent centres currently operating would be able to continue to do so under the proposed provisions (see Policy Memorandum, para 109).

³⁸⁸ Section 9(5).

³⁸⁹ Policy Memorandum, paras 100 -102. Overwhelmingly, the consultation responses were in favour of regulation of contact centres although one concern consistently expressed was the need to ensure sufficient funding and prevent closures of contact centre services.

³⁹⁰ This is one of the key aims of the Strategy.

³⁹¹ The use of this terminology in s 13 with reference to the appointment of curators implies that the appointment of a curator would be the exception rather than the norm. Section 13(1)(a) says that 'the court may only appoint a person to act as a curator... to a child if the court is satisfied that it is necessary to do so to protect the child's interests'. 'Necessary' in particular would appear to be a high threshold test.

³⁹² Section 13(1)(c) and (d).

³⁹³ It is a decision falling within the terms of Article 3(1) of the UNCRC 'concerning children'.

Creation of a ‘duty to investigate failure to obey order’

Section 16 of the Bill, which would create a new section 11F in the 1995 Act, addresses the situation in which one party fails to obey a court order in a family case. Courts have the power to find parties in ‘contempt of court’³⁹⁴ in such cases. The power is used sparingly.³⁹⁵

‘Contempt’ is a term used to describe behavior that is an affront to the court’s authority, and this could include repeatedly disobeying an order of the court in a family case. The punishments for contempt are based on criminal law (they include a fine or imprisonment³⁹⁶) and are not focused on families and family life. **Using a finding of contempt as a tool in family cases can be considered problematic from a human rights perspective.**³⁹⁷ **This is because it is generally assumed that the child’s best interests are not served by punishing his or her parent.**³⁹⁸

Scottish courts have acknowledged the limitations of findings of contempt in family cases. In [SM v CM](#) in 2017, the Inner House quashed (i.e. overturned) an earlier finding of contempt made in a family case. The Sheriff had found the mother in that case to be in contempt of court for repeatedly failing to obey a contact order. In noting that ‘[e]very case of contempt of court turns essentially on its own facts’,³⁹⁹ the Inner House observed that:

*‘It is not uncommon for disputes between former partners involving contact with children to be both acrimonious and emotional. A failure on the part of one parent to comply with court orders for contact, even where deliberate, may be an instinctive shying away from the immediate prospect of contact rather than some calculated or pre-planned refusal to comply with the order of the court. Ultimately, the court must enforce its orders, but... [a] custodial sentence, particularly on a mother with whom the children live, should only be imposed with reluctance and as a last resort.’*⁴⁰⁰

The responses to the 2018 Review were mixed as to whether the law should be changed in relation to the enforcement of court orders in family cases. One theme arising from the responses was the importance of exploring the reasons for non-compliance with a court

³⁹⁴ For general judicial discussions of contempt of court in Scottish family cases, see, e.g., *S v M* 2011 SLT 918; *F v H* 2014 GWD 26-515; *SM v CM* [2017] CSIH 1 (discussed in main text below, and in which the court stressed, at para [68] the need for clear ‘case management’ in such complex and seemingly intractable cases).

³⁹⁵ In the 2018 Review Consultation document, the Scottish Government referred at para 4.48, to ‘a survey of sheriff clerks in 2006 which suggested that non-compliance with family court orders was relatively low (c. 5%). However, since then, the issue of non-compliance with court orders by parents and children has been discussed and debated increasingly in Scotland and elsewhere (see 2018 Review Consultation document, para 4.48-4.52). See [here](#) for 2018 English CAF/CASS guidance on the issue of children resisting spending time with a parent/carer post-separation. In that guidance, various possible reasons are given for such resistance, ranging from what is termed in the guidance as ‘appropriate justified rejection’ to, at the other end of the spectrum, ‘parental alienation’. CAF/CASS have adopted the following definition of the latter: ‘a child’s resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent.’ For a recent English judgment in this area, see *RE v MP (Appeal: Termination of Contact)* [2019] EWHC 132 (Fam).

³⁹⁶ The Contempt of Court Act 1981, s15(2), provides for possible imprisonment (e.g. up to 3 months in non-criminal sheriff court cases) or a fine where there is a finding of contempt in Scottish proceedings.

³⁹⁷ It is expected that courts balance the Article 8 ECHR right to respect for private and family life of each parent against the other and also, importantly, consider the child’s best interests (Article 3, UNCRC) in family cases. See Chapter 2.2 above. The child’s welfare is also the paramount consideration in family cases. However, the child’s welfare is not the paramount consideration in any contempt consideration because contempt is a criminal matter. It would, though, be artificial to suggest that courts do not consider the child’s welfare when making a decision on the question of contempt. Were the court, for example, to consider sending a residential parent to prison then the issue of the child’s residence for that period is something the court would have to consider. See *SM v CM* (discussed below in main text) at para [62].

