

**Final  
Business and Regulatory Impact Assessment**

**Children (Scotland) Bill**

September 2019



Scottish Government  
Riaghaltas na h-Alba  
gov.scot

**Title of Proposal**

Children (Scotland) Bill

**1. Purpose and intended effect**

• **Background**

1.1 The Children (Scotland) Bill (the Bill) resulted from a consultation on the Review of the Children (Scotland) Act 1995 which is the key legislation in relation to parental responsibilities and rights and cases on where a child should live and who should see the child after the parents split up (contact and residence cases).

1.2 Primary legislation is only part of the action necessary to improve the operation of family justice. A Family Justice Modernisation Strategy (FJMS) was published when the Bill was introduced. This sets out work that is ongoing by the Scottish Government and others; work that can be done via secondary legislation or by improved guidance; areas covered by the Bill; and areas that are for longer term work. The FJMS is not considered as part of this BRIA.

• **Objective**

1.3 The key policy aims of the Bill are to:

- Ensure that the child's best interests are at the centre of any contact and residence case or Children's Hearing;
- Ensure that the views of the child are heard;
- Ensure further compliance with the principles of the United Nations Convention on the Rights of the Child (UNCRC); and
- Further protect victims of domestic abuse and their children.

• **Rationale for Government intervention**

1.4 The Bill contributes to the following National Outcome:

- We grow up loved, safe and respected so that we realise our full potential.

1.5 The Bill aims to help meet this National Outcome by ensuring our children grow up in an atmosphere of happiness, love and understanding and that children are not left worried or isolated. The effect of the Bill will be to further protect children and young people who are the subject of a contact or residence dispute. In addition, the Bill includes provisions ensuring the views of children are heard in contact and residence cases.

**2. Consultation**

2.1 In preparing the Bill the Scottish Government's Family Law Unit which sits within the Civil Law & Legal System Division of the Justice Directorate have worked with:

- Criminal Law Division
- Children and Families Directorate
- Justice Analytical Services

- Crown Office and Procurator Fiscal Service
- The Scottish Courts and Tribunals Service
- **Public Consultation**

2.2 The Bill is informed by the outcome of a consultation on the Review of Part 1 of the Children (Scotland) Act 1995 (the 1995 Act). The consultation on the 1995 Act and the Family Justice Modernisation Strategy ran between 15 May and 28 September 2018. The Scottish Government produced child friendly questions which were available via SurveyMonkey. The child friendly consultation ran for the same period. The main consultation included a draft BRIA.

2.3 The Scottish Government received approximately 250 responses to the main consultation and 300 to the child friendly questionnaire. The Scottish Government held a number of meetings with a range of stakeholders across the country during the consultation period, including with children and young people.

2.4 The responses have been published where the Scottish Government has permission to do so at the link below:

[https://consult.gov.scot/family-law/children-scotland-act/consultation/published\\_select\\_respondent](https://consult.gov.scot/family-law/children-scotland-act/consultation/published_select_respondent)

2.5 In addition the Scottish Government has published an analysis report which is available at the link below:

<https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/>

- **Business**

2.6 In late 2017 the Scottish Government conducted interviews with representatives from the following organisations to prepare for the draft BRIA which formed part of the consultation on the Review of the 1995 Act:

- CALM Scotland Mediation
- Children and Young People's Commissioner
- Children 1st
- Clan Child Law
- Faculty of Advocates
- Families need Fathers
- Family Law Association
- Grandparents Apart UK
- Law Society of Scotland
- Relationships Scotland
- Scottish Child Law Centre
- Scottish Legal Aid Board
- Scottish Women's Aid
- Scottish Courts and Tribunals Service

2.7 During the consultation period the Scottish Government met with the following organisations:

- Abused Men in Scotland

- Adoption and Fostering Alliance Scotland
- Canongate Youth Groups
- Celcis
- Children's Parliament
- Citadel Youth Centre
- Citizens Advice
- Cosla
- East Lothian Champions Board
- Families need Fathers Scotland
- Grandparents Apart UK
- Inverclyde Child Contact Centre
- Independent Care Review
- Kinship carers networks, East Lothian, Edinburgh, Kilmarnock
- Life Changes Trust
- Mentor UK
- Paisley Child Contact Centre
- Parent Network Scotland
- Perth, Stirling, Aberdeen City and Aberdeenshire Youth Rightsgroups
- Promoting Positive Contact
- Recharge Young People's Group Tranent
- Relationships Scotland
- Scottish Childrens Reporters Administration (SCRA)
- Scottish Women's Aid
- Social Work Scotland
- Society of Local Authority Lawyers and Administrators
- Scottish Youth Parliament
- Who Cares? Scotland
- Young Scot

2.8 The Scottish Government also held a roundtable with family law academics in July 2018.

2.9 Since the consultation closed the Scottish Government has met with the following organisations in relation to proposals in the Bill:

