Scottish Women's Rights Centre

Response to the Scottish Government's call for consultations on reforming Part 1 of the Children (Scotland) Act 1995

27/09/2018

About the Scottish Women's Rights Centre

The Scottish Women's Rights Centre exists because of abuses of power and because a gap persists between women's experience of violence and abuse and their access to justice. The Scottish Women's Rights Centre is a unique collaborative project that provides free legal information, advice and representation to women affected by violence and abuse. The Centre strives to fill the gaps that exist between women's experiences of gender-based violence and their ability to access justice by working with a specialist solicitor and an experienced advocacy worker. Informed by our direct work with victim-survivors of violence and abuse, we seek to influence national policy, research and training to improve processes and systems, and ultimately to improve the outcomes for women who have experienced gender-based violence.

We welcome the opportunity to respond to this consultation. However, we wish to emphasise our view that a wholescale review of the system for adjudicating family law matters in Scotland is necessary. Legislative change should only be undertaken where necessary and for good reason, and legislative change alone is not enough. The focus on reform of the system must be to place the child at the centre.

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?

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?

(**Neither yes or no**)

<u>Presumption</u>

This is a complex issue which does not allow for a straightforward answer. It is crucial that children who are capable of forming their own views are able to express them in proceedings relating to them, and that their views are given due weight in accordance with their age and maturity. This should be assessed on a case by case basis in an appropriate manner. We understand there are concerns that this presumption is often interpreted in civil court proceedings to mean that children under 12 do not have sufficient age and maturity to freely form a view. As a result, many children who are capable of expressing their views are

potentially being denied their opportunity to realise this right in Scotland. Certainly from what we hear the approach to taking children's views is not consistent throughout Scotland.

If this presumption is indeed acting in a manner which is restricting or preventing views of children being taken, it would not be consistent with Article 12 of the UN Convention on the Rights of the Child. This may be something that can be rectified by guidance and training to provide clarity that the meaning of the presumption is that children aged 12 and over are presumed to be able to give their views, and for that to be prevented the presumption requires to be rebutted, and does not mean that children under 12 are presumed not to be capable of giving their views. Alternatively, the presumption could be amended to a younger age (although that should still not result in a rule that is rigidly applied). It is outwith our expertise to comment on what an appropriate age would be. Alternatively, if removal of the presumption is deemed more appropriate, it must not result in a more restrictive position than the current one. The government must take steps to ensure that the position for children in Scotland is compliant with Article 12 and in keeping with the General Comment on Article 12.[1]

Article 12 applies to every child without discrimination. Rather than starting with the assumption that a child is incapable of expressing her or his own views, the state should assume that a child has the capacity to form her or his own views and recognise that she or her has the right to express them[2]. Accordingly, the presumption must not be applied in a manner which results in children under the age of 12 being considered to lack the capacity to give views. No matter what the decision regarding the presumption, guidance and training are essential to ensure consideration is given to whether any child is capable of giving views in any judicial or administrative process in relation to the child, with relevant factors being taken into consideration. The General Comment prescribes that the onus does not fall on children to prove their capacity, rather with the State to assess the capacity of the child[3]. However, those assessing the capacity of children to form and give their views require to have appropriate knowledge and understanding to enable them to do so properly. We would suggest that a test of practicability is not appropriate in relation to seeking a child's views, as this may allow for factors to be taken into consideration beyond the age, maturity and capacity of the child.

Further work is needed to ensure that our systems are enabling children under 12 to realise their rights to participate in judicial processes. The General Comment on Article 12 recommends training on Article 12 for all professionals working with and for children[4] including lawyers, judges, police, social workers, community workers, psychologists, caregivers, teachers, medical professionals, civil servants and public officials.

Information must be provided to children on their right to participate along with where to seek support to enact this right. Expressing views is a choice for the child, not an obligation. Further, the child should be supplied with sufficient information and support to enable them to give their views in a meaningful way. This will be discussed further in our answer to Question 2 below.

[1] http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf

[3] Para 20, General Comment Article 12

[4] Para 49, General Comment Article 12

Children experiencing/at risk of abuse

Further consideration must be given to children who have experienced abuse, including domestic and sexual abuse. The impact of fear and trauma can create additional barriers to children who may consider it unsafe to express their views. Instead of a reason why they can't express their views this should be treated as a qualification for additional and specialist support.

> ***"My son did not have sufficient speech because of his autism to be formally interviewed, but told us at home how he felt- again the court, curator & social work ignored his opinion"***

Since "the greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child[5]" the potential negative consequences of denying children who have been victims of violence or abuse the right to express their views cannot be understated. Children experiencing or at risk of abuse must be given sufficient support to safely make their views known to the court, including any allegations of abuse or concerns and fear about the impact of ongoing contact.

When children express fear this should be taken very seriously as this can be an important indicator of risk to the child. Safety of children is one of the reasons they should be better supported to make their views known. The children involved in Power Up Power Down highlighted the importance of taking seriously the fear of children, and they questioned why adults involved in the court system did not think the children's fear was a significant factor in decision making.

> ***"Please listen to the children they have the right not to live in fear anymore by courts automatically putting contact orders in place which leaves them exposed to abusive parents"***

Due weight and consideration

In addition to further provision for children to make their views known, significant assessment is needed in relation to the due weight currently given to these views. Article 12 stipulates that simply listening to the child is insufficient, the views of the child have to be seriously considered[6]. Additionally, further legislative measures may be required for decision makers to explain the extent of the consideration given to the views of the child and the consequences

> ***"They were all terrified of him and did not want to see him. My daughters told this to the sheriff in her chambers, but she dismissed their views. They told social work & the curator also, but they did not listen. My daughters' Guidance teacher (at secondary school) was the only professional who listened."***

[5] Para 30, General Comment Article 12

[6] Para 28, General Comment Article 12

for the child[7]. This could lead to greater clarity and consistency in courts' approach to taking views of children.

Children and young people's Article 12 rights are closely linked to their right to freedom of expression (Article 13) and right to access to information (Article 17) which are crucial prerequisites for the effective exercise of the right to be heard. Given than many cases involve more than one child, it is important that siblings are given the opportunity to provide their views separately and be individually supported to do so. Due weight should be given to each sibling's views.

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

e) Another way – A range of options should be provided including Child Support Workers, speaking directly to the judge or sheriff (if desired) and other options to provide written or recorded views.

A range of age-appropriate and child-led options

Children should have the opportunity to engage in a way which suits their preference, circumstances and capacity. The system should be suitably flexible to meet this range of needs. We note that in Power Up Power Down children stated that different children feel safe and comfortable expressing their views in different ways with different levels of support. An important theme was that children felt they should be able to communicate their views to the Sheriff and that this might look different depending on their capacity, personality, preferences, circumstances and lived experiences. Whilst we advocate for a range of creative and child-led options we caution against tokenistic approaches which may allow children to be heard but fail to give their views due weight.

Further, we understand the Additional Support Needs Tribunal for Scotland (ASNTS) has undertaken a large amount of work on engaging and keeping children at the centre of the process, including seeking their views. We refer to the "Needs to Learn" website as a good example of this and takes a child through the legal process whether they or a parent have instigated proceedings. We also refer to the ASNTS website, procedure rules and practice notes in this regard (The views of the child or young person | First-tier Tribunal for Scotland (Health and Education Chamber))

Trauma-informed processes

Children and young people who experience domestic and sexual abuse may experience trauma as a result of their experiences and/or talking about these experiences. All processes developed to ensure children's views are heard in court cases must be trauma-informed, including an understanding of how trauma impacts children. This may include challenges in building trust, recalling memories chronologically, feeling afraid, being nervous of new people, or feeling confused. Many children who have lived with domestic abuse over a period of time have lived in an environment where they are exposed to repeated traumatic events and where it is not safe to form or express an opinion. Children may have never disclosed abuse before and be living in fear of the consequences of speaking about it (for example many children are told by perpetrators that if they tell anyone daddy will be taken to prison or they will be taken away from their mum). Expecting children to suddenly form and express views about very difficult situations is unrealistic and does not reflect a trauma-informed approach. Children

[7] Para 33, General Comment Article 12

need to feel safe, empowered, and be given choice and some control over how the process will work for them. It is important that a child has sufficient time to build a trusting relationship with an adult with whom they will share their views. All professionals involved in gathering and considering children's views must undergo training on children's rights, trauma and domestic abuse.

Children at risk of abuse

The SWRC is concerned that in situations of domestic abuse children are expressing concerns about contact with their father but these views are not being represented and/or considered in court. Training for professionals is needed to recognise the impact of abuse and the influence of abusers on children, including trauma-bonding (where victims develop a strong loyalty to their abuser despite this bond being damaging). In preparation for this consultation response the SWRC ran a survey to collect the views of survivors of domestic abuse who have gone through civil court proceedings. 100% of respondents said their child/ren had expressed concern about contact with their father. We also refer to the useful research report on the views of children within private law disputes where there is a history of domestic abuse by Scotland's Commissioner for Children and Young People.

Child Support Workers

> ***"They worry their dad will hurt them or take them away to England where he lives"***

The SWRC believe that an independent specialist Child Support Worker would be best placed to ensure children's views are heard in court cases. Specialist Child Support Workers should be made available to children to support them to navigate the court process, provide advocacy on behalf of the child and in particular to express their views to the court. This should be available to children in any court process relating to them, including child welfare proceedings. We understand that in ASNTS proceedings the Tribunal can appoint an advocacy worker to provide a report solely on the child's views and that this is becoming an increasingly used service. It is important that Child Support Workers have sufficient time to build a relationship of trust with the child, in particular where there are concerns about domestic or sexual abuse. Expecting children to express concerns about very difficult situations with potentially huge consequences to an adult they have only met once or twice is unrealistic and does not reflect the requirement for States parties to create an environment where children feel able to safely and freely express their views as per Article 12[8].