³⁹⁸ For a discussion of this and judicial attempts to resolve intractable contact disputes, see Barnes, L-A, ‘Dear Judge, I am writing to you because I think it’s pathetic’: *Re A-H (Children)*, 2009 Edinburgh Law Review, Vol 13, 528.

³⁹⁹ *SM v CM*, para [2] per Lady Paton, Lord Malcolm and Lord Glennie.

⁴⁰⁰ As above, para [62]. The child in the case was 8 years old by the time the Inner House considered the issue of contempt. The family case about her had been ongoing since she was 1 year old.

order.⁴⁰¹ The proposed duty to ‘investigate failure to obey’ court orders in family cases was included in the Bill instead of other measures consulted upon.⁴⁰²

Proposed section 11F(1) empowers the court to investigate situations in which the court has reached the stage of considering whether to (a) find a person in contempt or (b) change⁴⁰³ the order currently in place. The policy intention is to ‘create consistency to ensure that if a party raises concerns about non-compliance with an order then the court investigates this.’⁴⁰⁴ If the court is ‘satisfied that the person failed to obey the order’ then the court must try to ‘establish the reasons’ for that failure.⁴⁰⁵

The power to appoint a child welfare reporter (CWR) to ‘investigate and report on failure (or alleged failure)’ to obey an order can broadly be read as a positive, and child-focused, proposal.⁴⁰⁶ The instruction of a CWR in such cases could assist the court in ascertaining whether a contempt of court truly exists or whether there are other circumstances⁴⁰⁷ leading to non-compliance with a court order.

Contempt of court remains the final sanction for non-compliance with a court order. This underlines ‘the serious nature of the issue.’⁴⁰⁸

If it is enacted, section 16 could empower courts more appropriately to identify and address these issues with a view to suggesting a solution focused on the child’s best interests (Article 3, UNCRC). It is anticipated that the CWR’s investigations would include ascertaining the child’s views on the issue of compliance. Consideration might be given as to whether this should be made explicit in proposed section 11F.

An important feature of a human-rights compliant court process in family cases is ensuring that any concerns raised by a party are promptly and appropriately addressed.⁴⁰⁹

Conferral of PRRs where child’s birth registered outwith the UK

Section 19 of the Bill proposes a new section 4B in the 1995 Act **making provision for fathers and second female parents who were registered as such outwith the UK.** The proposed section enables Scottish Ministers to make regulation for the conferral of PRRs, in Scottish law, upon some of these individuals.

Section 4B(2)(c) states that, where a couple are not married, PRRs can only be conferred where ‘the mother of the child has consented to that person acquiring those duties, rights or responsibilities.’ The proposed requirement for maternal consent touches on the issues

⁴⁰¹ See, e.g., response from the Children and Young People’s Commissioner for Scotland (response 570240422). The Scottish Government observed, at para 194, of the Policy Memorandum, that ‘this is a complex area’.

⁴⁰² Quote from title of proposed section 11E. Other measures were discussed at paras 4.55–4.63 of the Review and included creating a specific criminal offence or instead imposing a civil penalty for non-compliance.

⁴⁰³ Section 11F(1)(b) uses the terms to ‘vary or discharge an order’.

⁴⁰⁴ Policy Memorandum, para 197.

⁴⁰⁵ Proposed section 11F(2).

⁴⁰⁶ Proposed section 11F(2); 11F(3).

⁴⁰⁷ As outlined in the English CAFCASS guidance cited at note 395 above, these other circumstances may include cases in which ‘the child has been harmed by the parent or is frightened of them because of domestic abuse or other harmful parenting, such as neglect or substance misuse’.

⁴⁰⁸ Policy Memorandum, para 199.

⁴⁰⁹ Articles 8 (right to respect for family life) and 6 (right to a fair hearing) were discussed in Chapter 2.2 above. In particular, see *Elsholz v Germany* (2002) 34 EHRR 58, in which the German authorities were found to have violated Article 6 and 8 because the German court system had repeatedly failed to give due consideration to the application of an unmarried father for contact. The ECtHR held that the father had been afforded insufficient involvement in the court process determining his application for contact with his child after the child’s mother refused him contact.

discussed in detail in Chapters 4A and 4B above and may have an impact on the rights of children, fathers and second female parents.

Other clarifications

Other sections of the Bill address minor issues in the 1995 Act. For example, section 11 of the Bill creates proposed section 11(2A) in the 1995 Act. The aim of this new section is to clarify (in statute) **what certain orders about PRRs mean**.⁴¹⁰ Expressly clarifying this point in statute would not appear to have a negative impact on the balance of rights in family cases. The Explanatory Notes accompanying the Bill indicate that another aim of section 11 is to state clearly in legislation that a person under 16 years 'can seek and obtain a contact order'.⁴¹¹ If this is an aim of s 11, then it is suggested that a clear and explicit statement to this effect would be required.

