

Aberlour's response to the Scottish Government's consultation: Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy

September 2018

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Introduction

Aberlour works with vulnerable children, young people and families throughout Scotland across a range of settings. Working in over 40 locations around the country, we help to overcome significant challenges, like growing up in and leaving care, living with a disability, poor mental health, or the impact of drugs and alcohol on family life. We aim to provide help and support at the earliest opportunity to prevent problems spiralling out of control. As the principal piece of legislation in Scotland pertaining to children and families for over twenty years, the Children (Scotland) Act 1995 has provided the legal basis for decisions made, which impact upon many of the children, young people and families we work with. Therefore, we think it is appropriate that the Scottish Government should seek to ascertain whether this central piece of legislation reflects and recognises the experiences of children, young people and families in Scotland today.

The proposals set out in the Scottish Government's consultation on a review of Part 1 of the Children (Scotland) Act 1995 provides a welcome opportunity to consider the efficacy of the provisions within the 1995 Act. Whilst the proposals set out in this consultation aim to improve consistency and clarity regarding how parental rights and responsibilities are recognised and promoted within law, it also rightly recognises that family structures and networks are markedly different now for many families in Scotland than what we understood as societal norms when the 1995 Act was written. For many of the children, young people and families we work with such traditional family structures and roles are unfamiliar or anachronistic. Therefore, it is essential that the law in Scotland reflects the variety of family experiences that exist for families across Scotland. In addition, we welcome the opportunity that reviewing and updating the 1995 Act will provide, in aiming to embed consistency across policy and legislation relating to children and families, with regard to how we support and promote children's rights in Scotland today. We believe doing so will support the Scottish Government's stated commitment of further incorporating the principles of United Nations Convention of the Rights of the Child (UNCRC) into policy and legislation.

In responding to this consultation, we have chosen to answer those questions most relevant to the work we do and to which we are most qualified to offer our opinion, or to reflect the opinions and experiences of the many children, young people and families across Scotland we work with every day.

Part 2: Obtaining the Views of the Child

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?

a) Yes – remove the presumption and do not replace it with a different presumption.

It is our opinion that removing the presumption that a child aged 12 or over is of sufficient age and maturity to form an opinion would ensure greater consistency within Scots Law with the United Nations Convention of the Rights of the Child (UNCRC). The Scottish Government has announced in its Programme for Government 2018-19 that it intends to fully incorporate the principles of the UNCRC into law¹. Articles 12 and 13 of the UNCRC intimate that the views of children must be respected and listened to but does not identify a minimum age for when a child's views should be considered². We agree that ***“the main advantage of removing the presumption that a child 12 years of age or more is of sufficient age and maturity to form a view is that this may increase the number of children under the age of 12 whose voices are being heard”***. It is our experience that children younger than 12 can be supported to express their views, and there are well evidenced methods of supporting appropriate and meaningful engagement and participation of younger children in order to ensure their views are elicited and represented to inform decisions which affect them. We also believe that any provision within the 1995 Act ensuring younger children are appropriately supported to express their views must be clear and explicit, in order that obtaining younger children's views occurs consistently.

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

a) The F9 form.

Capturing and recording children's views on F9 forms can ensure children and young people who do not want to, or for whom it is inappropriate, to attend court, have their views represented. However, we believe that in order to support children to express their views meaningfully the design and content of the form must be child-friendly, with consideration for the language used and the inclusion of pictures and symbols which can support children to communicate in ways that are easy, comfortable and familiar. In addition, where and when children are supported to complete the form are also important considerations, ensuring this can occur in a comfortable and friendly space avoiding parental or other undue influence. Children are most commonly used to using digital apps and mobile devices, and therefore an app or e-version of any form would provide more opportunity for children to express and share their views and communicate in a way most familiar to them.

d) Child support workers.

¹ <https://beta.gov.scot/publications/delivering-today-investing-tomorrow-governments-programme-scotland-2018-19/pages/8/>

² https://www.unicef.org/crc/files/Rights_overview.pdf

Child support workers are qualified and experienced in working with vulnerable children and have a knowledge and understanding of child development and the impact of trauma. It is our opinion that such trained and qualified practitioners are best placed to support children to express and share their views, particularly in circumstances and situations which are likely to provoke anxiety and stress in children. The skills and experience of child support workers in engaging and communicating with vulnerable children, and in developing positive and trusting relationships, are key to ensuring children are supported to express themselves honestly, meaningfully and confidently.

