SCRA Consultation Response or Committee Submission
FULL VERSION

Family Law Reform Consultation (2018)

Family Law Consultation Response

Introduction –

Scottish Children's Reporter Administration (SCRA) – Background:

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. Among its fundamental principles are:

- the needs of children or young people in trouble should be met through a single holistic and integrated system, whether concerns relate to their welfare or behaviour
- a preventative approach is essential, involving early identification and diagnosis of problems
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making

SCRA operates the Reporter service which sits at the heart of the system. SCRA employs Children's Reporters who are located throughout Scotland, working in close partnership with panel members and other professionals such as social work, education, the police, the health service and the courts system. SCRA's vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard
- Our hopes and dreams for the children of Scotland are what unite us
- Children and young people's experiences and opinions guide us
- We are approachable and open
- We bring the best of the past with us into the future to meet new challenges.

SCRA welcomes the opportunity to respond to this consultation.

SCRA recognizes that this consultation is in respect of the part 1 provisions of the Children (Scotland) Act 1995 – however, would like to state that any developments intended to:

1) **improve the ways in which children give their views;**
2) **improve the ways in which children are communicated with;**

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3) **improve the ways in which vulnerable people are supported;**

4) **changes to rights and responsibilities;**

5) **changes to legal definitions:**

6) **changes to legal presumptions –**

will also have an impact across the Children's Hearings System.

Improvements to the Court system in Scotland are welcomed – but any improvements to the Family Courts should, at the same time, be replicated in the Children's Hearing and Children's Hearings courts, sitting daily across Scotland, and dealing with some of the most vulnerable children and families in our country.

Question 1):

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

a) Yes – remove the presumption and do not replace it with a different presumption.
b) Yes – remove the presumption and replace with a new presumption based on a different age. c) No – leave the presumption in.
Why did you select your answer above?

(b) is the best fit answer but doesn't quite fit with our detailed response as given below:

SCRA are of the view that the presumption should be that all children will have a view about their situation and circumstances, regardless of their age / maturity / ability to explain what their view is. The presumption should be that the Court takes account of the child's view; and as a result of that actively seeks to determine the view(s), take account of them and respond to them accordingly. It is the effective communication of the child's view which is critical – not the age at which the child is deemed able to have a view.

Question 2):

How can we best ensure children's views are heard in court cases?
Please select as many answers as you want.
a) The F9 form.
b) Child welfare reporters.
c) Speaking directly to the judge or sheriff.
d) Child support workers.
e) Another way (please specify).

Why did you select your answer(s) above?

We would select all of the available options - but are only able to select one. SCRA's view is that there are benefits to all of the options, for different children in different situations. We should not be limiting the ways in which children can give views, instead we should be more creative about our engagement with children and in being more creative, seek to find the communication methods which work for individuals. There have been many recent advances in respect of gathering the views of children and young people and in using those views to assist decision making. If the Court were to prioritise the communication of the child's view then it would need to have a number of ways of doing this at its disposal, as such an individualised approach would need to take account of many different factors in relation to the individual child.

a) The F9 Form – is quite impenetrable. The language is legalese and a child or young person may struggle to complete this independently. 'Having your say' forms are also quite readily available – but perhaps do not lend themselves anymore to the preferences children have for giving and receiving information. There are a number of different online tools for children and young people to give information, for example http://mindofmyown.org.uk/ which could be adopted for use by the Court.
b) Child welfare reporters may need to develop their role along the lines of the role of Intermediaries in England and Wales - to focus clearly and specifically on the ways in which individual children communicate and make sense of information and the world.
c) For some children and young people their preference may be to speak directly to a Sheriff; or to speak to a Sheriff through the support of an advocacy worker. Work would require to be done on determining how and when a child would want to give their views to the court in all of the possible scenarios.
d) The child support worker appears to be a new role in relation to Family Court proceedings – it might make more sense to consider the remit of the role and whether currently involved professionals could carry out this remit; or indeed whether this would also form part of effective advocacy service provision across Scotland.
e) Children could be encouraged to use technology to film a statement about their views or to present them using a PowerPoint presentation. Again, this puts the emphasis onto preparing the child for giving their views and supporting them to enable them to do this in the most appropriate manner.

Question 3):

How should the court's decision best be explained to a child?
Please select only one answer.
a) Child support worker.
b) Child welfare reporter.
c) Another option (please specify).

Why did you select your answer above?

If we decide that the focus for the Court should be on a child being supported to communicate in the way that suits them then we need to be prepared for the consequences of that. In preparing a child to communicate with the Court we should also prepare the child to receive information from the Court. This would mean, we think, that the Court would need to be prepared to be quite flexible in its approach to explaining what has happened to children and young people; and that the important decision about how this will be done is taken alongside the consideration of how a child will give their views.