- Adoption and Fostering Alliance Scotland
- Adoption Task Force
- Children 1st
- Children and Young People's Commissioner
- Children's Hearings Scotland
- Celcis
- ClanChildlaw
- Cosla
- Families need Fathers Scotland
- Family Law Association
- Grandparents Apart UK
- Independent Care Review
- Law Society of Scotland
- Maisie's Children's Centre

- Promoting Positive Contact
- Relationships Scotland
- Scottish Childrens Reporters Administration (SCRA)
- Scottish Courts and Tribunals Service
- Scottish Legal Aid Board
- Scottish Youth Parliament
- Scottish Women's Aid
- Social Work Scotland
- Dr C Jones, Strathclyde University
- Who Cares? Scotland

2.10 The meetings with organisations both during the consultation process and after the consultation had shut have helped to inform the policy of the Bill.

### **3. Options & Impact on Scottish Business**

3.1. The Bill covers a number of different areas in order to meet the policy objectives. The Policy Memorandum for the Bill provides further information on the policies and alternatives.

3.2. All of the options considered would have impacts on the child at the centre of the court case or Children's Hearing, any individual with parental responsibilities and rights (PRRs) and the parties to a case.

#### **Ensuring the views of the child are heard**

3.3. One of the key aims of the Bill is to ensure that the views of the child are heard in court proceedings and Children's Hearings that affect them.

3.4. Six options were considered to ensure that the views of the child are better heard:

- Do nothing
- Remove the presumption that a child aged 12 or over is considered mature enough to give their views in specific legislation and ensure that the views of the child must be obtained in a suitable way;
- Remove the presumption from all legislation;
- Maintain the presumption but introduce a new lower age limit;
- Remove the presumption and lay down in primary legislation the specific methods available to the court to obtain the views of the child; and
- Remove the presumption and require the court to use the child's preferred communication method.

#### Option 1: Do nothing

3.5. There is the option of not amending the law. This could mean that in practice the views of children under 12 are not fully taken into consideration. In addition, the decision maker might not choose a manner of expressing views that is suitable for the child. The consequence could be that the decision maker does not receive the best information possible about a child's

views. This would also be contrary to the objectives of the Bill on the views of the child and would be inconsistent with the terms of the UNCRC. Therefore, this is not considered a suitable alternative.

- 3.6. This option would have no cost implications or impact on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo.

Option 2: Remove the presumption that a child aged 12 or over is considered mature enough to give their views in specific legislation and ensure that the views of the child must be obtained in a suitable way.

- 3.7. This option ensures the position of younger children is fully considered by all parties. The changes will apply in relation to major decisions involving PRRs (see section 6 of the 1995 Act in particular). This will require the courts or other decision maker to give the child a suitable opportunity to express their views in a manner suitable to the child. This includes seeking the preferences of the child on how they wish to give their views.

- 3.8. **This is the option that is included in the Bill.** In the Financial Memorandum which accompanies the Bill the Scottish Government have estimated that this provision could cost between £0.49m and £0.87m per year. These costs would be expected to occur from 2023 onwards as the views of younger children would only be able to be obtained once a register of Child Welfare Reporters is established. These costs would fall to the Scottish Courts and Tribunals Service (SCTS) and also the Scottish Government who will fund Child Welfare Reporters.

- 3.9. This option would have an effect on SCTS, the Scottish Children's Reporters Administration (SCRA), local authorities who are seeking permanence and adoption orders, the judiciary, family lawyers, organisations representing children's views and Child Welfare Reporters.

Option 3: Remove the presumption from all legislation

- 3.10. The presumption that a child aged 12 or over is of sufficient maturity to express their views is also in other pieces of legislation. There is the option that this presumption is removed from all legislation where the court is required to have regard of the views of the child. This would not be appropriate as there are circumstances where a young person requires a certain degree of maturity and understanding to be able to make a decision. For example the Bill retains the presumption that a child aged 12 or over is mature enough to instruct their own lawyer in section 11(10) of the 1995 Act.

- 3.11. This option could have significant cost implications as it would require younger children's views to be taken into consideration in a wider

range of circumstances.

- 3.12. This option would have significant impact on the SCTS, lawyers, the judiciary, children's organisations and the Scottish Legal Aid Board (SLAB) due to a likely increase in the number of cases and also the number of times that the views of the child need to be sought.

#### Option 4: Maintain the presumption but introduce a new lower age limit

- 3.13. There is the option of introducing a new lower age limit as suggested by some stakeholders in consultation responses. This could lead to further discussions about children with maturity under that age not being able to give their views or children without maturity over the age being able to give their views. In addition, there are differences in the age that stakeholders feel a child is mature enough to give their views. By removing the age limit completely we are ensuring that the decision is made on a case by case basis.

- 3.14. This option would have an effect on the SCTS, the SCRA, local authorities who are seeking permanence and adoption orders, family lawyers, children's organisations and Child Welfare Reporters due to a likely increase in the number of younger children whose views are heard.