We feel additional ways of supporting children to share their views should also be considered. There are circumstances whereby video could be used in advance of sessions to gather a child's views, which could ensure a child is exposed to less anxiety or stress, particularly where a child may have experienced trauma in relation to the given circumstances. In addition, we believe the Barnahaus model of supporting children under 16 who are vulnerable witnesses in serious criminal cases³, whereby they are supported to give evidence away from courts to expert interviewers who are skilled in taking the evidence of children, should be considered for all court proceedings involving children.

3. How should the court's decision best be explained to a child?

- a) Child support worker.

It is our opinion that in circumstances where a court's decision affects a child there should be a duty on the court to inform the child about that decision and explain what it means, in an appropriate and child-friendly way. We believe a child support worker would be best placed to do so. Indeed, feeding back and keeping in touch with children and young people regarding their contribution or participation in any capacity is a key principle of a children's rights approach to participation⁴. If it is intended that the principles of the UNCRC are embedded within the revised 1995 Act, then that should ensure there is a duty on courts to communicate to children clearly and appropriately: the expectations and purpose of expressing their views; that all contributions are valid; accurate information; feedback to let them know what their contribution has achieved. We believe in most circumstances experienced and qualified child support workers will be best able to communicate with children effectively and explain decisions made by the court, particularly where the same child support worker has already established a relationship with a child through supporting them to express their views in the first place. It might be that in some situations a child's key-worker or a family member, in circumstances where they are a trusted adult and have a positive relationship with the child, inform the child about the court decision, together with a children's support worker to ensure what is being communicated is accurate. Again, we also believe that the Barnahaus model should be considered to support children in such circumstances.

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

³ <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2017/09/28/new-vision-to-change-children's-and-vulnerable-witnesses'-court-experience>

⁴ <https://www.cypcs.org.uk/education/golden-rules/read-me>

- b) A new set of arrangements should be put in place that would manage and provide training for child welfare reporters.

We believe that regulation of child welfare reporters and curators *ad litem* is essential to promote quality and best practice amongst practitioners, and also to ensure consistency of experience for all children who have contact with child welfare reporters or curators *ad litem*. We believe a new set of arrangements, similar to the current arrangements which are in place regarding the recruitment, training and management of safeguarders in the Children's Hearing System, and as described in the consultation paper, would best achieve this.

Part 4: Contact

6. Should child contact centres be regulated?

Yes.

Consistency, quality and comfort of environment are all essential requirements for contact settings to support and ensure quality family contact. Therefore, we believe that regulation of contact centres will most likely ensure such consistency and quality in all contact centres across Scotland.

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

It is our opinion that where a child expresses or indicates they wish to continue to have relationships with family members who are important to them, or it can be shown that family members have significant relationships with a child, then there should be a duty within law to support this, where doing so will not adversely impact upon their wellbeing. We believe that residence and contact arrangements must limit disruption to a child's routine, and all arrangements should place the child at the centre with others working around this to meet the child's needs. We recognise that supporting parents to work together to make contact with other family members possible will be necessary in many circumstances, particularly where parental disputes are significantly adversarial. We believe this can be achieved by ensuring appropriate assessments to determine the suitability of contact with identified family members are completed at the earliest opportunity, and decisions on contact arrangements can be agreed, and also reviewed, without having to return to court.

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

No.

Grandparents commonly are important and key individuals in their grandchildren's lives, most often providing positive, supportive and caring relationships for children. Current Scottish Government policy rightly recognises and reflects this within the National Parenting Strategy⁵ and the Charter for

⁵ <https://beta.gov.scot/publications/national-parenting-strategy-making-positive-difference-children-young-people-through/>

Grandchildren⁶, as it also recognises the roles of other extended or additional family members, such as aunts, uncles, step-parents and kinship carers. It is our opinion that the courts should recognise the important role grandparents often play in children's lives, as they should also consider the role of any other extended or additional family members who are identified as having key relationships with a child. However, it is not always the case that grandparents promote the best interests of the child. In our experience, grandparents can become equally embroiled in parental disputes regarding contact and custody of children. Therefore, we believe that, in line with current national policy, courts should have a duty to consider contact arrangements with grandparents, where it can be shown that contact is in the best interests of the child, but not presume that a child automatically benefits from contact with their grandparents.