Section 20, helpfully, enables local sheriff courts, as well as the Court of Session, to **enforce contact and residence orders made by courts in another part of the UK**.⁴¹²

Next, in 7D.4, key areas that do not form part of the Bill are briefly set out

7D.4 What the Children (Scotland) Bill 2019 does not do

The 2018 Review of Part 1 the 1995 Act was wide-ranging and a number of issues consulted upon, or options generated, were not taken forward in the Bill.⁴¹³ The key issues not addressed in the Bill from a human rights perspective include:

- **Statutory presumptions: no presumptions are being proposed whereby any particular living arrangement or relationship is to be assumed to be beneficial for children.**⁴¹⁴ The proposed **Checklist**, discussed at 7C.3 above, instead directs courts to consider the child's parental and other 'important relationships'.⁴¹⁵ The Scottish Government noted that consultation responses to the Review were 'very mixed'⁴¹⁶ on these issues.⁴¹⁷

This means that the balance of rights will not be significantly affected by any statutory presumption as to where the welfare of a child might, or should, lie. Scottish courts can be expected to proceed as they currently do, exercising broad

⁴¹⁰ This matter was resolved in the case of *Knox v S* [2010] CSIH 45. The court confirmed in this case, at para 45, that section 11(2) orders such as residence orders, contact orders and specific issues orders could all be described as 'orders in relation to' PRRs. This statement resolved a technical legal dispute that had arisen as to whether or not such orders actually conferred PRRs or were merely orders relating to the exercise of PRRs 'by anyone who has, or might, obtain them'.

⁴¹¹ At paras 55 – 58. Quote from para 56.

⁴¹² Section 20(2) inserts a new section 29A into the Family Law Act 1986. It should be noted that although parties can now bring proceedings in the sheriff court, which is more accessible: (a) the Court of Session still retains its jurisdiction to deal with these cases and (b) as before, orders from elsewhere in the UK still have to be registered before they can be enforced in a Scottish Court (see Part 1 of the 1986 Act).

⁴¹³ The areas not taken forward in the Bill are listed [here](#) and include, replacing the terms 'contact' and 'residence' and removing the term 'parental right' from Part 1 of the 1995 Act; PRR agreements for step-parents; removing PRRs from someone convicted of a serious criminal offence; no compulsory birth registration; no removal of the presumption that a mother's husband is her child's father.

⁴¹⁴ This can be found in Annex B of the Strategy ('List of areas consulted on but not taken forward...'). Presumptions discussed in 2018 Consultation included inserting a presumption(s) into section 11 of the 1995 Act providing for all or any of the following: (i) that children should have contact with their grandparents; (ii) that children *benefit* from both parents being involved in their lives (shared parenting); (iii) that children should *not* be presumed to benefit from both parents being involved in their life.

⁴¹⁵ Proposed section 11ZA(2)(e)(i) and (ii).

⁴¹⁶ Annex B, as above.

⁴¹⁷ The Scottish Government has pledged, in [Annex A](#), to continue to take certain steps, such as promoting the Charter of Grandchildren, the suggestion of non-statutory measures in respect of alternatives to court etc.

discretion as to how they will decide what best serves the welfare of the child concerned.⁴¹⁸

- **Rights for unmarried fathers: the Bill does not change the position of unmarried fathers.** The Strategy proposes some minor changes to the birth registration process through regulations.⁴¹⁹ The position of unmarried fathers has been discussed in Chapters 4A and 4B above.
- **DNA testing: courts are not being given powers to order DNA testing** in paternity disputes. The issues surrounding DNA testing were discussed in Chapter 4B.2 above.

A full list of the areas consulted upon but either not taken forward in the Bill or to be addressed in another way can be found in Annexes A and B of the [Family Justice Modernisation Strategy](#).

⁴¹⁸ The current approach of Scottish courts is discussed in Chapter 4C above.

⁴¹⁹ Annex A of the Strategy says that '[t]he Registrar General will make regulations amending the Registration of Births, Deaths and Marriages (Miscellaneous Provisions) (Scotland) Regulations 1965 to reflect that an informant may be an unmarried father with PRRs.' This would go some way to addressing one of the complexities discussed in Chapter 4B.1 above relating to the birth registration process. Annex A also, e.g., provides that consideration will also be given to (i) allowing a child with capacity to change their name on their birth certificate and (ii) to 'making regulations adding a reference to a second female parent being married to the mother of a child as well as being in a civil partnership with the mother in section 20(1)(d) of the Births, Deaths and Marriages (Scotland) Act 1965.'