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

a) There should be no change to the current arrangements.
b) A new set of arrangements should be put in place that would manage and provide training for child welfare reporters.
c) The existing arrangements should be modified to set out minimum standards for child welfare reporters and allow the Lord President and Sheriffs Principal to remove them from the list if the reporters cease to meet the necessary standards.
d) Another option (please specify)
Why did you select your answer above?

Given the approach we have already outlined to prioritising the child's view and the child's communication preferences it would seem that a further scoping of the most effective way for this to occur requires to be done. It may be through additional training, or realignment of the expectations around the work of Curators and / or Court Reporters. It may be that a child support worker is required or that advocacy service provision would work. However, until the principled approach to ascertaining a child's views and then communicating effectively with them is determined it is difficult to answer the specific of this question.

Question 5):

Should the law be changed to specify that confidential documents should only be disclosed when in the best interests of the child and after the views of the child have been taken into account?
Yes
No
Why did you select your answer above?

Yes.
This would be in line with the approach we support in relation to ascertaining a child's view and a child's communication preferences. This would keep the child involved in discussions around the most sensitive of information and would give them a sense of ownership of the information. It also means that their position is respected and that there is a clear delineation for the sharing of confidential information.
There would need to be a clear exception to confidentiality if the child was raising a child protection concern which would necessitate professional action in order to keep the child safe – and this would need to be clear to everybody from the outset.

Question 6):

Should child contact centres be regulated?
Yes
No

Why did you select your answer above?

There should be a consistent standard in all Scotland's contact centres – and a parity in the experiences of children and families attending the centres. Children and families would also be protected by the development of minimum standards for contact centres; minimum training requirements for staff and a clear complaints procedure. This could give, in turn, a clear inspection framework and a clear model for any improvements that require to be made. Any court decisions which involved contact outwith such a regulated centre would require to be explained and justified by the bench (ie in relation to the distance of travel to a regulated centre).

Question 7):

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

This is a very difficult issue to determine – as we think the answer will differ on case by case basis and indeed will differ for individual children according to their age, their living situation and their own agency. It will also differ according to the relationships and the agenda of any adults involved in the child's life. Our view is that the Court should be required to consider other people who may be important to a child – with a view to possible rulings in that regard – BUT that the consideration of the Court also takes into account the way in which other important relationships are managed / facilitated using the principle of minimum intervention.

Question 8):

Should there be a presumption in law that children benefit from contact with their grandparents?
Yes
No
Why did you select your answer above?

BUT that grandparents would form a key part of the consideration of important relationships as outlined above.
The derived benefits of contact with grandparents cannot be assumed and need to be assessed on an individualised, case by case basis.

Question 9):
Should the 1995 Act be clarified to make it clear that siblings, including those under the age of 16, can apply for contact without being granted PRRs?
Yes
No
Why did you select the answer above?

We agree that the issue of contact for people of importance to children should be separate and distinct from parental rights and responsibilities. We think that this should apply to all 'people of importance' not just siblings (so grandparents and others as well).
There is however, a very difficult balance to be struck, for children and young people where decisions are already being made in the Children's Hearing with regard to contact. We would want the Children's Hearing to remain the primary decision maker during its involvement – so that court decisions in relation to contact with people of importance would become relevant once the hearing was no longer involved.
If a Hearing then became involved subsequently then the status of the people of importance within the Hearing should be clearly specified.
SCRA and CELCIS have recently published the report 'Contact Decisions in the Children's Hearings System' [1] and the conclusions from this study are relevant and important for all decisions made about who children should see (and the when / where / how decisions that accompany the decisions about who).

Question 10):

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

There has to be a renewed spotlight / focus on the ways in which professionals work with families in order for there to be a consistent national approach to maintaining the important relationships of looked after children. A consistent national approach would also develop expectations about this, which will then make ongoing sense for children and their families.
Work on an updated version of contact guidance for looked after children was completed in July 2016 – but does not seem to have published (the publication timeline in 2016 was August 2016). This guidance posed useful questions for practitioners when working with contact, assessing contact and also gave advice about what contact decisions should (and should not) be based on. The 2016 guidance also highlighted the importance of sibling contact including links to CLAN Law information on sibling contact[1].
Both Children's Hearings and Courts makes decisions about who looked after children should see, when, where, for how long. Decisions about contact form part of a moving continuum for looked after children, and are, at all times, affected by the planning for the child which is occurring.

Guidance on contact should (at the very least):

- give much more prominence to sibling contact
- cover the looked after children regulations
- cover evidence based practice on contact (or point to resources)
- cover all the interactions with the legal system – the tests that will be applied in children's hearings and in appeals against hearing's decisions as well as the tests applied to decision making in the Family and Permanence / Adoption Courts.