9. Should the 1995 Act be clarified to make it clear that siblings, including those aged under 16, can apply for contact without being granted PRRs?

Yes.

We are unclear in which circumstances an application for contact under Section 11(2)(d) of the 1995 Act would be made by a sibling, however children have a right to maintain contact with their siblings and local authorities have a duty to support that, as stipulated in the Guidance for Looked After Children (Scotland) Regulations 2009⁷. Therefore, all references in law to a child's right to contact with siblings should be consistent and clear and ensure those under 16 can apply for contact with siblings, if in certain circumstances this is the appropriate process to enable them to do so. This does not presume that contact will be granted, but where contact with siblings will not adversely affect a child's wellbeing then there should be no reason to prevent contact with siblings from being supported and maintained. We also welcome the recent Supreme Court judgement which recognised the failure of the existing provisions in the 1995 Act to adequately support the right to contact of non-looked after children with their looked after siblings⁸. In addition, recognition of who a child views as a sibling, such as other children a child has grown up with or has a close familial relationship with (as outlined within the 2009 Regulations), must be taken into account by the court when considering an application for contact, given the wide ranging and complex family structures that many children grow up in.

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?

It is our experience that despite the 2009 Regulations outlining that contact between children who have shared a family life should be "**recognised in its own right and not purely as part of contact with parents**"⁹, in practice this often does not occur or fails to be sustained for a variety of reasons. Concerningly, it has been the experience of some children and young people we work with that denying or preventing contact with siblings or other children has happened as a punitive measure, as a result of "behaving badly" at school, for example. In other circumstances contact has not been

⁶ <https://beta.gov.scot/binaries/content/documents/govscot/publications/guidance/2018/04/parenting-plan-charter-grandchildren/documents/00534180-pdf/00534180-pdf/govscot:document/>

⁷ <https://www.gov.scot/Resource/Doc/344490/0114631.pdf>

⁸ <https://www.clanchildlaw.org/news/significant-ruling-issued>

⁹ <https://www.gov.scot/Resource/Doc/344490/0114631.pdf>

supported due to staff capacity issues. A recent study by the University of Strathclyde's School of Social Policy and Research showed that contact arrangements between siblings who are placed permanently away from home vary greatly in frequency and quality, and that "***estrangement from siblings was a common experience***"¹⁰. We agree with the study's recommendation for a review of statutory guidance in order that assessment, placement, contact arrangements and the promotion of wellbeing better reflect the needs of looked after children. In addition, keeping siblings together by introducing a duty on local authorities to place them together, unless it is clearly identified that this is not in the best interests of either child, would best ensure that looked after children can maintain contact with their siblings.

11. How should contact orders be enforced?

b) Option two: alternative sanctions (e.g. unpaid work, attending a parenting class or compensation).

In imposing any kind of sanction, consideration must be given as to what is in the best interests of the child. We believe the imposition of a criminal record or custodial sentence on parents will not support or promote a child's wellbeing and could serve only to create further problems for parents, and consequently adversely impact upon their child. It is our opinion that however contact orders are enforced, we must ensure there is a trauma informed approach to doing so. Parents' failure to maintain contact or fulfil a contact order can be the result of issues resulting from trauma and, therefore, this should also be a consideration before the imposition of any sanction.

Part 7: Parental Rights and Responsibilities

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.

However, this should only occur when the child's views have been sought on whether they want a step parent to have parental rights and responsibilities. Step parents are often key relationships for children, in many instances fulfilling parental roles regardless of whether they have been formally granted parental rights and responsibilities. Therefore, we believe establishing a step parents' parental rights and responsibilities agreement, including an appropriate assessment process to be undertaken, removing the need to go to court to obtain and complete these for step parents, would likely limit or prevent both individuals' and court time being spent unnecessarily on court processes that can be completed outwith court.

17. Should the term "parental rights" be removed from the 1995 Act?

No.