The children involved in Power Up Power Down strongly recommended children should have access to a specialist support worker whom they can trust, who is involved from the beginning of the court process and will remain involved in order to provide support throughout. Being listened to and believed were highlighted as extremely important to by children and young people involved in Power Up Power Down.

[8] A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for their age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms, Para 34, General Comment Article 12

Child Support Workers require specialist domestic abuse training to ensure awareness of the impact of domestic abuse on children and wider family relationships. They should be trained to understand the child's full circumstances so that they can understand the views that are being expressed, for example different views might be expressed after contact with one parent due to pressure being put on the child by a perpetrator of abuse.

Speaking directly to the judge or sheriff

Some children may prefer to speak directly to the judge or sheriff (as indicated by many of the children and young people involved in Power Up Power Down). If so children should be given a choice of where this takes place (based on feedback from Power Up Power Down where some children indicated that the court was too scary, and the sheriff should wear 'normal clothes'). Other children may find talking with a sheriff too intimidating. Children should have the option to speak with the judge or sheriff if they choose and for a trusted adult (such as their Child Support Worker) to accompany them if they choose.

Children should have access to information about what to expect when speaking to a judge or sheriff, and how their views will be treated, including whether the views they express will remain confidential. The same provisions should be made across different courts and regions to prevent different options being made available to some children. Judicial training is required on how to speak to children, children's rights and on trauma-informed processes.

Why Child Welfare Reporters aren't suitable as exclusive way of hearing children's views

Children's views should be expressed to the court in their own words, not through the filter of someone else's recommendations. Child Welfare Reporters are not required to relay the child's views to the court but instead to put forward their recommendations in relation to the child's best interests. This is not therefore a sufficient route for children's unfiltered views to be heard in court. We are aware of situations where children have told Child Welfare Reporters about abuse or their fear of a parent and these views have not been not expressed to the court. More should be done to ensure that Child Welfare Reporters are better trained in relation to children's rights, listening to children's views, and giving children's expressed views due weight within their recommendations.

Child Support Workers could work closely with Child Welfare Reporters to support the reporting process. For example, the Child Welfare Reporter could frame questions about the child's views and prepare the report, while the Child Support Worker could support the child to safely express their views.

> ***"The lack of understanding is devastating regarding domestic abuse."***

Other options

The General Comment on Article 12 encourages provision of creative methods to ensure children can realise their right to make their views known[9].

Children and young people involved in Power Up Power Down also suggested children could:

- Write a letter to the court
- Create a video
- Draw pictures or build Lego to express what they want to happen, and explain what they mean to a support worker
- Show how they are feeling through play, talking or drawing
- Speak to the sheriff in person
- Talk to people they can trust
- Fill out a form
- Talk to the Sheriff on the phone
- Record on tape what they want to say and play it to the judge

Adequate information and ongoing dialogue

Children and young people require age-appropriate and timely information about the court process, their rights and how their views will be treated, including who they will be shared with, and how their views will be used. If participation is to be effective and meaningful, it needs to be understood as a process, not as an individual one-off event. Children should be given multiple opportunities to make their views known and be given information and sufficient time to form and express their views. This is in line with understanding children's evolving capacities, or where children may develop different views over time. This is particularly relevant for cases which go on for years.

Evaluation

Evaluation procedures should be built in to review how current and updated processes support children to make their views known to the court. This should include research with children with lived experience of the court process to establish where improvements could be made.

Protection from manipulation and undue influence by adults

We are aware of concerns in giving children's views due weight in court proceedings on the basis that they may be unduly influenced by a parent. The SWRC believe that adequate support and safeguards need to be built in for children (through the recommendations above) to ensure that children can safely and freely form their views and make these known to the court. The risks of parental manipulation should be managed through designing more robust processes for children to make their views known, not through discounting children's views or denying them the opportunity to make them known.

[9] Para 21, General Comment Article 12

Question 3): How should the court's decision best be explained to a child? Please select only one answer.

A) Child Support Worker

Feedback should be provided in person and in writing. Children experiencing domestic abuse who have had contact awarded through the courts with an abusive parent against their will describe feeling trapped and powerless.

In addition to feedback about the decisions made, children should also receive feedback about how their views were considered and the rationale for the decision made. This is particularly important when the decision made is not in line with the child's views. This is in line with the General Comment on Article 12 which states that such feedback acts as a guarantee that the views of the child are not only heard as a formality but are taken seriously[10]. Some of this information (particularly how the child's views were considered and the rationale for decisions) would need to be provided to the Children Support Worker by the sheriff.

Children should be given an opportunity to ask appropriate questions to the Sheriff (if the Child Support Worker cannot answer them) and to receive timely feedback on these. Following a court decision, children should also be given information about where to access support should they need it, and where they can make complaints if they feel their right to be heard is breached (for example to raise concerns to the Children and Young People's Commissioner for Scotland). Children should also be informed about any processes available for appeals and reviews of the decisions made.

In line with our response to question 2 we do not believe it is appropriate for this feedback to be given to children by the Child Welfare Reporter but should be given by someone with a support role whom the child trusts and has a built a relationship with (i.e. Child Support Worker). The person providing feedback to a child about decisions made about them in court must receive training on age-appropriate communication with children, children's rights and the impact of domestic abuse on children. A Child Support Worker should not be viewed as an alternative to a solicitor if the child requires legal advice.

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

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

Child welfare reporters and curators *ad litem* play an incredibly important part in the process, with very little clarity over recruitment, training or quality assurance. It is concerning that this has not yet been addressed. Significant weight is generally placed on reports produced by such professionals and their conclusions are rarely looked behind or challenged. Concerns about Child Welfare Reporters are frequently reported on our helpline. Many women felt and expressed the view that Child Welfare Reporters were biased and untrained. Despite belonging to professional fields that presupposed a level of skill and expertise in child welfare matters they do not require to demonstrate any particular training or education in this area. It

[10] Para 11, General Comment Article 12)

is reported that Child Welfare Reporters often use competing discourses to describe the impact of separation, minimising domestic abuse as a convenient claim.

> ***"The report was generally good but (and I know this sounds unbelievable) my ex threatened to kill a social worker, but this was not included in the report. When my family asked why, we were told that this would be "too prejudicial" to the outcome of the case, as the judge would immediately take against him if this was revealed, and the Child Welfare Reporter didn't want to "bias" the result of the case."***

Centralised system to manage role of Child Welfare Reporters

The SWRC strongly believes that a new set of arrangements should be put in place to manage the recruitment, appointment, training, administration and regulation of Child Welfare Reporters and curators *ad litem*. The appointment criteria should be consistent across all sheriffdoms and should include the requirement of direct experience of working with children and young people, and demonstrable understanding of children's rights. Experience as a family legal practitioner alone should not be sufficient. Accreditation and a body to hold practitioners accountable are necessary.

Training

There is currently no mandatory training for Child Welfare Reporters or curators *ad litem* and no standard approach to cases. As a result of these two factors parties often feel their report is based on the personal views of the individual appointed. From a child rights and best interests perspective this is a failing of the current system. A system must be introduced to ensure there is standardised practice.

Victims/survivors of coercive control often report that their abuser is able to manipulate the Child Welfare Reporter. If Child Welfare Reporters are manipulated by abusers, this serves as a mechanism for continuing the abuse. Child Welfare Reporters and curators *ad litem* must be trained to identify and prevent this.

Mandatory training for Child Welfare Reporters and curators *ad litem* should include:

- Considerations regarding the child's wellbeing
- Domestic abuse and its impact on children
- How domestic abuse may affect the presentation of and communication from a survivor (for example an abuser is often likely to come across as in control and 'charming' whereas a survivor may present as emotional and protective)
- Communication with children (including young children, children who have experienced trauma and children with additional support or communication needs)
- Children's rights
- Attachment theory (particularly for younger children)
- Assessing the capacity of children to freely form and express their views (if this is included in their remit)
- diversity training (eg socio-economic factors, sensitivities surrounding race/other cultures, women fleeing gender based violence in other countries, and to address a lack of understanding or prejudice against women with mental ill health).

> ***"Parents are often experiencing extreme anxiety in this situation which is often presented as unstable & can be viewed as an unstable adult."***

Appraisals and monitoring

Appraisals and monitoring should be introduced to evaluate and review practice. A commitment to equality and diversity and children's rights should be written into job descriptions for these roles to allow these responsibilities to be evaluated through the appraisal process. A robust system for managing conflicts of interest should be introduced (for example if the Child Welfare Reporter is known to one of the parties).

Complaints and removal procedures

Processes for making complaints about Child Welfare Reporters should be consistent, transparent and accessible. Currently this is complicated by the fact that not all reporters are solicitors, solicitor advocates, or advocates and the onus is on the complainer to find out the reporter's professional background and the appropriate complaints procedure.

Robust and consistent processes must be introduced to remove Child Welfare Reporters if they do not meet the required standard. A centralised system is the best way to do this. Although maintaining a PVG registration is important, much more stringent measures of accountability should be introduced to ensure Child Welfare Reporters and curators *ad litem* have the necessary skills, experience and training to carry out their duties and to monitor the quality of their practice.

Other comments

We are concerned to note that the guide to the child welfare report produced by the Scottish Government working group includes references to 'parental alienation' given our concerns expressed earlier about reports of Child Welfare Reporters being manipulated by domestic abusers.

If national provision of Child Support Workers to support children through the court process and represent their views to the court is introduced, careful consideration is needed as to how this role will complement the role of the Child Welfare Reporter.