If a lack of clarity about what tests a hearing or sheriff on appeal from a hearing would apply is preventing guidance from being refreshed (which seems to have been the case), then SCRA would suggest that the government seek independent legal advice, perhaps counsel's opinion.
There are examples of contact guidance (such as the City of Edinburgh Council document called "Keeping in Touch; Managing Contact for Looked After Children") which, with editing to properly reflect children's hearings law, and to make them less unwieldy, could be a really good basis for a refreshed guidance.
However, the City of Edinburgh document arguably focusses very much on parental contact and too much on the impact of permanence planning on contact.
Reducing drift and delay with permanence planning would assist – making speedier, more effective decisions would perhaps allow practitioners more time holistically to assess contact with the wider family. The national focus on the PACE[2] programme should help with this.
Other things could also help – for example, there could be a legislative requirement on decision makers in the Children's hearing and Courts to consider whether to include a measure of contact in relation to the important people in a child's life, or to the people with whom family life has been shared?

[1] Sibling contact - https://www.clanchildlaw.org/sibling-contact

[1] PACE - https://beta.gov.scot/policies/looked-after-children/permanence-and-care-excellence/

Question 11):

How should contact orders be enforced?
Please select only one answer.
a) no change to existing procedure.
b) alternative sanctions (eg unpaid work, attending a parenting class or compensation).
c) making a breach of a contact order a criminal offence with penalties including non custodial sentences and unpaid work.
d) another option (please specify).

Why did you select your answer above?

SCRA thinks that the concept of the criminalisation of contact orders is not helpful at all.
However, if decisions are made about contact by a Court (or a Children's Hearing) then there is a reason for that decision and a Sheriff or a Children's Hearing have determined that a certain level or pattern of contact (for example) is in a child's best interest.
If that contact order is not being enforced then there has to be an underlying reason that the parties subject to the order are not abiding by the decision. For parties to move towards abiding by the contact decision the underlying reason(s) for it not being followed have to be:

- Determined
- Assessed
- Addressed in a positive way

keeping the best interest of the child in question at the centre of any work which is done.
It may be that the Children's Hearing is the best place for this work to be done and a referral to the Reporter or indeed straight to a Children's hearing (with established grounds for referral) could be the answer.

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

Yes
No
Why did you select your answer above?

No answer given to this question.

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

Yes
No

Why did you select your answer above?

Unlike section 41 of the Family Law Act 1986, there is no clear provision regarding jurisdiction in the Children's Hearings (Scotland) Act 2011. In cases involving other EU states, Council Regulation (EC) No. 2201/2003 ('Brussels II bis') regulates jurisdiction. It provides for habitual residence to be the primary basis for the jurisdiction of a Children's Hearing, subject to various provisions that enable a Children's Hearing to take action even though a child is not habitually resident in Scotland (Principal Reporter v LZ 2017 SLT 961).

We understand that in public law proceedings in other jurisdictions within the UK, habitual residence is the primary basis for the court's jurisdiction, with there being provision for measures to be taken in urgent situations where a child is not habitually resident.

In Principal Reporter v LZ, the Inner House followed the earlier decision of Mitchell v H 2000 SC 334 and held that the jurisdiction of the Children's Hearing is limited to making orders in relation to a child who is present in Scotland at the relevant time (the date when the reporter referred the case to the children's hearing). (The case of Walker v C (No.1) 2003 SLT (Sh Ct) 31 is also relevant here.) Accordingly when an issue of jurisdiction arises involving a Children's Hearing and a court in another part of the UK, different considerations will be applied in determining jurisdiction – the simple presence of the child for a Children's Hearing and habitual residence for the court in the other part of the UK. This may result in both claiming full jurisdiction (e.g. where a child habitually resident in England is present in Scotland at the time of the reporter's decision to refer the child to a Children's Hearing) or neither having full jurisdiction (e.g. where a child habitually resident in Scotland is present in England when the reporter decides to refer the child to a Children's Hearing).

We recommend that steps are taken to provide a clear legislative basis for the jurisdiction of a Children's Hearing in cases involving cross-UK issues, and that the approach is in line with that in Brussels II bis.

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

Yes
No

Why did you select your answer above?

This presumption is outdated and out of sync with current social mores. It is now possible to determine definitively who the father of a child is and in cases where there is dispute this is a remedy. In other cases a mother and father can between them determine how the child's birth should be registered and then, following that, how the child shall be cared for throughout childhood – including any relevant caring roles. A presumption is unnecessary and in cases where the husband of a woman is NOT the father is ultimately confusing.

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

Yes
No

Why did you select your answer above?

It would seem that making testing compulsory would automatically lead to sanctions if testing was not complied with – and as previously indicated SCRA does not support this sanction based / punitive approach to the family law. A DNA test result, whatever it says, does not provide any resolution to a parenting dispute (other than identifying biological parents) – and it is already possible to seek that DNA clarification in the Scottish Courts.
Where one party is refusing to allow consent for DNA testing and that test is required in order for further decisions to be made in the child's best interest then it should be open to the Court to require the test (overriding the consent of the refusing party). However, this should be a case by case decision for the Court, not a compulsory decision in every case.