We are uncertain what this may achieve in relation to a child's wellbeing. In our experience, a parent's right to child contact can often be used in parental disputes as a way of exercising control or furthering

¹⁰ <https://www.scra.gov.uk/wp-content/uploads/2017/02/SWSPresearchbriefing.pdf>

animosity between separated parents, often impacting negatively upon the child. However, the right to a private and family life, in accordance with Article 8 of the European Convention of Human Rights (ECHR)¹¹, and therefore a parent's right to contact and continuing relationship through keeping in touch with their child, will not be diminished or removed by the removal of the term "parental rights" in the 1995 Act. It is our opinion that in circumstances where there is parental dispute regarding residence or contact with a child, all agencies involved, including the courts, should aim to support parents to access the appropriate help and support they need to resolve disputes. Ensuring a focus on the wellbeing of the child at the centre of any parental dispute over residence or contact must be the primary purpose for all involved, and therefore whichever agency supports parents in such circumstances, including the courts, should work with parents to focus their attention on what is in the child's best interests.

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

Yes.

We believe this will help to provide a focus on the child's best interests and needs by bringing together both elements of a child's residence and contact arrangements as on overall consideration in relation to a child's wellbeing, and better promote equity in relation to both parents' responsibilities as well as rights.

19. Should all fathers be granted PRRs?

Yes.

Societal norms have changed and families where parents are unmarried are recognised as accepted and normal family structures. We believe most often it is in a child's best interest that their father is acknowledged as having PRRs automatically regardless of the status of their relationship with the child's mother. By ensuring all fathers have PRRs automatically, it is our opinion that this would better promote shared care arrangements and reduce the likelihood of disputes amongst parents who have never lived together. However, there should be provision to withhold the automatic granting of PRRs in certain circumstances, such as where there is evidence of abuse or a child has been born as the result of rape.

21. Should joint birth registration be compulsory?

Yes.

We believe this would be in accordance with Article 7 of the UNCRC¹² and limit instances of fathers seeking to have their name added to their child's birth certificate through going to court, which impacts upon both parents and court time. However, similarly to the automatic granting on PRRs, we

¹¹ https://www.echr.coe.int/Documents/FS_Parental_ENG.pdf

¹² <https://www.cypcs.org.uk/rights/uncrcarticles/article-7>

believe there should be provision that where there is evidence of abuse or a child has been born as the result of rape then the mother should not be compelled to jointly register the birth of the child.

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.

We believe the automatic granting of PRRs as outlined previously should always apply where a person is the recognised father of a child, regardless of where the child was born.

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

No.

We believe that in most circumstances a child benefits from both parents being involved in their life. Having both parents involved in a child's life is evidenced to have a positive impact on a child's wellbeing, however, there are circumstances where having either parent involved in a child's life may not be in their best interests. There are examples of other countries, such as Australia and Belgium, who have a "rebuttable presumption" in law which ensures an equal allocation of shared caring arrangements between parents, which can be argued against by either parent in disputes over contact and residence¹³. However, it has not been evidenced that such presumptions in law have promoted any minimum quality of parenting, as courts can't order good parenting but only insist upon parents acting within the law. Good shared parenting between separated parents is most often the result of a joint decision to put the child's interests first. It is our opinion that parents who dispute contact and residence arrangements must be supported to recognise their child's best interests, and to work together to support and promote shared caring arrangements which ensure those interests are paramount.

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

No.

We do not believe legislating either for or against such a presumption will promote the best interests of a child. We believe such considerations can only be determined on the merits of each individual case.

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

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<http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children%20OXLAP%20FPB%207.pdf>

b) Yes – issue guidance on the enrolment form and annual update form.

We believe the Scottish Government must undertake the necessary work to ensure there is consistency across Scotland for all non-resident parents, by making practice guidance clear and through supporting local authorities with their approach to how they support non-resident parental involvement. It is our opinion that it would be beneficial to develop exemplar forms and templates for enrolment and annual updates which can be used across local authorities and help to promote consistency.

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?

b) Yes – guidance.

Please refer to our previous answer.

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.

Please refer to our answer to question 9.

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.

We believe all agencies involved in any parental dispute should be alert to signs that this may be happening to a child, and the Scottish Government should make it a policy aim to take action to prevent this from happening to children. In our opinion, where this is alleged or suspected to be happening, a qualified child support worker and/or a child's advocate would be best placed to determine whether a child is being put under such pressure, and support them to say so.

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

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

We believe removal of PRRs would depend on the nature and circumstances of the serious criminal offence of which a person has been convicted. There is already a process through the civil courts to have PRRs removed if that is considered appropriate, and we believe this should remain so in order that if an application to have PRRs removed is made then all relevant information is available to the civil court beyond what information the criminal court may have.

Part 9: Domestic Abuse

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

Yes.