We support the proposal to change the name of curators *ad litem* to Child Interests Solicitor as this will make their role easier for children to understand.

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

We strongly support the proposal to change the law to specify confidential documents should only be disclosed when in the best interests of the child and after the views of the child have been considered. Children's rights should be at the centre of this process. The issue of disclosing confidential documents directly relates to a child's rights under Article 8 of the ECHR and under UNCRC to:

- Have their best interests be primary consideration (Article 3)
- Be listened to (Article 12)
- Privacy (Article 16)
- Protection from abuse (Article 19)
- Recovery from abuse (Article 39)

This is particularly relevant to cases of domestic abuse where children may access specialist support services. The right to access confidential support is extremely important in the recovery from abuse. If a child fears the information shared in a confidential support session may be shared in court or to an abusive parent this could severely impact their experience of support and their recovery. Disclosure of confidential information to an abusive parent may also place the child in serious danger and create significant fear and anxiety.

A child's views must be taken (in accordance with their maturity and capacity) regarding sharing of their confidential information. A Children's Support Worker could explain the process and decision to the child and provide information about their rights.

Question 6): Should child contact centres be regulated?

Yes

Regulation and training

All children deserve to have their safety, dignity and confidentiality respected equally. We therefore recommend that all contact centres are regulated. We have been made aware of issues where contact centre staff have not been aware of domestic abuse and have not been trained to identify coercion. Regulation by a body such as the Care Inspectorate could go some way towards addressing this. All child contact centre staff should receive specialist in-depth training (on issues including children's rights, trauma, and domestic abuse), and the centres should work to standardised processes.

Every service in Scotland which facilitates contact should be required to be registered and regulated in order to deliver this service – there should be no exceptions. Minimum standards for accommodation for contact centres should be regulated and should require that spaces are safe, child-friendly and accessible. If contact centres cannot meet minimum standards or adhere to regulations, they should not be permitted to continue operating.

Further, contact centres must be adequately resourced and this should be the case across Scotland. They can play a vital role in offering a safe and neutral option for contact. Frustrations and delays can arise for children and parents when there are long waiting lists and/or issues with funding which result in lack of flexible hours available to facilitate contact. Funding requires to be provided to address this.

Monitoring, review, and complaints processes

Regulation should include a robust review process to monitor the wellbeing of the child and introduce processes where concerns can be raised. Consideration should be given as to the kinds of information contact centre staff are permitted to share with the courts in relation to the quality of contact observed and any concerns they have (and not simply limited to whether contact took place). This would ensure that the welfare of the child remains the paramount consideration of the court decision and review process.

A standardised, robust and transparent complaints procedure should be introduced and regulated which can be utilised by children, young people, and parents who may wish to raise complaints or concerns about the centre, staff, or the service provided. There should be an independent body (such as the Care Inspectorate) to whom complaints can be made if the complaint is unable to be resolved through a centre's complaints process. Age appropriate

information should be created for children and young people about contact centres, complaints procedures, their rights in relation to contact and where to seek help if they need it.

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

The safety and welfare of children should be the primary concern in relation to contact with any family members (or other significant members of a child's community). These rights sit with children and young people and are not trumped by the rights of parents, grandparents or other family members.

In domestic abuse cases extended family, including grandparents, can be used to perpetuate abuse and to put pressure on children to maintain contact with abusive parents. However, is it clear that safe and trusted extended family members can have a positive impact if contact is granted by providing continuity and by facilitating or supervising contact where appropriate. Accordingly, care must be taken to ensure that where contact with extended family members is considered the potential for domestic abuse is identified.

Contact with wider family members should be considered by the sheriff when contact orders are made. If, for instance, contact with a parent is withheld on the basis of the child's safety and wellbeing then contact with other members of the family needs to be assessed on this basis also.

Maintaining contact with siblings and family pets can be extremely important to children and young people and should be facilitated as much as possible where this is in the best interests of the child. A specific requirement for decision makers could be introduced to consider whether another important relationship (such as a sibling or other child of the family) should be considered when they are making decisions about a child.

Isolation from friends and family is a very common tactic of domestic abuse and impacts children as well as adults. Efforts to address isolation through domestic abuse should be considered as part of a child's recovery from abuse. Children and young people should be consulted on who the important people are in their lives and who they would like to maintain relationships with following parental separation. This will be different for each child and dependent on the quality of those relationships. Children should be supported to maintain relationships with those identified individuals where it is in their best interests to do so.

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

No

We recognise that in some contexts relationships with grandparents will be beneficial to children. However, in some cases contact with grandparents could place children in danger through children being pressured or tricked into contact with an abusive parent. Since not all children benefit from contact with their grandparents a presumption in law that children benefit from contact with their grandparents would undermine the principle that the best interests of the child are the paramount consideration in decisions about child contact.

There are other extended family relationships which may be important to children, and a presumption in law that children benefit from contact with grandparents specifically does not take this into account. This creates a hierarchy of contact based on other people's rights and not based on the child's best interests. Furthermore, grandparents can already make an application to the court to seek contact with their grandchild.

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?

(Neither yes or no)

As there appears to be confusion over whether the court can make an order without giving that person PRRs it may be appropriate to clarify the Act. This may also aid access to justice as it may assist people to get legal aid for such actions (if they are otherwise eligible) by making it clear that this is an available legal route. However, if this can be clarified through clear guidance, this may be preferable. Further, if a contact order is granted in relation to another child (i.e. to a sibling under 16), clarification should be provided that there will be no repercussions for children if the contact order is breached.

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?

No comment

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

d) another option

The best interests of the child must be the paramount consideration. Because contact decisions made in court are deemed to be in the best interest of the child there is currently a lack of options to raise concerns about the impact of contact on the safety and wellbeing of children. This is problematic where domestic abuse has not been recognised by the court. Where breaches of contact raise concerns that children are being physically, emotionally or psychologically damaged by contact orders this should automatically prompt investigations and reviews.

However, the context leading to breaches of contact orders should be fully understood and lead to different consequences. For example, if a parent breaches a contact order out of safety and wellbeing concerns for their child (or indeed for themselves) this should prompt a review to ensure that the court order is still in the best interests of that child. However, if a parent breaches a contact order as a means of continuing their abuse and control, this should prompt a review to assess whether sanctions should be imposed for doing so.

<u>Contempt proceedings as means of perpetuating abuse</u>

Court orders are often long term and inflexible, imposed without specific reference to domestic abuse where this is a factor. Non-abusive parents (usually mothers) are often forced to maintain contact with abusive ex-partners through court mandated contact, thus prolonging the abuse.

The SWRC are aware of many domestic abuse cases where threats of contempt of court are used as a means of perpetrating abuse through the courts. These include instances where contempt proceedings are raised against a woman when she is not breaching an order. Raising contempt proceedings can also be a form of financial abuse due to the cost of defending such proceedings if legal aid is not available.

> ***"My eldest child currently suffers from suicidal ideation because of this situation. I am currently waiting of support from Social Services to stop him from going. Without the support my ex-partner has threatened me with contempt of court"***

If a parent deems it not to be in the interests of the child to continue with the contact arrangement, the need to bring proceedings back to court for an order to be varied can be prohibitive. The current system reinforces non-abusive parents' feelings of powerlessness as it would not generally be appropriate to go to court in every circumstance, for example repeated low level breaches. This includes patterns of behaviour such as not showing up for contact, repeatedly altering schedules or bringing children home late to intentionally prompt fears they will be harmed or abducted. The present system discourages survivors of abuse from challenging such breaches because bringing contempt proceedings or seeking variation of an order will often mean a return to a stressful court process that, for many, feels like a continuation of the abuse, with no guarantee that their child will be protected by the outcome.

> ***"It has left my child who has additional needs to being further abused not only by his father over 7 years but by his new partner too. At 11 years old he threatened to kill himself."***

Impossible choices

> ***"As a mother I have felt powerless to help my child or protect him from further abuse, manipulation and fear"***

The SWRC is aware of circumstances where mothers have faced impossible choices and feel trapped and unable to keep their children safe. An example of this is being told by social workers that there are child protection concerns if contact goes ahead while facing contempt of court if they do not comply with a contact order. We are aware of cases where children are so anxious and distressed by contact that they are sick, have nightmares, scream, cry and refuse to attend. Mothers who have experienced domestic abuse often feel unable to keep their child safe from perpetrators of abuse due to contact orders and threats of being held in contempt. This is a failing of our current system.

> ***"I have suffered depression and anxiety, financial hardship, panic attacks prior to court hearings having to see my sons father. My child is scared of him yet I am threatened with prison if he does not attend contact. My relationship with my son has been difficult at times due to him being angry with me for making him go to contact, I have a lack of trust in the court process to protect my son (and myself)"***

Alternative options

Consideration should be given to alternative options for remedying problems with court-ordered contact falling short of court proceedings in domestic abuse situations, where agreement generally cannot be reached between parties. For example, in situations where there are repeated low level breaches that would not appear to warrant taking a case back to court but serve to continue a controlling or abusive relationship.

A robust review procedure should be introduced where the impact of contact on children where there are concerns of domestic abuse can be monitored. This includes where children are showing signs of psychological, emotional and physical distress before, during and/or after contact. Children, parents and other members of the community should be able to raise timely concerns about the impact of contact and for this to be assessed by specialists (i.e. child

psychologists, specialist support workers etc) without the need for recourse to the courts. No parent or child afraid for their safety should be forced to have contact with an abusive adult.