Question 16):

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

Yes
No

Why did you select your answer?

This is a complicated area – not least because of the number of potential adults who, over the course of a child's 16 years of childhood, could gain parental rights and responsibilities. The increase in people with PRR's could dilute the effectiveness of the PRR's in respect of the child and leave no-one with clear, definitive responsibility.
That said, in some circumstances, where everyone is in agreement, it would make sense to have a streamlined process – perhaps a paper based process which is ratified by the Court, without the need for a Court hearing in front of a Sheriff. Such a paper based process would allow for closer judicial scrutiny of cases where the possible difficulties outlined above are beginning to occur and would allow for a Sheriff to set a hearing if there were aspects of the case which were causing concern.

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

Yes
No

Why did you select your answer above?

SCRA is of the view that maintaining the link between parental rights and responsibilities is crucial, and that the two are interlinked. It is too easy for 'rights' to be discussed without any mention of the responsibilities that come from those rights. Those 'rights' are enshrined in law – and the key for legislation should be to ensure that the parental responsibilities emanating from legal rights are clear and unequivocal.
SCRA have a concern that this is not semantic; that removing 'rights' from the discourse will have an unintended consequence on the lexicon of children's rights – where the rights are paramount (and not accompanied by a child's responsibility).

Question 18):

Should the terms "contact" and "residence" be replaced by a new term such as "child's order"?

Yes
No

Why did you select your answer above?
If you answered yes what terms should be used?

SCRA recognises that the language of looked after children is not the same as the language of childhood. Our own children do not have 'contact' or residence and it seems right that we make attempts to normalise the experience of looked after children as far as we can. However, if we change the language of family law we need to ensure that we change the language across the board of children's services in Scotland at the same time. It would seem a little incongruous for a Court to issue a 'child order' whilst a Children's Hearing issues a 'compulsory supervision order' – but having said that, a 'child order' focuses decision making on the child immediately – and would be flexible enough to allow consideration of other factors of import in the child's life.

Question 19):

Should all fathers be granted PRRs?

Yes
No

Why did you select your answer above?

The act of fathering a child is not what is important – what is important is a commitment to parenting that child.
If a father is committed to parenting and signs the birth certificate of a child, he already gets PRR's – and the consultation states that 'the vast majority of fathers now obtain PRR's automatically'. Granting PRR's to all fathers in an attempt to change the behaviours of the minority of men who are unwilling or unable to commit to parenting a baby / signing a birth certificate seems heavy handed. It is also inappropriate – as it shifts the burden of challenging the PRR of a father who is also a rapist or an abuser onto a vulnerable woman.

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

Yes
No

Why did you select your answer above?

The passage of time will mean that this is not required after 2022 and until then there is a remedy which can be pursued in the court if that is required. This backdating is not required.

Question 21):
Should joint birth registration be compulsory?

Yes
No

Why did you select your answer above?

If this becomes compulsory it would be another element of parental behaviour which would need to be subject to sanction of it was not complied with. There can be many, many reasons why joint birth registration doesn't happen – and in each of those cases a woman would need to justify why. This is inappropriate. A father / child relationship does not come from a piece of paper or the single act of signing a register. Nor should it.

Question 22):

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

Yes

No

Why did you select your answer above?

If a father's intention to parent is clear from their involvement in another jurisdiction then it should be honoured in Scotland.

Question 23):

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

Yes
No

Why did you select your answer above?

It is fair that both parents of a child, wanting to exercise their responsibilities should have an ongoing involvement with the child – unless it can be demonstrated that this is not in a child's best interest. There may be a number of circumstances where this is not in a child's best interest. Rather than a rebuttable presumption in law it could be a principle of the approach taken by the legislation, which can be overruled by certain circumstances. Specifying these circumstances could be possible (eg: rape, domestic abuse, sexual abuse, where the involvement of a parent is not in a child's interest).

Question 24):

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

Yes
No

Why did you select your answer above?

See answer to Q 23 above.

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

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

Why did you select your answer above?

Given the General Data Protection Regulation (GDPR) this would be very difficult to put into action – and would take education staff a disproportionate amount of time to check details and amend them as required. Non-resident parents can already take an active interest in a child's education – the key is whether that active interest is in the child's best interest or whether it is something more to do with a parent's personal motivation. If it is genuinely in a child's interest to involve a non-resident parent then key decision making forums already do this (the Children's Hearing / Child Protection Case Conference) in ways which already take account of data protection and information security.