- 3.15. There would be less significant cost implication than removing the presumption in its entirety as it would not require the views of the youngest children to be heard. However, this would not meet the policy aim of furthering compliance with the UNCRC. Article 12 of the UNCRC states that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child<sup>1</sup>."

#### Option 5: Removing the presumption and laying down in primary legislation the specific methods available to the court to obtain the views of the child

- 3.16. There is an option of laying down in primary legislation the specific methods of obtaining the views of the child. This could mean the decision maker having to consider all of the options laid down. However, a list of this nature could not be exhaustive. Laying down that the decision maker must give the child a suitable opportunity for the child's views to be heard gives flexibility. There may also be cases where the urgency of a case means the decision maker has to limit the methods of obtaining views while still ensuring the method chosen is suitable to the child.

- 3.17. This option would have an additional impact beyond that of removing

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<sup>1</sup> [https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC\\_summary-1.pdf?\\_ga=2.55933165.751997382.1567158992-154815287.1551436589](https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_summary-1.pdf?_ga=2.55933165.751997382.1567158992-154815287.1551436589)

the presumption on the courts as this would limit the options available when deciding the best way to obtain the views of a child. In addition, this option could have an impact on Child Welfare Reporters as they could be used more often to obtain the views of the child if options are limited.

Option 6: Remove the presumption and require the court to use the child's preferred communication method

3.18. There is the option of the court being required to use the method preferred by the young person for obtaining their views. This could fully empower a child to give their views. This not be feasible as the way preferred by the child may not be practical. However, the decision maker is required to give the child the opportunity to express their views in a manner suitable to them.

3.19. This option would have an additional impact beyond that of removing the presumption on the courts as if a child wishes to speak directly to the sheriff then this would need to be accommodated. This would also have cost implications in relation to the judicial time spent obtaining the views of the child.

**Prohibition of personal conduct of case**

3.20. One of the key aims of the Bill is to ensure that victims of domestic abuse are further protected in family law cases. One way of protecting vulnerable individuals when giving evidence as a witness is to prohibit a party from conducting a case themselves if they have committed a serious criminal offence involving the witness, or if the witness is otherwise considered to be vulnerable.

3.21. Five options have been considered in relation to prohibiting personal conduct of a case in certain circumstances during family court proceedings and Children's Hearings court proceedings:

- Do nothing;
- Introduce a new special measure prohibiting personal conduct of the case and requiring the court to appoint a lawyer from a list held by the Scottish Ministers where a person is subject to the prohibition;
- Limit the prohibition on personal conduct to those people who have been convicted of domestic abuse in a criminal court or are subject to a civil protection order;
- Prohibit personal conduct of a case if a party has a relevant conviction regardless of who was the victim; and
- Introduce automatic civil legal aid where a party has been prohibited from conducting a case.

### Option 1: Do nothing

3.22. This will allow persons convicted or accused of serious offences including domestic abuse to be able to personally cross-examine the victims or complainers and their children. This is unpleasant and difficult for the witness, can prolong the domestic abuse and may not be in the best interests of the child. This is not considered a suitable option.

3.23. This option would have no cost implications or impact on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo.

### Option 2: Introduce a new special measure prohibiting personal conduct of the case and require the court to appoint a lawyer from a register

3.24. The new special measure will be available in proceedings where the court is considering making an order under section 11 of the 1995 Act and in Children's Hearings court proceedings. The special measure can be authorised by an order made under section 12 or 13 of the Vulnerable Witnesses (Scotland) Act 2014. This option will protect victims of offences including victims of domestic abuse and also individuals who are vulnerable witnesses who are appearing in such a case, by ensuring that an individual is not using court proceedings to perpetuate abuse of another person. This will ensure protection in the family courts and Children's Hearing proceedings and is more closely aligned with existing protections in the criminal courts.

3.25. In relation to the register held by the Scottish Ministers, a recruitment round would be undertaken to obtain a number of lawyers who would be willing to act for parties. The Scottish Ministers would take the power to set the fee rates for these lawyers in regulations as appropriate.

3.26. **This is the option that is included in the Bill.** This option would have an impact on lawyers who may wish to be on the list of appointable solicitors and on the courts who need to consider applications from parties to authorise the new special measure. In addition, there would be an impact on SLAB as there could be more applications for legal aid if a party has been prohibited from conducting a case and is eligible for legal aid under the normal criteria. The Financial Memorandum for the Bill has estimated the cost of this option to have set up costs of £0.20m and ongoing costs of between £0.22m and £0.24m per year. The majority of the costs would be in relation to establishing the register of lawyers.