> ***"having a mother under such stress is not good for children plus the equilibrium of the house changes before and after contact so it is destabilising for them"***

Penalising vexation actions

In any review of the sanctions for breaching a contact order there must be an acute understanding of the likelihood of this process being abused by perpetrators of coercive control as a means of continuing their abuse, and there needs to be better recognition of domestic abuse by the courts. Abusive parents who continually raise contempt of court actions as a means of perpetuating abuse should be prevented and penalised for doing so.

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

The inclusion of the Sheriff Court seems sensible given the vast majority of contact proceedings are heard in sheriff courts. This may also contribute to more consistency across family cases in relation to approaches to hearing the voice of the child and safeguarding against abuse/risks of abuse to children through court orders.

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

Yes

The SWRC would welcome guidance on this for the public and legal practitioners. We are concerned that to be treated as habitually resident in the original part of the UK for one year seems a very short amount of time for the parent who opposes the move to contest this, as there is a lack of solicitors who can practice in both jurisdictions. The SWRC often hear from women in circumstances such as this where they have a great deal of difficulty challenging cross-UK family cases.

In any guidance produced specific consideration around safeguards for children experiencing domestic abuse should be included.

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

No

The presumption that the husband of a mother is the father of her child should not be retained in Scots law. This is no longer in-keeping with social realities that the majority of children are now born out of marriage. The presumption also does not take account of rape and domestic abuse in marriage, nor does it take into consideration separation. Parentage should be acknowledged when registering the birth and not through a presumption in law.

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

No

We could see why this might be appropriate in non-domestic abuse situations as it would avoid unnecessary hearings and allow the court to focus on other issues with regard to whether PRRs should be granted (although relevant human rights principles would require to be carefully considered before bringing in such a provision).

However, consideration needs to be given as to why women are refusing consent to DNA testing in parentage disputes. This could be to prevent the possibility of PRRs being given to an abusive partner in order to protect a child from abuse or the risk of abuse. As above this does not take into account situations of rape.

Our concern here is that if a woman flees domestic abuse (for example during pregnancy when the risk of domestic abuse increases) and is then later involved in a parentage dispute, compulsory DNA testing to prove parentage could be used as a means to seek PRRs and continue the abuse of the woman and/or the child.

In deciding whether to require a DNA test, the court should weigh up the potential risks to children and young people with children's rights to information and wishes about their parenting and parents' rights around parentage.

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

No

As outlined in this section of the consultation (7.01) any legislative changes must benefit children. As the previous serious concerns about safeguarding children's views and interests highlighted in the 2004 consultation have not been addressed, we do not support changes which would allow step parents to obtain PRRs without having to go to court.

Step parents can already receive PRRs. In order to obtain PRRs without the need to go to court the rights of children and their views would be omitted from the application and would therefore be open to abuse.

The best interests of the child should be the paramount consideration which requires assessment on a case by case basis. With any consideration of who can obtain PRRs processes to establish children's views, rights and interests in this decision must be followed.

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

Yes

This is a circumstance in which legislative reform appears to be appropriate.

The legislation is clear that parental rights exist to enable parents to carry out their parental responsibilities. However, removal of the term 'parental rights' could contribute to changing social attitudes which is crucial (coupled with the significant reform which is necessary to improve the system of adjudicating matters relating to children as discussed throughout our response). The historical legacy of wives and children being legally deemed as property of husbands/fathers continues to influence the culture of Scotland's family courts. Children are not the property of their fathers (or mothers). Rather children are active agents and bearers of human rights and parents have a legal responsibility to care for their child/ren. The key difficulties with the current system stem from the adversarial nature of these cases. Too often parental rights override those of children. We support efforts to strengthen the rights of children and provision for considering children's best interests as paramount. In any amendments or reform the focus should be on parental responsibilities and the rights of the child.

However, consideration should be given to how parental rights are retained vis-a-vis third party organisations such as social work. Parents, when fulfilling their responsibilities to their child, should still have an active say in decisions made about them by arms of the state (along with the consideration of views of the child and in line with the child's best interest principle).

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

(Neither yes or no)

The priority for any terms (or replacement terms considered) should be to emphasise children's rights and interests. The concerns raised in the consultation document (7.28) about this issue appear to be about 'one parent having a better position in relation to a child than the other parent'. Since the paramount consideration in decisions about child contact are to be about the best interests of the child, any changes to terminology to the types of order a court may make should be rooted in the child's best interests, not parents' concerns about position.

The term 'parental order' remains focused on parents and not children, which undermines the commitment to considering children's best interests as the priority in decision making. 'Child's order' may seem overly formal or intimidating to children.

It is possible that having a distinction between 'residence' and 'contact' could provide clarity and stability for children in terms of their sense of belonging and home.

Further work is needed to establish children and young people's perspectives on the benefits or disadvantages about these terms (and other alternatives), and the impact of these terms on their wellbeing. Children and young people with lived experience of parental separation and family court proceedings should be directly consulted about this.

In considering changing this terminology consideration should be given to implications for other sections of the Act such as automatically awarding PRRs (further comments on this under Q19 and Q27).

Question 19): Should all fathers be granted PRRs?

No

<u>Best interests of the child</u>

PRRs are for the benefit of the child, not the parent. Article 9(3) of UNCRC (referred to in 7.34) states that the child's right to contact with both parents is qualified by their best interests. The best interests of the child cannot be ascertained if PRRs are automatically granted.

<u>Protection for survivors of sexual abuse, rape, and domestic abuse</u>

Parental rights should not be automatic. For survivors of rape who conceive and parent the child, and for survivors of domestic abuse, automatic granting of PRRs would not be appropriate and would represent an erosion of their rights. Shared registration is a simple way of accessing PRRs and offers some protection to women who parent following rape and domestic abuse.

Other comments

The research cited (7.39) does not support automatic granting of PRRs. In contrast it supports the view that it is the safety and quality of relationships with fathers which benefits children (described here as 'good father-child relationships'), not whether they have PRRs.

The subsequent claim (7.40) that PRRs somehow has an impact on the involvement in a child's life also does not provide any assurance that the quality of this relationship is scrutinised which must be the test for whether PRRs are in the child's best interest.

PRRs should require a commitment to joint parenting. If there are allegations or risks of abuse to the child/ren, the best interests of the child should remain paramount over the father's rights.

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

No

Given the passage of time this does not seem necessary and would change the legal status of families who registered prior to changing the PRR status.

Question 21): Should joint birth registration be compulsory?

No

Joint birth registration should not be compulsory, for the same reasons as cited in our response to Q19 on why fathers should not automatically receive PRRs.

The rights of the parent cited in 7.55 are for the benefit of the child. The potential benefits of father/child relationships are dependent on the safety and quality of that relationship, which is not determined by whether a father is named on the child's birth certificate.

For women who have experienced rape and/or domestic abuse compulsory joint birth registration undermines their right to safety and recovery from abuse. The exemptions mentioned (7.57) rely on a conviction for rape or the recommendations of a social worker or medical practitioner. These provisions would not adequately safeguard women who have experienced rape and/or domestic abuse because not all women may report rape or abuse for many reasons, and for those who do the conviction rates remain very low. Not all women who have been raped or experience abuse are involved with social workers or medical practitioners. This would leave many survivors of rape and abuse and their children without sufficient safeguards.

If failure to register a father would have consequences or result in actions being taken against the mother this too would be an erosion of her rights. Given the level of shared registration at present it does not seem that this is a significant issue requiring amendment.

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?

(Neither yes or no)

Where a birth has been registered jointly in a country where joint registration leads to PRRs, it would seem consistent for fathers to have their PRRs recognised in Scotland since joint registration in Scotland leads to PRRs for fathers. However, consideration should be given to whether this could lead to fathers obtaining PRRs from birth registration in countries where joint registration is compulsory which in our view is not appropriate for the reasons outlined in

response to question 21 above, or where there are insufficient safeguards in place (for example, in some countries forged birth certificates may be easily obtained). It would not be appropriate for fathers to obtain PRRs through a "back door". Additionally, consideration should be given to appropriate international private law principles.

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

No

Many women experiencing domestic abuse report that such an assumption already informally operates in Scotland's civil courts to the detriment of ensuring children's, and women's, safety and wellbeing in contact and residency decisions. Introducing such a presumption will make this worse, by introducing a new legal assumption of the benefits of shared parenting.

Many women report to the SWRC that they are advised that domestic abuse is not relevant or should not be raised in contact proceedings. The SWRC would have significant concern that proposed legislation to introduce a presumption of benefit to children of involvement of both parents in Scotland would introduce an additional barrier for women disclosing domestic abuse in civil cases.

We are concerned that sufficient weight is not always given to abuse allegations and safety concerns in Scottish courts and the provisions under S11 (7A(-(7E) are already under-utilised. This is feedback we regularly receive through our helpline, surgery, and we consistently received in response to our survey. Again, we are concerned that introducing this presumption would make this worse.

> ***"I felt like it didn't really matter what her dad was like he was always going to be allowed contact"***

Women regularly report to the SWRC that they need to represent themselves in child contact cases and a presumption of this nature would disproportionately affect them.

Creating a presumption in law that a child benefits from both parents being involved in their life directly undermines the key principle in Section 11(7)(a) of the 1996 Act that the court shall regard the welfare of the child concerned as its paramount consideration. It also undermines the child's Article 9 right which clearly states that their right to maintain direct relations and contact with both parents applies only if this is in their best interests.

Creating a presumption based on the claims that there is evidence that shared parenting benefits all children is also misleading. The research cited in 7.71 does not support claims that children universally benefit from shared parenting. This research clearly states that the benefits to children from shared parenting arrangements are connected to the *quality* of parenting they receive, the quality of the relationship between their parents, and practical resources such as adequate housing and income – not to any particular pattern of care or amount of time[11].