Question 26):

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

Please select only one answer
a) Yes – legislation.
b) Yes – guidance.
c) Yes – other (please specify).
d) No – no further action is required.

Why did you select your answer above?

See answer to Q25 above.

Question 27):

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

Yes
No

Why did you select your answer above?

Further work needs to be done in order to separate out the key decisions which may be important for a child or a young person. Decisions about contact with siblings or grandparents should not have to involve decisions about parental rights and responsibilities and taking a clearer, simpler approach would be of benefit to all.

Question 28):

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

Yes
No

Why did you select your answer above?
If you selected yes what should be done?

The concept of Parental Alienation Syndrome (PAS) has been completely discredited. The originator of PAS, Richard Gardner, held extreme views in relation to paedophilia, and the theory was used to undermine allegations of child sexual abuse. The syndrome has not been accepted in the mental health arena due to a lack of sufficient scientific reliability.
Arguably, the lingering concept of PAS has led to the validity of and respect for children's views being undermined. There may be justifiable reasons for a child not wanting contact with a parent, such as having been abused, including emotional abuse by perpetrators of domestic abuse.
Parental alienation, or intractable conflict between parents is recognised as existing in some cases. However, there is no accepted definition of parental alienation and its prevalence is therefore unknown. Research from 2018 commissioned by CAFCASS, Wales, found the 'evidence base for parental alienation to be very limited because of a lack of robust empirical studies' (p41) and that 'Where allegations or issues of alienation arise, early determination of the facts is seen as the essential factor in achieving the best outcome for the child.'(p42)[4].
It is also not abnormal for a child to align more with one parent than another (paragraph 4.1 of Welsh research above).
There may be justifiable reasons why one parent opposes contact for the other parent, such as domestic abuse. Domestic abuse is a choice by the perpetrator and amounts to emotional abuse of the child. It is important that courts do not consider that it is inevitably safe for children to have contact with a parent who was domestically abusive. Research has shown that in extreme cases this can result in child deaths.
If parental alienation is suspected, then it is important that there is real evidence of the actual behaviour by the parent suspected of alienating, not just suspicion that a child's views could be coloured. Such suspicions, absent evidence, unjustifiably undermine the validity of children's views.
Where there is evidence of actual behaviour by one parent and that behaviour is such that it is detrimental to the child or causes the child to suffer, a referral to the Children's Reporter can be made.

Question 29):

Should a person convicted of a serious criminal offence have their PRRs removed by the criminal court? Please select only one answer.

a) Yes – by an application to the criminal court following a conviction to remove that person's PRRs.
b) Yes – by giving the criminal court a duty to consider the removal of PRRs when a person is convicted of certain types of offences.

c) No – leave as a matter for the civil courts.
d) No – another way. (please explain).

Why did you select your answer above?

This should be a matter of fact and circumstance on an individualised case by case basis. The criminal court does not seem to be the court with the requisite expertise to make these decisions – but it could be that there is a requirement on the criminal court to request a civil court to consider the removal of PRR's. The cases where this requirement should occur could be specified.

Question 30):

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

Yes
No

Why did you select your answer above?

Instead there should be a clear definition of 'exercising' rights – which takes account of a person's intention to exercise rights were it not for barriers which can prevent this from happening.

Question 31):

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

Yes
No

Why did you select your answer above?

It would follow that if we support clear arrangements for parental rights and responsibilities and clear principles in relation to parenting, then we should enforce controls on attempts to circumvent or avoid these arrangements.
There are, however, significant logistical difficulties in enforcing this approach – and a re-think across the United Kingdom may be needed in relation to travel documentation and permissions. The UK Border Agency are already insisting that mothers carry birth certificates of children with a different surname in order for them to get back into the UK without questioning.
There would also need to be a clear way for consent(s) to be given – and a public awareness raising in relation to the new offence and how it could be committed. It would seem that the offence could apply to anyone travelling with children – it is difficult to see how specific individuals of concern could be targeted.

Question 32):

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

Yes
No

Why did you select your answer above?

There needs to be a clear and unequivocal way for victims of domestic abuse to be identified – but along with other vulnerable witnesses they should be protected from further abuse through the system.

Question 33):

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

Yes
No

Why did you select your answer above?

The wider use of case management hearings in the Child Welfare Court would allow the relevant protections in relation to vulnerable witnesses to be built into the proceedings. It would also allow for procedural matters already considered (the voice of the child / communicating with the child) to be determined.

Question 34):

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

Please select only one answer.
a) Yes – retain as currently.
b) Yes – but amend (please give details).
c) No – remove these provisions.

Why did you select your answer above?

The matters that a court should regard need to be promoted and used – and could be improved by the inclusion of any ongoing need to provide further protections to an adult party in the proceedings (in certain specified circumstances).

Question 35):

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

Yes
No

Why did you select your answer above?