### Option 3: Limit the prohibition to those people who have been convicted of domestic abuse in a criminal court or are subject to a civil protection order

3.27. Another option would be to limit the prohibition to those who have been convicted of domestic abuse in a criminal court or who are subject to a civil

protection order against domestic abuse. However, in 2017/18 there were 59,541 cases of domestic abuse recorded by the police in Scotland<sup>2</sup>. During the same period there were 9,782 convictions with a domestic abuse indicator recorded<sup>3</sup>. There are also instances of domestic abuse which are not reported to the police. It is accordingly important that the courts have discretion to apply the prohibition to protect vulnerable witnesses more generally.

- 3.28. This option would have a lesser impact on the courts than option 2 as they would only be required to consider if there is a relevant criminal conviction or civil protection order. However, this could have a negative impact on witnesses who are victims of abuse where there has not been a conviction as they would not be protected.

Option 4: Prohibit personal conduct of a case if a party has a relevant conviction regardless of who was the victim

- 3.29. There is the option of prohibiting personal conduct of the case if a party has a relevant conviction regardless of who was the victim.

- 3.30. This option would be simpler to operate than option 2 as the court would not have to consider whether an individual has been convicted of (or is being prosecuted for) an offence committed against the witness. However, this is not a viable option as parties may be prohibited from personally conducting the case due to a conviction which has no connection to or effect on the witness, which is not the policy.

Option 5: Introducing automatic civil legal aid where a party has been prohibited from conducting a case

- 3.31. Consideration was given to whether a party, if made subject to the prohibition on personal conduct, should receive automatic civil legal aid. This option would require amendments to the Legal Aid (Scotland) Act 1986 to allow for automatic legal aid in certain civil cases. The party would then need to identify a legal aid lawyer willing to represent them.

- 3.32. This option has the advantage of not requiring a new list of lawyers to be established and would meet the Scottish Government's aim of ensuring that vulnerable adults and children are protected during the court process. However, this option could incentivise parties to delay cases either to appoint legal representatives unnecessarily or to unnecessarily dismiss their representatives and appointing new representatives, which could have a negative impact on the child at the centre of the case, on a vulnerable witness and/or on the efficient disposal of court business. In addition, giving automatic civil legal aid in this area could set a precedent for legal aid to be automatically available in other areas of civil law, which would have

<sup>2</sup> <https://www.gov.scot/publications/domestic-abuse-recorded-police-scotland-2017-18/>

<sup>3</sup> <https://www.gov.scot/publications/criminal-proceedings-scotland-2017-18/>

repercussions for the affordability of the strong set of legal aid rights that citizens currently are able to make use of.

- 3.33. This option would have implications for lawyers who undertake legal aid work and for SLAB as there would be more applications for legal aid. In addition, this would have an impact on witnesses.

### **Protecting vulnerable parties when court making an order under section 11 of the 1995 Act.**

- 3.34. Concerns were raised by domestic abuse victims during stakeholder events and consultation responses that in Child Welfare Hearings they have to encounter and engage directly with their abusers. A number of options were considered to protect victims of domestic abuse including:

- Do nothing;
- Amend the 1995 Act to give the court the power to order a range of special measures;
- Make amendments by rules of court; and
- Allow proceedings to be conducted separately for each party.

#### Option 1: Do nothing

- 3.35. There is the option of not amending the law. This would mean that the current situation whereby there is no clear provision to authorise special measures to facilitate the attendance and participation of a party. This would not meet one of the key objectives of the Bill which is furthering protection of victims of domestic abuse.

- 3.36. This option would have no cost implications or impact on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo.

#### Option 2: Amend the 1995 Act to give the court the power to order a range of special measures

- 3.37. This option gives the court the power to order a range of special measures if attending or participating in hearings is likely to cause a party distress which could be alleviated by use of a special measure. The court may order that the proceedings be conducted with the use of video link, with the use of screens or with supporters. The measures in the Bill are similar to existing special measures used in the different context of assisting vulnerable witnesses when giving evidence in other civil and criminal proceedings. This option would protect parties during proceedings.

- 3.38. **This is the option that is included in the Bill.** It is not considered to have financial implications as the court should already have facilities such as screens and live video link available for use in other cases.

3.39. This option will have an impact on the courts as there may be additional requests for special measures. In addition, this would have an impact on individuals acting as supporters as they may now be able to attend Child Welfare Hearings.

#### Option 3: Making amendments by rules of court

3.40. There is the option of making an amendment by Rules of Court. Rules of Court are made by Act of Sederunt and are a matter for the Lord President on behalf of the Court of Session. Therefore the Scottish Government did not include this option in the consultation paper. The Scottish Government's view is that it would be better to make provision in primary legislation to put the matter beyond doubt, as with the existing Vulnerable Witnesses (Scotland) Act 2004 provisions.

#### Option 4: Allowing proceedings to be conducted separately for each party

3.41. Another option could be for proceedings such as Child Welfare Hearings to be conducted separately for each party. This is not considered a viable option as it would fundamentally change the nature of the proceedings.

3.42. This option would have an impact on the courts as it could lead to longer court proceedings and would require more coordination.