Research indicates that children are more likely to feel positive when contact arrangements are flexible, child-focused, when their parents get along, and when children have had input

[11] P6, http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf

into decisions about their living arrangements[12]. There is an increasing body of evidence to show that shared time arrangements present particular risks for children when mothers express on-going safety concerns, where there is high ongoing parental conflict and when children are very young[13]. This research also cautions against framing new legislation in terms of adult rights rather than the needs of children[14].

Countries which have introduced a presumption of benefit to a child of both parents being involved in their life report this has increased focus in court on parents' (especially fathers') rights over children's best interests, and increased reluctance of mothers to disclose violence and abuse[15]. Learning from other countries has shown that shared time is workable for some families but risky for others, particularly where there are safety concerns. Of particular concern, the Nuffield research states "ironically, legislation promoting shared time seems most likely to be directly applied in contexts where shared time is least likely to be beneficial for children"[16].

The consultation document (7.70) indicates that this presumption operates in England and Wales 'unless the contrary is shown'. We are concerned about what level of evidence is required to show the contrary and that children may be exposed to harm and abuse for a time before the negative impact can be demonstrated. Again, this directly cuts across the child's best interests principle and creates a further burden of proof in relation to abuse.

Such a presumption could be extremely detrimental to the wellbeing of children and adult survivors of domestic and other abuse. While the presumption could be rebuttable there would need to be a process attached to this which in itself could endanger women and children.

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?

(Neither yes or no)

Many survivors have reported to the SWRC that they feel an informal presumption of benefit of contact with both parents is currently in operation in civil courts operate. This requires to be addressed. However, we do not believe that a negative legal presumption is the correct method to provide the necessary clarity and redress this barrier. Such a presumption could have unintended consequences that could infringe either parent's and/or children's right to family life. For example, this may disproportionately affect parents who do not abuse their child(ren)/partner. It could also have an unintended negative impact on women experiencing domestic abuse (for example where women have false allegations of domestic abuse or

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[12] P6, http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf

[13] P8, http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf

[14] P3, http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf

[15] P10, http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf

[16] P13, http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf

"parental alienation" made against them or are alleged to be unable to look after their child due to substance abuse or psychological difficulties, potentially caused by the domestic abuse itself). It may put a further hurdle in place that requires to be overcome in an already cumbersome process.

> ***"The sheriff is clearly not impartial. She has entrenched views that all fathers should see their children whether or not it is beneficial for the children."***

However, it is essential that steps are taken to address the current informal presumption which results in contact being awarded inappropriately. For example, training and guidance should be provided and courts must ensure that they carefully consider any allegations of and evidence of domestic abuse (towards a parent or a child) and weigh any benefit to the child regarding an ongoing relationship with a parent against a risk of further harm or abuse to the child and non-abusing parent. Domestic abuse is a feature in around half of all court actions over contact. A change in attitude is required to ensure that the law is fit for purpose to deal with these situations.

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

d) No – no further action by Scottish Government is required.

We are aware of situations where schools are already used by perpetrators to gain information about the whereabouts of survivors of abuse and continue to stalk and/or abuse women and children. In some instances, women and children are forced to flee again and find emergency refuge accommodation in another area, and for the child/ren to enrol in yet another new school. The impact of this is devastating for women and children - causing distress, further isolation from friends and family, and huge financial consequences. Many women and children fleeing domestic abuse live in constant fear of this happening again. Introducing the suggested changes could worsen the risk for women and children experiencing domestic abuse. Furthermore, this is an administrative burden which should not be placed on schools.

If the Scottish Government issues guidance in relation to non-resident parent involvement in education decisions this should closely align with the Scottish Government's Equally Safe strategy which seeks to prevent and eliminate violence against women and girls and take into consideration the recent Domestic Abuse (Scotland) Act 2018. Training for school professionals on the risks and impact of domestic abuse are required, particularly for anyone involved in administration or who may come into contact with non-resident parents.

If there are any concerns around abuse or risks to children (or their siblings and non-abusive parents) no information should be shared with non-resident parents. Parents with a history of perpetrating domestic abuse should not be entitled to involvement in education decisions for their children.

Furthermore, the views of the child/ren should be considered about what information should be shared with non-resident parents. Children should be provided with age-appropriate information about their rights on this matter and where to seek help if they are worried or feel unsafe.

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

d) No – no further action is required.

We do not believe any further action is required for the same reasons stated above under Q25. The SWRC is concerned that health information could be used to track down survivors of domestic abuse.

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?

No

If there is confusion in relation to this then it seems sensible to provide clarity that orders (except residence or PRR orders) do not automatically grant PRRs, however this could be provided through guidance rather than legislative amendment.

We re-iterate our position that PRRs should not automatically be given when contact is awarded as this will not always be appropriate or in the best interests of the child.

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?

No

This question raises a number of concerns and complexities. It is not helpful to conflate the range of issues highlighted in the consultation paper paragraphs 7.108 to 7.116.

A parent pressuring their child/ren to reject the other parent is not the same as expressing valid and serious concerns women and children may have about contact with abusive fathers which may cause them to limit contact. Rhetoric around 'parental alienation' is routinely used to undermine children and women's concerns about the risks to children's wellbeing and safety in relation to contact. In cases where domestic abuse is present, the potential risks to the welfare of child/ren through ongoing abuse severely outweigh the risks to the welfare of the child/ren through 'rejecting' a parent.

This question again seems to prioritise the interests of parents over the interests of children, which undermines the requirement in S11 cases for the child's best interest to be the paramount consideration. This question appears to rest on the presumption that children benefit from both parents being involved in their upbringing (see 7.114) which we disagree with (see answer to Q23). From a children's rights perspective Article 9(3) clearly cites the child's best interests as the condition for maintaining personal relations and direct contact with both parents on a regular basis.

<u>'Parental Alienation'</u>

We are aware that perpetrators of abuse often construct the concept of 'parental alienation' as a weapon against women in an attempt to twist the truth, manipulate mothers into facilitating contact, and discredit accusations of abuse. Sadly, these allegations often appear credible to professionals involved in the family's life, especially when perpetrators of abuse have influential jobs and appear charming and reasonable, whereas women experiencing abuse may appear emotional and defensive. Men who are abusive are often skilled at manipulating professionals, friends, and extended family. This can lend weight to allegations of 'parental alienation' when accusations of abuse (which is very often hidden and happens in private)

surface. The gendered dynamics of legal defences which paint women as hysterical, manipulative and bitter play into the hands of abusive men who appear rational, calm and professional.

'Parental Alienation' is not medically recognised nor is not recognised by the World Health Organisation[17]. The SWRC is concerned that 'parental alienation' is increasingly presented to the courts as a credible phenomenon and is a convenient defence to deflect legitimate concerns around the impact of contact where there is domestic abuse and/or child abuse, and to disregard or place less weight on the views of the child.

For these reasons the Scottish Government should not take action which would lend credibility to theories of 'parental alienation' which can be used by abusers to discredit the child's other parent in court and manipulate the court into believing they are the victim.

Parental alienation should not be included in the suggested welfare checklist (see para 10.17 – 10.20 of consultation) for these reasons.

> ***"he continually abuses me on social media and to friends, family and the children and accuses me of parental alienation and sabotages contact in order to continue the cycle of abuse against us… He says he is a victim and accuses me of making false allegations against him to the police."***

> ***"I'm very concerned that abusers seem to be accusing ex partners more and more of parental alienation in order to threaten court action"***

Abuse and risk of abuse

Specialist training on domestic abuse is necessary to assist courts in recognising situations where an abusive parent is manipulating, pressuring, or intimidating children as part of their abuse. Limiting contact for legitimate reasons such as concerns about the safety and wellbeing of children should not be used as evidence that a parent is turning a child against another parent.

Protection needs to be provided to children through the courts from being manipulated or intimidated by parents to not disclose abuse, to retract allegations against them, to make false allegations against the non-abusive parent, or to say they want contact with perpetrators of abuse when they don't. The focus must be on the child's rights and best interests, not on the parent/father's rights to have access to the child. A common tactic we hear of from women accessing our services is abusive parents manipulating children's views for example through buying them presents.

[17] P32, https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/Domestic-abuse-human-rights-and-the-family-courts-report.pdf

Safeguards against manipulation

The best steps which can be taken to stop children being put under pressure by one parent to reject the other are:

- Increase and improve access to the specialist support for children to ensure they are supported to make their views known in relation to contact (for example through trained Child Support Workers)
- For all professionals involved in the court process to receive in-depth training about the dynamics of domestic abuse and the impact on children
- Ensure that any training on this issue for all professionals involved in the court process includes credible information about 'parental alienation' (as a discredited 'syndrome') and its frequent use by perpetrators of abuse to manipulate the court and discredit survivors of abuse.

Question 29): Should a person convicted of a serious criminal offence have their PRRs removed by the criminal court? Please select only one answer.

d) No – another way (please explain)

While, ideally, whether to remove PRRs could be part of the sentencing process, we consider that there is a risk that (a) this will overburden already under-resourced criminal courts (b) there may not be adequate opportunity/mechanisms for the child's views to be taken and (c) that perpetrators would argue that they are not being given access to a fair trial because the considerations for whether PRRs should be removed are different from the considerations of a criminal court in deciding to find someone guilty of a criminal offence. The perpetrator would need to have to an appropriate hearing to avoid a possible Article 6 breach.

However, the current system puts too much pressure on survivors of abuse – it is for them to raise appropriate civil proceedings, and obtain documentation about convictions etc. Therefore, the criminal courts should have the power to decide that it is necessary to consider whether PRRs should be removed and make a referral to a process that is appropriate for a decision on that to be made.

There would need to be a mechanism to ensure that the views of the child/ren were taken and the victim of the abuse should have access to legal representation (which should be non-means tested).