Repeated litigation is not in the interest of any child. However, if parties are not satisfied with the judicial decisions which have been made, and a more discursive, review based approach would be of benefit then a court should be considering whether the Children's Hearings System is a better forum for discussing the child's needs and involving local authority social work departments in developing a plan. If a decision is not working then this needs to be addressed. Building in another bureaucratic step in order for this to happen seems unnecessary.

Question 36):

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

Yes
No

If yes, what action should be taken?
Please select all answers that apply.

a) Introducing a duty in legislation on the civil courts to establish if there has been domestic abuse.
b) Placing a duty in legislation on child welfare reporters that they must consider in each case whether there is evidence of domestic abuse and, if so, report on it accordingly.
c) Including domestic abuse in any welfare checklist for the courts to consider in section 11 cases.
d) Discussing with the Law Society of Scotland and the Family Law Association whether guidance for practitioners would be helpful.

It is the nature of the information and the source of the information which is problematic. The civil court should certainly be informed of any criminal conviction in relation to domestic abuse – but duties in relation to establishing domestic abuse would appear to be onerous (if not impossible) and would certainly detract from the focus of the court on a child and a child's best interest.

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

Yes
No

If yes what should be done?

Why did you select your answer above?

If there is domestic abuse within a family we know that this will have a pervasive and corrosive impact across all of the people within that household. In many ways it makes sense for a single decision maker to consider all of the circumstances of a family and for the people involved to be very clear about what is happening. However, the standards of proof in the civil and criminal courts are very different – and in addition across Scotland the Children's Hearings (Scotland) Act 2011 allows Children's Hearings to address domestic abuse specifically as well – with another process / standard of proof. Aligning work through risk assessment across all these decision makers will depend on a number of factors, including (but not exclusively):

1) The origin of the allegations;
2) The evidence presented in respect of the allegations;
3) The intended outcome of the proceedings.

It would be very difficult, for example, if a contact case about a child – focused on the child's best interest – turned into a criminal case about the behaviour of the Dad, delaying decision making in respect of the child for a number of months.
The improved communication would not just need to be between the criminal and the civil court, it would require to be between either of the courts (or both of them) and the Children's Hearings System. Grounds for referral in respect of Section 62 (2) (f) of the Children's Hearings (Scotland) Act 2011 could be found established (for example) in either the criminal or civil court and the matter sent to the Children's Hearing for disposal – if ongoing professional involvement with a concrete review / appeal process was decided to be the best route for supporting an individual child.

Question 38):

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

Yes
No

Why did you select your answer above?

See above. Any improved interaction also needs to involve the Children's Hearing – whilst being mindful of the time that this interaction would / could take.
In addition there should be consideration of the ways in which the views of relevant people are given to the courts and to Children's Hearings in cases where the presence of one person is preventing another person giving their view. The Children's Hearings (Scotland) Act 2011 - section 76 is a power to exclude relevant person from children's hearings
(1)This section applies where a children's hearing is satisfied that the presence at the hearing of a relevant person in relation to the child—

(a) is preventing the hearing from obtaining the views of the child, or

(b) is causing, or is likely to cause, significant distress to the child.

(2)The children's hearing may exclude the relevant person from the children's hearing for as long as is necessary.

(3)After the exclusion has ended, the chairing member of the children's hearing must explain to the relevant person what has taken place in the relevant person's absence.

SCRA think that an equivalent power for the Hearing to exclude a relevant person in order to take the views of another relevant person would strengthen the ways in which a Children's Hearing can keep safe those people who have a right and a responsibility to be party to the Hearing's discussions. The detail of this power and how / when it could apply would require further development.

Question 39):

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

Yes
No

Why did you select your answer above?

There should be a principle of minimum delay in cases involving children – however, the introduction of the principle as outlined above in primary legislation would not have any effect. Instead, there would need to be a clear timescale / expectation around the time interval standard that any court case involving a child should follow / take. The Blueprint in relation to Children's Hearings timescales has attempted to address this – but, in part because of the specific nature of individual cases – it is very difficult to put a blanket timescale in place across all civil (or criminal) matters. If we then speak about matters which, at different times, may be addressed by possibly 3 principle courts (civil, criminal, Children's Hearing) then a single timescale expectation becomes almost impossible to set, let alone achieve.

Question 40):

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

Yes
No

Why did you select your answer above?

Most of the civil cases are already dealt with in the Sheriff Court.
It may be appropriate for the Sheriff Court to make the decision about whether a case should be considered by the Court of Session for a particular reason – and if so refer the matter to the Court of Session.

Question 41):

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

Yes
No

Why did you select your answer above?

If you answered yes what should be in such a checklist?

This would be helpful and could make explicit the relationships between the civil / criminal courts and between the courts and the Children's Hearing. It could be made clear that any checklist is not exhaustive – but gives the court suggestions about the areas which may be of import for consideration.