#### **Regulation of individuals appointed to ascertain and report on the best interests of the child or to undertake enquiries and report on the views of the child**

3.43. Currently the court can appoint a Child Welfare Reporter to either seek the views of the child and to report any views expressed by the child to the court; or to undertake enquiries and report to the court. These functions are set out in the Ordinary Cause Rules. The existing Child Welfare Reporters are all on lists held by the Court of Session and the six sheriffs principal. The court can then appoint a Child Welfare Reporter from the appropriate regional list to produce a report.

3.44. A curator ad litem (curator) is appointed by the court to safeguard and promote the interests of a child in so far as those interests are affected by particular litigation. Curators are appointed in a range of cases in Scotland including in adoption, permanence order, divorce and dissolution cases.

3.45. In cases under section 11 of the 1995 Act the court may appoint a local authority to report on a child. This power is set out in section 11 of the Matrimonial Proceedings (Children) Act 1958 (the 1958 Act). Further provisions are set out in rules of court. The Scottish Government understands that in certain areas of Scotland the courts are using these provisions to order a Child Welfare Report from local authorities.

3.46. There were five options considered in relation to regulation of Child Welfare Reporters, curators and local authorities appointed to produce child welfare reports. These are:

- Do nothing to regulate any of these individuals;
- Establish a register of Child Welfare Reporters and curators;
- Give the Lord President the power to regulate Child Welfare Reporters;
- Require curators appointed in cases under section 11 of the 1995 Act to be on the panel of curators for permanence and adoption cases held by individual local authorities; and
- Require local authorities who receive a court order to produce a report under section 11 of the 1995 Act to allocate this work to a Child Welfare Reporter.

#### Option 1: Do nothing

3.47. There is the option of not establishing registers of Child Welfare Reporters and curators and continuing to allow local authorities to produce child welfare reports. This would have the benefit of maintaining the status quo. However, this would not be in the best interests of the child as Child Welfare Reporters and curators currently do not currently have regular appraisals, training or a formal appointment process.

3.48. Whilst the Scottish Government understands that the majority of individuals appointed by a Local Authority to undertake child welfare reports are social work staff, this is not specified in legislation. Therefore, to ensure that the best interests of a child are protected it is important to ensure that all individuals who undertake a child welfare report are suitably trained.

3.49. The option of doing nothing would have no cost implications and also no impact on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo.

#### Option 2: Establish registers of Child Welfare Reporters and curators

3.50. The Bill establishes registers of Child Welfare Reporters and curators. Child Welfare Reporters and curators would be appointed to registers maintained by an external organisation contracted to the Scottish Government or by the Scottish Government itself. The Bill gives the Scottish Ministers the power to lay down minimum standards and training.

3.51. This option would have the benefit of ensuring that all Child Welfare Reporters and curators are sufficiently trained in key areas such as domestic abuse. It would also ensure that if a Child Welfare Reporter or curator does not meet the required standards then there is a mechanism for removing them from register. All these benefits would help meet the policy aim of the Bill of ensuring the best interests of the child are at the centre of any family

court case.

3.52. **This option is included in the Bill.** It has significant cost implications. The Financial Memorandum for the Bill has estimated the costs to the Scottish Government of between £1.76m - £2.55m in 2022/23, between £2.18m - £2.55m in 2023/2024 and £2.14m - £2.55m in subsequent years.

3.53. Establishing registers of Child Welfare Reporters and curators will have an impact on the SCTS and the sheriffs principal who currently administer and maintain the list of Child Welfare Reporters and curators. In addition it will have an impact on the Child Welfare Reporters and curators themselves as they would be required to apply to be on the register.

#### Option 3: Give the Lord President the power to regulate Child Welfare Reporters

3.54. This option would have the benefit of maintaining the status quo as the Lord President and sheriffs principal would continue to be responsible for appointing to the list of Child Welfare Reporters and could be less time consuming to establish than creating a new structure. However, the Lord President and the sheriffs principal would need to take on responsibility for the appointment and reappointment process for Child Welfare Reporters. They would also become responsible for reviewing the people appointed to ensure that they continue to meet the eligibility criteria.

3.55. This would have significant cost and resource implications for SCTS. This option would have less of an impact on the Child Welfare Reporters themselves as they will continue to be appointed by the Lord President and sheriffs principal.

#### Option 4: Require curators appointed in cases under section 11 of the 1995 Act to be on the panel of curators for permanence and adoption cases held by individual local authorities

3.56. This option would have the benefit of maintaining the status quo for the majority of curators appointed to cases under section 11 of the 1995 Act whilst ensuring that there is eligibility criteria in place. The Scottish Government understands that the majority of sheriffs principal appoint curators from the panel of curators held by local authorities for permanence and adoption cases.

3.57. However this could place an additional burden on local authorities as they would be required to meet the costs of curators. As local authorities are rarely involved in cases under section 11 of the 1995 Act this does not appear to be appropriate. In addition, it would place a burden on curators who are not currently on a panel of curators for permanence and adoption

cases.