In considering appropriate options for a process to remove PRRs in relation to criminal proceedings, we would like to note that the criminal courts have a responsibility to improve their systems to obtain the views of the child. The current lack of provision for this should not be the reason children are not afforded an additional layer of protection through the duty to consider the removal of PRRs

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

The SWRC considers it is a reasonable step to clarify that a person may not be exercising these rights because the child is now outwith the UK. A definition of "exercising" would help all parties understand when consent is required and when it is not.

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?

No

The SWRC is concerned that such an amendment may result in crimes being alleged in inappropriate circumstances, for example if one parent takes the child on holiday and the other parent withdraws consent at the last minute. This is likely to be used as a mechanism to perpetuate control and abuse.

However, a distinction needs to be drawn between parents who are going on holiday with a child as opposed to taking the child to live abroad without the consent of the other parent. There is an associated risk of provision of PRRs being granted in other countries, particularly where the country is not Hague compliant. Such scenarios would not be in the best interests of the child and appropriate safeguards should be put in place.

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

Yes

Cross examination of domestic abuse victims perpetuates abuse and prevents survivors giving their best evidence. Introducing a ban on personal cross examination of domestic abuse victims should be introduced immediately. This process is potentially devastating and triggering to be questioned in an adversarial system by someone who has abused you. Again, it must be recognised that this process is commonly used by abusers as a means of perpetuating ongoing abuse. It is a place where power and control can be too easily acquired by abusers.

Equally, there needs to be a wider consideration of the impact on women who have no legal representation being required to question an abusive ex-partner in child contact proceedings. In our experience this is a common scenario. Being questioned by and questioning abusers should not be required of survivors of abuse by our legal system.

This ban should not apply only in cases where the perpetrator/alleged perpetrator has a criminal conviction of abuse or is the subject of a civil protection against domestic abuse. This should apply in all cases where domestic violence has been disclosed.

Vulnerable witnesses should have the same level of protection in civil cases as provided in criminal cases. Failure to stop cross examination by a perpetrator of domestic abuse is just one way that child contact procedures enable domestic abuse to be prolonged.

> ***"I was terrified of him and had to go in the same entrance (Court of Session)."***

We are aware of issues where applications for vulnerable witness protection of special measures are not being granted by the court, or not being applied for by the survivor's legal representative. Automatic use of special measures for deemed vulnerable witnesses in civil cases involving sexual offences, domestic abuse, child abuse or stalking should be made available for those who wish it. Any ban on personal cross examination of a victim of domestic abuse must also extend to children and young people involved in the case.

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

> ***"There was an Interdict with Power of Arrest against him in place. He sat right beside me in an open court"***

Although SCTS found there was a low level of applications for separation of parties and that often this happened automatically, this is not the experience of the SWRC. We often speak with women on our helpline where their solicitor has not led domestic abuse evidence in contact proceedings. 82% of our survey respondents also reported this.

Another related issue which must be addressed is that women are often dissuaded from raising concerns or allegations about abuse and are often told this will make them look like they are being difficult or malicious which will reduce their chance of getting custody of their child/ren.

The current process is too fragmented and difficult to coordinate, with women having to seek remedies through other court processes. Survivors must feel safe in order to participate effectively in the court process. This amendment would contribute to minimising ongoing abuse perpetrated by the court process. There is a huge training gap for solicitors around domestic abuse which needs to be urgently addressed. As discussed elsewhere this training must be trauma informed.

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

These subsections are an important tool for survivors of abuse. Further training and guidance are needed on these subsections for solicitors and the judiciary with regard to when these should be used, and scrutiny given to the weight placed on allegations and evidence. As noted at Question 23 above, these provisions are under-utilised.

The main issues are around the weight (or lack of weight) currently given to allegations of domestic abuse and the evidence the court is prepared to accept when considering cases in line with S11 (7A)-(7E). A particular concern we have is around how allegations of abuse are dealt with and what solicitors tell their clients. For example, we are aware of solicitors telling their clients not to appear too distressed.

Many of the respondents to the SWRC survey reported that domestic abuse was not raised in their case even where there were charges or convictions, or where the child/ren had made allegations of abuse.

> ***"Previous solicitor didn't explain court proceedings, my rights, my children's rights or advised me of anything. She had no empathy and left myself and my children exposed to a very terrible experience overall."***

There needs to be better awareness and training for solicitors and sheriffs on the barriers to disclosure of domestic abuse. We are aware of survivors who were dissuaded from disclosing abuse or who felt unable to initially but felt that disclosing domestic abuse later in the case

was dismissed as an attempt to change the outcome of the contact case. Survivors of abuse are often caught in this trap – being told that disclosing abuse initially will reflect badly on them and damage their chances of protecting their children, and then penalised for not disclosing abuse at the beginning of the case. If they then try to voice concerns of risks to children of contact, they are portrayed as manipulative and lying.

False allegations of domestic abuse are very low and should not be used as a reason to remove safeguards for children at risk of abuse.

Recent research into lawyers' attitudes towards and use of these subsections in Scotland[18] revealed that the main barriers to these subsections being fully utilised included the attitudes of sheriffs and the different approaches taken in different regions in Scotland.

These subsections should remain, but we would like to see them strengthened and utilised more in contact proceedings. Further work is required to understand how these protections can be better utilised to ensure that any children at risk of abuse through contact with an abusive parent, or witnessing the abuse of a parent, are protected by the current provisions in law.

We would also welcome the introduction of a presumption against contact with the abusive parent where there is domestic abuse.

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

This amendment would help filter out any inappropriate cases and weed out cases where an abusive partner is using repeated litigation as a means of perpetuating abuse.

The SWRC hear of many cases where women are repeatedly brought back to court by men seeking to amend or alter arrangements made already by the court. This is particularly common where men's means are disproportionately higher than those of the women involved and has significant financial repercussions for women. It is well known in the women and children's sectors that this is a method of abuse. Any changes to the process should take into consideration the emotional, psychological and financial impact on survivors of abuse through repeated litigation.

> ***"For 9 years my (now) ex-husband repeatedly took me to court for child contact- seeking changes & increases to the court order."***

Women who responded to our survey have described cases which took numerous years or remain ongoing with constant revisions being requested. Furthermore, women described the impact on them (and their children) of engaging in contact proceedings. These include depression, anxiety, contemplating suicide, feeling disbelieved and financial hardship. These responses correspond with what is reported to us through our helpline and other services.

[18] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-08-may-2017/paper-4-2a-case-management-in-family-actions---research-report-by-dr-richard-whitecross-and-dr-claire-lindsay.pdf?sfvrsn=2

"My children are very frustrated that he won't just stick to the contact agreement and stop involving them in his games. They are fed up of the constant threat of court."

While we fully support steps taken to ensure women are protected from malicious repeated litigation, any such measure must ensure that women experiencing domestic abuse who are concerned about the safety and wellbeing of their children through court decisions about contact and residence are able to appeal decisions and seek amendments. Our previous comments about the need for a robust monitoring and review system of contact decisions to ensure children's safety and welfare relate to this point.

"My son's father continues to control and abuse me and my child through the court process. I am continually called a liar, my son is accused of lying and the court sees the case as 'a bitter ex trying to stop contact with the father'. They completely disregard my concerns, my sons views and 'punish' us by allowing the abuse to continue and contact ALWAYS increased at the abusers request. My son is scared of his father, I have severe anxiety with every court hearing and continually struggle to find legal aid representation"

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

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.

The SWRC welcomes a more proactive approach to establishing if domestic abuse is a factor in civil cases. Any changes would need to be systemic. In order to be effective, it would require training at all levels.

Many of the women who contact SWRC report that they disclose domestic abuse only once child contact proceedings have started. We know that there are many barriers to reporting domestic abuse. Where this is the case the courts perhaps need to adopt an approach which recognises that abuse is potentially a factor. We are of the view that this could be done in a manner which would not infringe the rights of the party accused.

All measures should be used to ensure that courts have in-depth information on the dynamics and effects of domestic abuse, and negative inference should not be drawn from delayed disclosure. It is vital that survivors of abuse are not only provided with one opportunity to raise domestic abuse.

Where domestic abuse is raised by a woman for what is essentially the first time in the eyes of the justice system, it cannot simply be rejected outright because it has not been confirmed in the criminal justice system.

It is a huge failing that the civil and criminal processes do not sufficiently communicate or complement each other. However, charges or convictions should not stand as the only measure of domestic abuse given the substantial barriers to reporting faced by survivors of abuse.

There exists scepticism among some professionals about the existence of abuse when it is claimed. Robust processes and an understanding about the dynamics of abuse should help with this. Work should be done to address and challenge victim-blaming mentalities to domestic abuse victims (in line with work being done elsewhere such as social work responses through the Safe and Together model). Children's fear of a parent should be considered as a significant indicator of risk. Some questions which arise for us in relation to this issue include:

- Would routine enquiries be introduced?
- What would the court be prepared to accept as evidence of domestic abuse?
- What processes would be in place to support survivors if enquiry by the court resulted in an initial disclosure of abuse?

We are also concerned about cases of 'dual reporting' where perpetrators of abuse make counter allegations of abuse in order to discredit the survivor's disclosure. Any training and measures introduced in relation to information provided to the civil courts on domestic abuse would need to take into consideration how to safeguard from false counter-allegations from perpetrators of abuse.

Inclusion of domestic abuse in a welfare checklist would need to consider the many tactics and forms of domestic abuse (including isolation, verbal abuse, sexual abuse, coercive control, deprivation of resources, imprisonment, physical abuse, threats, blackmail, etc.). There should not be a tick-box for 'domestic abuse' as this would not sufficiently cover the many forms of abuse which is tailored to individuals, nor provide enough information for an assessment of the level of risk.