Question 42):

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

a) Yes – introduce Mediation Information and Assessment Meetings in Scotland.
b) Yes – better signposting and guidance.
c) Yes – other (please give details).
d) No – no further action required.

Why did you select your answer(s) above?

It makes sense for families to provide their own solutions wherever possible – and whenever there is a family dispute the expectation should be that informal processes should be tried (or even exhausted) before the court becomes involved.

A summary of the informal process could be provided to a court, should a court then become involved. In those cases where the Istanbul Convention is relevant there should be an exception – and the court should be the arbiter.

Question 43):

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

Yes
No

Why did you select your answer above?

The situation is currently not as clear as it could be and regulations would change that.

Question 44):

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

Yes
No

Why did you select your answer above?

This guidance should be based on the framework given to the courts in any re-write of section 11 and the key areas for the consideration of the court. This would be a big piece of work – and would require to be updated as a result of the way in which the knowledge and evidence base for this kind of work is constantly shifting.

Question 45):

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

Yes
No

Why did you select your answer above?

As long as the people with PRR's agree, then a young person should be able to change their name. This is in line with UNCRC and in line with SCRA's approach to gender reassignment and fluidity.
However, we are not certain that a 'test of capacity' is workable or fair – and we are also not sure that shifting the onus of the process in order to change the name over to a young person is appropriate or fair either. Allowing the young person's view to prevail over opposing views from the people with PRR's also seems to be an approach which could add layers of confusion to situations where there is already disagreement.

Question 46):

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

Yes
No

Why did you select your answer above?

Young people should absolutely be able to give a view about their name / identity.
It may be that advocacy service provision for these young people would be helpful / beneficial / enable them to be fully involved in discussions around this.

Question 47):

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

Yes
No

Why did you select your answer above?

This would make the situation regarding his parenting intent clear to everybody.

Question 48):

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

Yes
No

Why did you select your answer above?

Deemed relevant person status relies on a Children's Hearing applying a legal test to the information in front of them. The application of the test about relevant person status – The Childrens Hearings (Scotland) Act 2011, s 81 (3)**The pre-hearing panel must deem the individual to be a relevant person if it considers that the individual has (or has recently had) a significant involvement in the upbringing of the child** – must be made, and justified by the lay panel members within the Children's Hearing.
The application of the test then has a significant effect on the further involvement of individuals within the Children's Hearing – if people are deemed relevant persons then they receive all of the paperwork for the hearing in the same way as the people with PRR's for the child, the child and the panel members.
We think that individuals will want to challenge a decision about deemed relevant person status on the basis of their emotional attachment to a child and their wish to be involved in the child's life on an ongoing basis. Individuals will not challenge a decision specifically on the basis of the legal test.
This means that it is difficult for specific questions about the test itself to be addressed by judicial review as and when they occur.

Giving the Principal Reporter a right to appeal a Sheriff's decision about deemed relevant person status would allow clarity and consistency to develop in relation to the application by the Children's Hearing of the significant involvement test.

SCRA do not see that the granting of this specific appeal right would have any impact on the reporter's role in any other Children's Hearing appeals.

Question 49):

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

Yes
No

Why did you select your answer above?

The Children's Hearings System (SCRA and CHS) has embarked on a digital transformation programme. This programme is intended to 'future proof' the working environment of individuals within both NDPB's but is also intended to improve the experiences of children and families involved with the Children's Hearing System. SCRA sees those improvements including:

1) The facilitation of remote attendance at Children's Hearings (for example: where travelling lost distances / where being in the same building as another attendee at the hearing is unsafe / where remote attendance for part of a hearing makes most logistical / practical sense).
2) Children (and other people potentially) would be able to give their views to a Children's Hearing in a variety of supported ways – not just in person / putting pen to paper.

These changes would not alter the basic principles of the Children's Hearing or the fundamental position that the Children's Hearing makes the 'best' decisions if everyone can be involved in the same discussion, in the same place and at the same time.

Question 50):

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

Yes
No

Why did you select your answer above?

Although SCRA would stress that we support the provision of safeguarder reports / independent reports to local authority social work departments, but there will be other participants within the hearing who do not get sent reports (education and health for example).

Social workers should see the recommendations of independent professionals – as they undoubtedly have an effect on the recommendations / assessments that are being made by social work departments. In cases where a safeguarder / independent report writer does not share their report or recommendation with a social worker it can make the social workers position within a Children's Hearing very difficult.

Question 51):

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

Yes
No

Why did you select your answer above?