Option 5: Require local authorities who receive a court order to produce a report under section 11 of the 1995 Act to allocate this work to a Child Welfare Reporter;

3.58. **This option is included in the Bill.** It ensures that all the Child Welfare Reporters would be required to be on a list held by the Scottish Ministers. This would be in the best interests of the child as it would mean that all reports would be undertaken by individuals who have sufficient training in issues such as domestic abuse and coercive control.

3.59. The Financial Memorandum has estimated the cost of this option to be between £0.14m and £0.28m.

3.60. This option would have an impact on local authorities who currently are ordered by the court to produce a report on the child. The Scottish Government understands in particular this occurs in Comhairle nan Eilean Siar and Dumfries and Galloway. This option would also impact on individuals employed by local authorities to undertake these reports. The Scottish Government understands that it is normally social work who produce these reports but this is not set down in legislation.

### **Regulation of child contact centres**

3.61. Child contact centres are safe venues for conflict-free contact between children, parents, and other people in the child's life. Contact centres are not currently subject to any regulation in relation to the standard of accommodation or training of staff. There are four options:

- Do nothing;
- Regulate child contact centres;
- Require a contact centre to be a member of an association; and
- Issue a practice direction.

#### Option 1: Do nothing

3.62. There is the option of not doing anything and maintaining the status quo. This would mean that contact centres would not be subject to additional regulation. The option of doing nothing would have no cost implications and also no impact on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo. However, this option would not further protect children and others using the centres.

#### Option 2: Regulate child contact centres

3.63. There is the option to take the power to set minimum standards in

relation to training of staff and accommodation. The Bill gives the Scottish Ministers the power to appoint a body to oversee the standards and report on the standards on a regular basis.

3.64. **This is the option that is included in the Bill.** It has significant financial implications. The Financial Memorandum has estimated that the cost of regulation of contact centres could be between £1.25m and £3.01m in initial set up costs and £0.75m a year in ongoing costs.

3.65. This option would have an impact on the courts who order contact at a contact centre as contact would only be able to be ordered at a regulated centre. This option would also affect the independent contact centres, Relationships Scotland (RS) (the organisation to which 41 of the contact centres are members), and the member services themselves as they would need to meet minimum standards set by the Scottish Ministers.

#### Option 3: Require a contact centre to be a member of an association

3.66. Another option is to introduce legislation specifying that contact centres must be a member of an association. In New Zealand there is the Aotearoa New Zealand Association of Supervised Contact Services<sup>4</sup>. This organisation establishes a national set of procedures and arrangements between the Family Court and Supervised Contact Providers, and ensures that the needs of any child using such a service for protection and safety are met and that the child's welfare and best interests are promoted.

3.67. The most similar organisation in Scotland is RS. RS has a national set of procedures and arrangements for their contact centres. The Scottish Government does not consider that RS should have this supervisory role as there are three independent contact centres. In addition, this would not meet the policy aims of establishing an independent complaints procedure and of establishing an independent inspection service.

3.68. This option would have an impact on RS and also the individual contact centres including the three independent contact centres as all contact centres would need to be a member of RS.

#### Option 4: Issue a practice direction

3.69. In England and Wales the President of the Family Division has issued a practice direction that court ordered contact must only take place in a centre affiliated with the National Association of Child Contact Centres (NACCC). This would not be an option in Scotland as there is no family division of the civil courts. Each sheriff principal would have to issue a similar direction (and the Lord President would have to issue one for the Court of Session). In any event, there is no equivalent to NACCC in Scotland.

<sup>4</sup> <https://www.anzascscs.org.nz/>

## Promoting sibling contact

3.70. The 1995 Act currently gives local authorities duties to take steps to promote personal relations and direct contact between a child and any person with PRRs where it is practicable and appropriate. There is no equivalent provision for promoting sibling contact.

3.71. There are three options to consider :

- Do nothing;
- Make provision in the Bill that local authorities must promote contact between a child and their siblings; and
- Rely on the existing guidance and law in relation to looked after children.

### Option 1: Do nothing

3.72. The Scottish Government could do nothing and maintain the status quo. This would mean that legislation does not reflect the important role that siblings can play in a child's life when they are not able to live with their parents. This would not meet the needs of the key stakeholders.

3.73. The option of doing nothing would have no cost implications and also no impact on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo.

### Option 2: Clarify in the Bill that local authorities must promote contact between siblings.

3.74. **This is the option that is included in the Bill.** It provides that local authorities must promote sibling contact and personal relations and take the views of siblings into consideration.

3.75. This option would have implications on local authorities, adults who are caring for a child, either in kinship, residential or foster care and the sibling(s) of the child.

3.76. This is not expected to have significant cost implications as local authorities are already bound by regulations to promote children's relationship with their siblings and to implement their duties under Article 8 of the European Convention on Human Rights.