A review of what evidence would be sufficient to support claims of abuse is needed. This is particularly relevant in cases where abuse is not physical and/or is historical, or where no charges have been made or services have been involved. This is a particularly challenging area in civil contact proceedings where parties are pitted against each other as one person's word against another.

Women who responded to the SWRC's survey reported that although 42% of respondents' children had themselves made allegations against the father and 33% of respondents had ex-partners who had been charged with or had domestic abuse convictions, that there were no pleadings or use of domestic abuse in the contact case of 82%. Even where there was use of domestic abuse evidence, respondents did not find this impacted on sheriffs with 90% saying that they felt the sheriff did not take domestic abuse into account.

> ***"completely lost faith in the system, feel hopeless and at times suicidal"***

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

Yes

Where domestic abuse is disclosed a risk assessment should be required where (a) the survivor consents and/or (b) the court considers that this is in the best interests of the child/ren. The court should take the domestic abuse risk assessment into account in reaching its

decision. Child Welfare Reporters should also take this into account in their report and when dealing with the case. However, unless significant training and processes for accountability were implemented we do not consider that the proposal for Child Welfare Reporters to carry out domestic abuse risk assessments is appropriate.

The current domestic abuse risk assessment process is primarily linked with the criminal justice system and is designed to prevent homicide. In the context of child contact cases, risk assessments will be potentially useful to broaden the approach (i.e. to not limit risk to the outcome of homicide). They have the capacity to capture qualitative information that might be case specific and useful to the process. Risk assessments need to be more than an actuarial tool in the context of child contact. In the criminal justice process, the risk assessment is used to justify the allocation of tight resources. Risk assessments are a good way to structure conversations with victims about their past and continuing experiences of abuse. The current DASH risk assessment most widely used includes questions about children and their experience of abuse. As risk assessments tend to focus on this, the consequence of this is resources tend to be focused on women experiencing physical abuse. There is still a preference for creating a hierarchy of abuse (which prioritises physical abuse) which could limit the value of the risk assessment in child contact and family law contexts. In line with the new Domestic Abuse (Scotland) Act 2018 more focus needs to be given to emotional and psychological abuse also.

Consideration must be given to who would carry out the risk assessments and how they would be used. Risk assessments can be useful, but they have their limitations. For example, we are aware of referrals to MARACs which have had very high scores but no resulting actions. The entire process needs to be looked at, but risk assessments could contribute to improving safety, for example through access to civil non-harassment orders.

There is also an opportunity to join up relevant policy aims in assessing risk to children. For example, the Scottish Government Child Protection Guidance 2014[19] clearly states that:

- Children and young people living with domestic abuse are at increased risk of significant harm, both as a result of witnessing the abuse and being abused themselves
- Domestic abuse can profoundly disrupt a child's environment, undermining their stability and damaging their physical, mental and emotional health
- If a child's non-abusive parent/carer is not safe it is unlikely the child will be
- Supporting the adult victim of domestic abuse ultimately supports the child
- The impact of domestic abuse on a child should be understood as a consequence of the perpetrator choosing to use violence rather than the non-abusing parent's/carer's failure to protect.

> ***"I think the family court needs a radical overhaul. Children should not have contact with violent men. This is the only occasion where you would be made to knowingly expose a child to this. My daughter was completely settled after a very traumatic early life and then she was exposed to this again. It just doesn't make sense that this is what is in her best interest."***

[19] https://www.gov.scot/Resource/0045/00450733.pdf

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

Yes, there should be another approach. Improved interaction would take some of the burden off domestic abuse victims. Examples include:

- Criminal courts could pass documentation about conviction to civil courts
- Criminal courts could consider leaving bail conditions in place to allow an opportunity for a victim to raise proceedings for protective orders
- Criminal courts could consider granting protective orders even when there is no conviction if, in summary cases, the Sheriff considers that the allegation was proved on the balance of probabilities
- Where there is a conviction for domestic abuse disposal should be tailored to address any children in the household

In the context of domestic abuse, the distinction between civil and criminal is wholly unhelpful. The current separation of civil and criminal requires women to split their experiences of abuse in unrealistic ways. Doing so reinforces many aspects of the abuse including powerlessness and fragmentation. Women who have experienced domestic abuse require to engage in a number of legal process that can be costly, complicated, lengthy and re-traumatising. They often do not know where to turn. Further steps require to be taken to improve the response to domestic abuse, access to early legal advice and legal aid This could be assisted by improving interaction between civil and criminal courts.

Family Law Centres in Europe work with survivors from reporting throughout the civil and criminal processes. This approach puts women and children at the centre. Whilst it may be a longer-term objective and will require greater consultation this approach is worth exploring further in Scotland.

Another approach to consider is learning from problem-solving courts. Problem-solving courts, like drug-courts and domestic abuse courts in the US, deal with the problem and the individual in a way that is arguably more able to absorb the conflict between criminal and civil procedures created largely due to the differing 'burden' of evidence in each. Early attempts to have these courts in the UK failed for a number of reasons, but mostly because of the existing tension between burdens of evidence and the problems this throws up. We need to think of domestic abuse as a problem made up of a variety of issues and concerns that are best dealt with as a whole, rather than a series of isolated incidents. This would perhaps require greater monitoring, particularly of abusive parents regarding their right to have continued contact with children.

Competing rights of all concerned, including the children, are an issue in the current system. This needs to also be considered in any new model or approach being considered. Any approach to improving the interaction between criminal and civil courts where there has been an allegation of domestic abuse should not require a criminal charge as a prerequisite.

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?

(Neither yes or no)

We are aware of significant delays and the detrimental impact this can have on survivors and their children. Causing delay in court proceedings can be another method of perpetuating abuse. This could potentially be addressed through guidance/practice directions rather than

legislation. Undue delay is certainly likely to have a detrimental impact on the welfare of the child, therefore guidance which links undue delay to detrimental impacts could have a positive effect. Women who have experienced domestic abuse report the detrimental impact of delays and the financial impact must also be considered. However, this should be balanced with the need to properly prepare cases. Further, courts require to be able to appropriately prioritise and manage their own business.

> ***"I have a lack of trust in the court process to protect my son (and myself). My life has changed dramatically since court proceedings started 4 years ago."***

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

No

The choice should remain but we are concerned that the Court of Session is sometimes used as a means of financial control where one party has more means than the other. We would recommend a test is introduced where only sufficiently complex cases can be raised in 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

Although provisions in S11 should be flexible enough to provide protections for any form of abuse/risk of abuse, we suggest that these existing provisions could be strengthened through the introduction of a checklist.

Consideration is needed as to how such a checklist would interact with risk assessments. Ultimately the effectiveness of a checklist to ensure children are protected from abuse/risks of abuse depends on the processes attached to it, how it is done and by whom. Flexibility to respond to individual circumstances in cases would be necessary, particularly because domestic abuse is tailored to individuals and operates differently in every family affected.

We caution against a tick box approach which would not ensure that appropriate scrutiny was taken relating to the potential risks faced by children.

Any checklist created should build on and complement the existing subsections in S11 (7A)-(7E).

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

I. *Whether DA has been disclosed or identified*
II. *Whether a DA risk assessment is needed*
III. *Whether a CSW should be assigned*
IV. *How the court will obtain the views of the child*
V. *Whether the child/ren has indicated or it is suspected that they fear an abusive parent*
VI. *Whether interim contact can be ordered then monitored and if so how long for?*

VII. Whether supervised contact is appropriate

VIII. Whether Proof is likely to be required

Other comments

We are very concerned at the inclusion of the phrase (10.18) 'evidence of one parent unreasonably trying to influence the child against another parent' (known by some as 'parental alienation'). For the reasons given under Q28 this should be removed.

Question 42): Should the Scottish Government do more to encourage Alternative Dispute Resolution in family cases? Please select as many options as you want.

d) No

We recognise that ADR could benefit families where there is no abuse. However, ADR should only be used in domestic abuse cases if the system and associated processes were dramatically changed so that (a) a decision reached in ADR could be enforced and (b) those conducting the ADR would have to receive specialist training in recognising and dealing with domestic abuse and (c) parties should have access to representation in the process. Without ADR the only option is an adversarial court system which can often perpetuate abuse.

The Scottish Government should provide better guidance on why ADR is not usually appropriate where there are any concerns or allegations of abuse. One of the fundamental reasons ADR can be inappropriate in situations of domestic abuse is that it assumes it involves equal parties who are equally able to advocate for themselves and negotiate with each other. This does not take into account fear, manipulation, blackmail, threats, coercion, abuse and so on. ADR cannot sufficiently safeguard against these things and can be psychologically and emotionally traumatic for survivors of abuse to be asked to negotiate with perpetrator of abuse. Domestic abuse is not a dispute. Any push towards compromise or middle ground when it comes to domestic abuse is wholly inappropriate and potentially dangerous. Further, in our experience and from what is reported to us, often it is simply not possible to reach agreement in a domestic abuse situation and so negotiation would merely cause further delay in an already lengthy process.

ADR should never be a prerequisite to court or for access to legal aid. SWRC supports Article 48 of the Istanbul Convention which prohibits the use of mandatory alternative dispute resolution processes including mediation and conciliation, in relation to all forms of violence covered by the scope of the convention. This aims to highlight the negative impact of ADR being used instead of court procedure in cases involving domestic abuse. In cases involving domestic abuse, individuals should have access to court proceedings presided over by a neutral judge.