A lot of work has happened in recent years in relation to the evidence of vulnerable witnesses – including the Evidence and Procedure review, the High Court Practice Note on Commissions and the Pre-recorded Evidence Bill. All of this work is all helping to shift the culture and practice in criminal trials, but Children's Hearings proofs involve some of the most vulnerable children (and adults) in our society, and culture and practice cannot be allowed to stagnate or fall behind. Therefore, SCRA is asking for the same or similar provisions to be introduced into proof proceedings as are in the process of being introduced in criminal proceedings. In the same vein SCRA think that the same / similar provisions in relation to vulnerable witnesses need to be included within civil proceedings.

Specific issues that SCRA think would help vulnerable witnesses are:

1) Introduction of the Barnahus concept as set out in the Level 1 vision set out in the Evidence and Procedure Review Report, Child and Vulnerable Witness Project – Pre-recorded Further Evidence Work-stream Project Report, September 2017. This approach should be phased in not just for criminal proceedings involving the most serious offences, but for any child who is currently subject to a joint investigative interview (which is conducted when there are child protection concerns). Key issue is that from the witness's perspective, the things that are likely to be distressing or harmful are not necessarily related to whether the proceedings are criminal, or involve the most serious offences.

2) Until Barnahus can be implemented:

a. One of the key issues is identifying a vulnerable witness early. Therefore, there ought to be a duty on a party (PF, Reporter, accused, respondent) to identify whether any witness they are calling is a vulnerable witness with sanctions for failing to do so (unless there were reasonable grounds for failure). Likewise, a power for decision-maker to fix a hearing or take some positive step if it appears to the decision-maker that the matter raised in the initiating document – complaint, petition, grounds – will involve the evidence of a child or VW.
b. Make evidence by commissioner to be conducted asap the presumed best special measure for children's hearings proofs (perhaps set an expected timescale e.g. within 28 days of the first court calling), in line with the presumption set out in the Vulnerable Witnesses (Criminal Evidence)(Scotland) Bill.
c. Legislatively (primary or secondary legislation) require a "ground rules hearing" to be held whenever a vulnerable witness is to give evidence in proof proceedings, requiring written questions to be set out in advance, and requiring solicitors/advocates/reporters/fiscals to have confirmed they have read the appropriate Advocate's Gateway toolkit. For a vulnerable witness, keeping questions to those that are necessary is essential whether evidence is taken by commission, or by using any other special measure, or no special measure – arguably all the more so when evidence by commissioner is not used.
d. If possible the Lord President should encourage all sheriffs to attend training provided by the Judicial Institute on vulnerable witnesses – this could if possible include training on ground rules hearings, advance judicial scrutiny of questions, restrictions on putting the case, Advocates Gateway toolkits regarding appropriate questioning, the impact of trauma on memory and the ability to give evidence, informal strategies to assist witnesses, such as starting to hear evidence on time (waiting around increases stress), and the importance of considering practical issues in advance to ensure evidence proceeds smoothly (e.g. where people will sit, how introductions effected) and being aware of the needs of the witness in advance (e.g. best strategies to "ground" the witness if fight, flight or freeze due to trauma)

e. Only "certified" solicitors/advocates having undertaken specialist training and continuing professional assessment for questioning vulnerable witnesses be able to question vulnerable witnesses; or learn from experience in England in relation to creating free pan-professional training on vulnerable witness advocacy for all solicitors/advocates/reporters/fiscals who might undertake such work.
f. Explicitly recognise the Advocates Gateway toolkits as best practice in court rules Undertake multi-agency work including Law Society, Faculty of Advocates, SCRA, COPFS along the same lines as the Evidence and Procedure Review in order to refresh multi-agency best practice in questioning vulnerable witnesses, pre-court visits etc. Multi-agency work could consider creating a training "framework" which each agency would be responsible for implementing.
g. Consider an intermediary service for witnesses with particular difficulties or communication impairments.

2) There should be a complete prohibition from the outset of personal examination of complainers in all proceedings.

Question 52):

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

Yes
No

Why did you select your answer above?

It would make sense to clarify the position in legislation if it is unclear. This makes sense regardless of whether there has been any challenge to the current position.

Question 53):

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

a) The partial Business and Regulatory Impact Assessment;
b) The partial Child Rights and Wellbeing Impact Assessment;
c) The partial Data Protection Impact Assessment; or
d) The partial Equality Impact Assessment?

Yes
No

If yes please provide your comments below.

Modernisation of the Family Law in the ways described throughout the consultation will have profound consequences for the legislation currently operating to support vulnerable children and families through the Children's Hearings System.
SCRA supports the modernisation strategy but would urge the Government to consider from the outset how the positive changes to the family law can be implemented with Children's Hearing legislation, so that Children's Hearing legislation does not fall behind.
SCRA also thinks that there will be associated costs involved with advocacy service provision, an intermediary service provision and additional required training in respect of vulnerable witnesses which are absent from the current costings.

Question 54):

Do you have any further comments?

Yes
No

If you have answered yes please provide your comments below.

SCRA Practice & Policy Team 2018