### Option 3: Rely on the existing guidance in relation to looked after children

3.77. This option would not require legislation. The disadvantage is that the existing guidance is insufficient in this area. Therefore, this is not

considered to be a viable option.

- 3.78. This option would not have an effect on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo.

### **Principal reporter right of appeal from the sheriff court: Relevant Persons status**

- 3.79. Under the Children's Hearings (Scotland) Act 2011 (the 2011 Act), a pre-hearing panel or a Children's Hearing can decide whether an individual either is or is not to be 'deemed', or continued to be deemed, as a relevant person.

- 3.80. Under section 164 of the 2011 Act, there is also a further right of appeal to the sheriff principal or the Court of Session against a decision of the sheriff if the sheriff overturns a children's hearing's decision. This appeal right is currently restricted to the individual requesting deemed relevant person status, the child, a relevant person in relation to the child, or a combination of those persons acting jointly.

- 3.81. The Scottish Government is aware of the importance of the rights of a relevant person and consider it would be in the interests of children for the Principal Reporter to have a right of appeal which would only be exercised where required to clarify a key point of law.

- 3.82. In addition, there is currently a lack of clarity about section 160(1)(a)(ii) and 160(1)(b) and the rights of appeal against decisions to 'continue to deem' or to 'no longer deem' a person as 'relevant'.

- 3.83. In Children's Hearings cases there is currently a choice of appeal from a sheriff's decision on appeal to either the sheriff principal or the Court of Session which differs from other civil proceedings and should be amended to allow for consistency.

- 3.84. There are two options in this area:

- Do nothing; and
- Amend the legislation.

#### Option 1: Do nothing

- 3.85. The rights of appeal against relevant person status would not extend to the Principal Reporter. This could lead to rights wrongly being given to a person including sensitive information about a child and their family. This is not a viable option.

- 3.86. The Scottish Government could continue to allow courts to interpret

section 160 of the 2011 Act. Courts might themselves interpret this to include a decision to deem, continue to deem or to no longer deem a person as 'relevant'. However, this would continue to leave the law in an uncertain state. Therefore it is not considered a viable option.

3.87. The option of doing nothing would have no cost implications and also no impact on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo.

#### Option 2: Amend the legislation

3.88. **This is the option that is included in the Bill.** This option would also give the Principal Reporter the right of appeal and ensure that the correct people are involved in Children's Hearings to safeguard the welfare of vulnerable children.

3.89. We would seek to clarify that determinations in respect of appeals under section 160(1)(a)(ii) and 160(1)(b) in relation to a decision to deem, continue to deem or to no longer deem a person as 'relevant' are included.

3.90. This option would have implications for the courts, the SCRA and Principal Reporters as it could lead to more appeals. In addition it could have an impact on relevant persons who may seek to defend the appeal. In the Financial Memorandum the estimated cost of this provision is between £5,000 and £100,000 per year.

#### **Clarification of the law regarding parental responsibilities and rights**

3.91. There has been conflicting court cases in this area, some of which doubted whether certain orders under section 11 of the 1995 Act could be made without affecting PRRs.

3.92. There are two options:

- Do nothing; and
- Clarify the law.

#### Option 1: Do nothing

3.93. This option may lead to continued debate or challenges around whether orders, apart from residence orders, grant individuals PRRs automatically. This may lead to some children not being able to maintain contact with a person which may not be in the best interests of the child.

3.94. This option would not have an effect on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo.

## Option 2: Clarification of the law

3.95. **This is the option that is included in the Bill.** It ensures the best interests of the child are at the centre of the case. It would clarify that a court may make an order for contact (for example) in cases where it may not be possible to award PRRs (ie the person is under 16 and not a parent) or the court does not consider it is in the child's best interests for the person being granted contact to also be granted PRRs.

3.96. This option would have an impact on the courts and SLAB as this could lead to more cases. The Financial Memorandum for the Bill has estimated that the costs could be between £0.14m and £0.28m.

### **Factors for the court to consider before making an order**

3.97. When establishing how to ensure the best interests of the child remain at the centre of any court case under section 11 of the 1995 Act the Scottish Government considered whether to stipulate certain factors for the court to consider.

3.98. The Scottish Government considered three options:

- Do nothing and retain the legislation as currently drafted;
- Do not introduce any new factors for the court to consider, and remove those currently stipulated in relation to abuse; or
- Introduce further factors to consider, building on the existing factors in relation to abuse.

## Option 1: Do nothing

3.99. There is the option of not introducing any new factors and maintaining the status quo. The Scottish Government does not consider this a viable option. The Scottish Government considers further factors should be introduced as it could be in the best interests of the child for the court to consider and take account of a range of these matters when making a decision under section 11 of the 1995 Act.

3.100. This option would not have an effect on business, voluntary sector, public bodies or Scottish Government as it would be maintaining the status quo.