We are very concerned about the large number of court referrals to mediation. We recommend that the Scottish Government should fully align any proposals to ADR with the Istanbul Convention. We also support the suggestion outlined in the consultation paper (11.16) that a policy paper is produced for the Family Law Committee in line with the Istanbul Convention

As well as making sure lawyers and sheriffs are aware that ADR is generally not appropriate where there is a history of abuse, this information needs to be promoted to the general public as survivors of abuse may not know the risks or that it is an option to refuse it when they are advised/ordered by court.

Survivors required to pursue ADR to receive legal aid removes this protection and choice. Where exemptions are made for domestic abuse, consideration is needed about what evidence will be required. This relates to concerns expressed elsewhere in this consultation

response points around low conviction rates, low disclosure rates and why many women choose not to disclose history of abuse in order to protect their children.

All solicitors providing ADR should receive specialise training on identifying domestic abuse and coercive control. In our experience this is rare.

Finally, there are currently not sufficient avenues for views of children and young people to be considered in ADR processes which is directly contrary to children's Article 12 rights.

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

No comment

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

Yes

As discussed in our answers to Q1-3, children and young people have the right to participate in decisions made about their lives (Article 12 UNCRC) which is dependent on access to information (Article 17 UNCRC). Guidance for children in relation to contact and residence would help children and young people to understand the process which in turn may improve their engagement in the process.

It is important that it is clear that this guidance is not a substitute for legal advice. Information about how children and young people can instruct lawyers should be included. We again refer to the work of the ASNTS in this regard.

We are aware of some information guidance previously produced for children on the issue of parental separation and contact which unhelpfully reinforced the idea that contact with both parents is always the best option. It is important that any information produced will reflect a variety of lived experiences of children and young people including references to domestic abuse.

Any information would require signposting to where people (and specifically children and those who have experienced domestic abuse) can find information about legal advice, support services, complaints, further information, and their rights. Any resources aimed at children and young people should be co-created and tested with children and young people.

The SWRC would also support detailed guidance being issued for parties who require to represent themselves in contact and residence cases.

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

We have worked with survivors of domestic abuse where we have assisted women and children to change their name after fleeing domestic abuse. Under the current system, formally changing the name of a child requires the consent of both parents if they have PRRs. Arguably a system where a young person can apply for a name change would improve their safety in such circumstances.

This approach is also in-keeping with promoting the agency and rights of children.

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

However, this may not be necessary if the above change was made (Q45). Consideration would need to be given as to who would assess capacity of the child to make this decision. This would require specialist training to adequately assess whether the child has capacity to make this decision. This must take into consideration any language, communication and learning needs.

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?

No comment

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

On balance, yes. This right of appeal could afford another layer of protection for children and young people at risk of domestic abuse if 'relevant person' is abusive.

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

Yes

Improving engagement through enhanced use of available technology would be beneficial particularly where the child/ren are from a family where there is domestic abuse present. The criminal justice process has recognised the potential to pre-record video evidence for child witnesses and is exploring this. Modernisation in the Children's Hearings System would therefore be in-keeping with the criminal justice process.

We recommend this approach is also considered for the civil justice process more generally where protection for vulnerable witnesses has not matched the provisions in the criminal justice process.

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?

No comment

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

Yes

A ban on personal cross examination of vulnerable witnesses, including children, in certain Children's Hearings proceedings is vital to ensure that children to not suffer abuse through the process and to ensure best evidence.

It is abhorrent that children recognised as vulnerable witnesses, taking part in a hearing which pertains to hold their interests central, should have fewer rights than child witnesses in criminal cases. Cross examination by the accused in sexual crime cases was stopped through amendments which were brought in following the suicide of Lyndsey Armstrong. This very clearly highlights a failure in the current process in Children's Hearings.

This ban should apply to all cases related to sexual offences, domestic abuse and forced marriage. We would caution against including cases of lack of parental care because we are concerned about cases where women experiencing domestic abuse have been penalised for a "failure to protect" their children from abuse.

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

No comment

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?

No Comment

Question 54): Do you have any further comments?

Yes

Comments on the current system

The system for adjudicating family law matters in Scotland is clearly not working for some of the most vulnerable people in our society – children who have experienced or witnessed abuse and their mothers. It needs to change and the SWRC welcomes the opportunity to engage with this consultation. However, in our view a wholescale review of the system is required. Legislative change should only be undertaken where necessary and for good reason. Many of the legislative changes of the type proposed by this consultation will have unintended legal consequences and cannot be considered in isolation. We would suggest that a review of the system by the Scottish Law Commission may be appropriate. For example, the Commission could establish whether there is substantial evidence of judicial interpretations which are at odds with the legislative intention (particularly on the points where clarification of the legislation is being considered). If that is the case, it may be that legislative amendment is necessary.

The current adversarial system is used to perpetuate abuse. Controlling partners want to win. The process could be framed in another way to minimise this. Many women accessing our service and women who have completed our survey have expressed real distress at the impact that child contact proceedings in particular have had on them. The vast majority of women calling our helpline have experienced domestic abuse and the majority of our callers are seeking advice about child contact. The current system is not geared towards seeking the truth or what is in the best interests of the child**.** The child is not at the centre of proceedings.

The current protections for women and children experiencing domestic abuse in civil cases are not sufficient and must be addressed as a priority within the Family Justice Modernisation Strategy. The SWRC receives many calls from women experiencing domestic abuse who feel re-traumatised through civil court proceedings where their experiences of abuse are either not taken into account in assessing risks to their children through ongoing contact or are twisted around to be used against them to portray them as malicious and bitter women who are then discredited in court. Both of these result in unsafe decisions being made for children at risk of ongoing abuse.

Domestic abuse significantly impacts children and these risks do not disappear after parental separation. We need a culture change as well as an overhaul in the law and the processes to challenge the perception that abusive partners are good parents. The current safeguards in place are not working. More needs to be done to ensure that women and children

experiencing domestic abuse are not sentenced to ongoing abuse through civil contact proceedings, and more must be done to hold perpetrators to account for their abuse and the manipulation of court proceedings, and accordingly public funds, to continue their campaign of abuse.

Legal Aid

Cost is a barrier to ensuring that a decision is made in the best interests of the children. Where one party can access legal aid or can afford to pay privately and the other cannot access legal aid but has limited resources, the latter will often have no option but to represent themselves or give up and accept what the other party wants. This need to be considered.

Sometimes parties cannot access legal aid solicitors, particular in small towns and rural areas. As legal aid in contact and residence proceedings is front loaded survivors of abuse often find it very difficult to change solicitor during the process even where they get poor representation. Legal aid is not sufficiently remunerative for solicitors which means that solicitors often, due to their case load of legal aid cases, cannot take the time to properly explain the process to very vulnerable clients.

> ***"My solicitor was very sympathetic and kind and experienced in the field (she was recommended, rightly, by Women's Aid), but as it was a legally aided case she didn't have the time to listen or explain much, and I was a bit floored by the sorts of questions I was asked in court, which I hadn't expected. I don't blame her in the slightest for this; she had an enormous caseload."***

Training on domestic abuse, coercive control

There needs to be judicial and practitioner training on the dynamics of domestic abuse. Common misconceptions include that all domestic abuse is reported to the police, that all domestic abuse is physical, that domestic abuse only has only occurred where there is a conviction, and that domestic abuse automatically ceases after separation. This acts as a barrier to justice.

The impact of domestic abuse on children

The risks to children from domestic abuse do not cease when their parents separate. Understanding risk as limited to witnessing physical incidents of harm of their non-abusive parent is not supported by the vast weight of evidence, research and lived experience of women and children experiencing domestic abuse in Scotland, nor the recent changes to legislation in Scotland which acknowledges the serious risks and harm of other forms of abuse including coercive control, emotional, psychological, financial and sexual abuse prevalent in domestic abuse situations.

> ***"my son's father tells him I am going to prison, that the man at court doesn't believe me or him and only listens to his father, my son has been extremely angry, emotional and has had a big impact on his behaviour at home and at school"***

Children are harmed in multiple ways through domestic abuse perpetrator's choices and actions. These include experiencing abuse directly, witnessing abuse to their non-abusive parent, through the effect of abuse on their non-abusive parent's parenting and wider effects such as educational and social disruptions. These harms to children can be seen as parenting choice on the part of the abusive parent (see Safe and Together model). It is imperative that

court systems do not separate the risks associated by perpetrators abuse of their partner and their ability to be a good parent.

Trauma informed processes

Understanding the impact of trauma is critical to ensuring civil court reforms are fit for purpose. Further suggested resources include:

- Trauma and the Brain: understanding abuse survivors responses
- Trauma Informed Practice for the Workforce

Process for review of contact decisions

The Scottish Government should urgently consider and establish an appropriate mechanism for reviewing child contact when it is not safe for women and children experiencing domestic abuse.

Children's rights

The rights of children must be front and centre in any changes made to Children (Scotland) Act 1995. In particular, children need to have access to ongoing specialist support, have their rights to freely express their views upheld, and for sufficient weight to be given to their views and fear through a significant cultural shift in courts. These rights apply to all children including young children and those with additional support or communication needs. Particular care should be taken to support children requiring additional support to make their views know and for these to be seriously considered by the court, due to the increased risk of abuse to young children and children with disabilities.

> ***"I left an abusive relationship and I later found out that my eldest son was abused also. Unfortunately my son is disabled so he could not take it further. He did not want to see his father anymore but the court proceedings did not take this into account. Contact was re-established. It was disappointing as it is obvious that he is a risk to children as well as women."***

Principles for participation

The Children and Young People's Commissioner for Scotland have created an excellent resource for understanding the principles for children's participation which we would recommend be utilised by all professionals involved in gathering and considering the views of children in court. These are based on the principles[20] outlined under the General Comment Article 12 which are also a very useful resource.

[20] Para 134, General Comment Article 12