We believe banning cross examination of domestic abuse victims would ensure civil law in Scotland is consistent with the recognition of the impact of domestic abuse on victims in criminal law. It has been shown that there can be continued exposure to abuse for victims, as a result of having to face their abusers when conducting their own personal cross examination. Criminal law in Scotland has recognised this and the Domestic Abuse (Scotland) Act 2018 now prohibits the accused from personally conducting their own defence and cross examining victims¹⁴. We believe the same principle in law should apply in civil cases regarding contact and residence.

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.

We believe all necessary steps should be taken to ensure domestic abuse victims and other vulnerable parties are protected, and that there should be a duty on the courts to do so rather than for it to be only at the court's discretion.

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

Yes.

The evidence shows that domestic abuse is one of the most common welfare concerns in disputed residence and contact cases in Scotland¹⁵. Therefore, we believe there should be a duty to establish if there has been domestic abuse in order that courts have taken reasonable steps to identify if this is a welfare concern which must be considered, and that victims and vulnerable parties can be protected and not potentially exposed to their abusers during court proceedings.

37. Should the Scottish Government do more to promote domestic abuse risk assessments?

Yes.

¹⁴ <http://www.legislation.gov.uk/asp/2018/5/contents>

¹⁵ <https://www.napier.ac.uk/~media/worktribe/output-836656/rwhitecross-edinburgh-law-review-final-accepted-version.pdf>

Domestic abuse risk assessments are a stated policy intention of the Scottish Government, outlined within the National Parenting Strategy¹⁶, and there is evidence that when used they provide further protection for victims. Therefore, we believe more work should be done to further promote their use.

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.

There is still a gap between the criminal and civil courts in recognising the impact and effects of domestic abuse, even with the new Domestic Abuse (Scotland) Act 2018. It is widely evidenced that delays which occur in civil cases regarding child residence and contact, as a result of criminal cases of domestic abuse, impact on a child's wellbeing. Therefore, if a child's welfare is the paramount concern of the court in contact and residence cases, then we believe it is essential that there is improved interaction and communication between civil and criminal courts around issues relating to domestic abuse, ensuring cases proceed without unnecessary and avoidable delay.

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.

We believe there should be a provision in primary legislation to ensure courts consider the impact of delays on children with equal merit to other legal considerations regarding process, as there is significant evidence to show that such delays in court processes adversely affect children.

Part 11: Alternatives to Court

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

Yes.

We believe it is essential to ensure that litigants, and particularly children, are supported to understand the processes that inform decisions which affect their lives and the principles being applied by the courts in matters concerning contact and residence. Producing easy to understand and accessible guidance would be consistent both with wider children's policy in Scotland and the UNCRC.

Part 13: Children's Hearings

¹⁶ <https://beta.gov.scot/binaries/content/documents/govscot/publications/publication/2012/10/national-parenting-strategy-making-positive-difference-children-young-people-through/documents/00403769-pdf/00403769-pdf/govscot:document/>

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

Yes.

We believe that modernisation through the use of technology can help make the Children's Hearing System more efficient and comfortable, and less stressful and traumatic for children. Improved use of technology can also better support children's participation. In our experience, attendance at Children's Hearings can often be traumatic for a child, with children often choosing not to appear as a result. Even in circumstances where children do appear often they only express views which they believe the adults around them want to hear, not their true feelings. We believe modernisation of the Children's Hearing System is required to help reduce stress and anxiety for children and support them to express their views honestly and confidently, and utilising available technology, such as video and communication tools and applications to support and represent how children communicate their views, can help achieve this.

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.

We believe this would provide more opportunity to ensure all parties involved have all the relevant information and are appropriately prepared in advance of children's hearings. We also believe it would promote greater transparency and help to avoid disputes or disagreements amongst those professionals and agencies involved during individual hearings.

51. Should personal cross examination of vulnerable witnesses, including children, be banned in certain Children's Hearings (Scotland) Act 2011 proceedings?

Yes.

We believe there should be provision to ban personal cross examination of vulnerable witnesses, for the same reasons we have outlined in relation to the impact of personal cross examination in domestic abuse cases. We also believe that personal cross examination in Children's Hearings can cause a child anxiety and stress or to revisit trauma and, therefore, discourage or prevent them from disclosing what has happened to them or expressing their views honestly.

For any further information please contact Martin Canavan, Policy & Participation Officer
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