## Option 2: Remove factors in relation to abuse

3.101. There is the option of making no further provision and also removing sub-sections (7A) to (7E) of section 11 of the 1995 Act which stipulate some factors for the court to consider. These sub-sections focus on abuse and risk of abuse. This was in the consultation on the 1995 Act and responses were in

favour of retaining the provision. For these reasons this option has been discounted.

- 3.102. Removing sub-sections (7A) to (7E) to the 1995 Act would have an impact on the courts, parties to a case under section 11 of the 1995 Act, lawyers and also the child at the centre of the case. Removing these subsections could also have an adverse impact in relation to domestic abuse.

Option 3: Introduce new factors to be considered

- 3.103. **This is the option that is included in the Bill.** The Scottish Government considers that a small number of factors should be stipulated as it could be in the best interests of a child for the court to consider and take account of additional matters when making a decision under section 11 of the 1995 Act.

- 3.104. The policy is to increase consistency amongst courts in what areas they should be considering when making an order. This may be in the best interests of the child as each court would be considering the same issues when making a decision.

- 3.105. The consultation on the 1995 Act sought views on what factors should be included for the court to consider. The Scottish Government believes that both parents should be fully involved in their child's life as long as this is in the child's best interests.

- 3.106. Therefore, the Scottish Government considers that the court should consider, when deciding whether or not to make an order under section 11(1) of the 1995 Act, the effect the order might have on the involvement of the child's parents in the child's upbringing.

- 3.107. The Scottish Government also recognises the important role that siblings and grandparents can play in a child's life. Therefore, it is important for the court to consider, when deciding whether or not to make an order, the effect the order might have on the child's important relationships with other people.

- 3.108. The Scottish Government is aware also that an individual may have legitimate reasons for expressing concern about a parent, related to the child's welfare. These factors are something which should also be considered in making a section 11 order.

- 3.109. Including factors to be considered would have an impact on the courts, lawyers acting for parties and Child Welfare Reporters as there would be a list of areas for the court to consider when making an order under section 11 of the 1995 Act.

## **Explaining a court decision to a child**

3.110. There is no requirement at present for the court's decision to be explained to the child concerned. There are four options in relation to this policy:

- Do nothing;
- Require decisions that will have an impact on a child to be explained to the child by either the court themselves or by a Child Welfare Reporter;
- Require the court to explain every decision to the child; and
- Allow an explanation of a decision to be given by another person who is not appointed by the court.

### Option 1: Do nothing

3.111. There is the option of not doing anything. This would have the benefit of not placing additional responsibilities on the courts. This option would have no cost implications as it maintains the status quo. However, this means that children and young people would continue to receive information that may not be impartial on the outcome of a decision that affects them directly. This may not be in the child's best interests especially if they have given their views and the court has decided a different outcome is in the child's best interests. In addition, this may not further compliance with the UNCRC.

### Option 2: Require important decisions to be explained to a child either by the court themselves or by a Child Welfare Reporter

3.112. **This is the option that is included in the Bill.** It ensures that the outcomes and reasons for important decisions are explained to the child concerned in an impartial manner if the court considers it in the best interests of the child. An explanation can be provided by either the court or by appointing a Child Welfare Reporter.

3.113. This option will have an impact on the courts and Child Welfare Reporters as decisions would need to be explained. In addition, the court would need to consider whether it is in the best interest of the child for a decision to be explained. If the court decides that a decision should be explained they will need to ensure that the Child Welfare Reporter has sufficient information. This option will have significant financial implications. The Financial Memorandum for the Family Law Bill has estimated the costs as between £2.27m and £5.16m per year.

### Option 3: Requiring the court to explain every decision to the child

3.114. This option would have a significant impact and cost on the courts and Child Welfare Reporters. According to SCTS statistics in 2018/19 there were 15,649 hearings in family cases involving children (excluding adoption and permanence). Of the 15,649 hearings there were 6,655 Child Welfare Hearings. The impact on the courts would be disproportionate to the benefits to the child as a number of hearings do not lead to a decision which has a

significant impact on the child.

Option 4: Allowing an explanation of a decision to be given by another person who is not appointed by the court

3.115. This option would have an impact on individuals who are relatives of a child, and on teachers, social workers, youth centre workers or child support workers as they could be required to explain court decisions to a young person. This would have less cost implications than requiring decisions to be explained by a Child Welfare Reporter or the court themselves.

3.116. However, this option may lead to decisions not being explained in an impartial manner and also would place an extra burden on individuals such as teachers or youth club workers who may not be trained in providing feedback.

**Amendment to procedure in relation to non-compliance with an order**

3.117. There are four options in relation to non-compliance with orders under section 11 of the 1995 Act. These are:

- Do nothing;
- Require the court to investigate reasons for non-compliance;
- Amend the procedure in relation to enforcement of contact orders; and
- Establish Family Court Facilitators.

Option 1: Do nothing

3.118. There is the option of maintaining the status quo which would mean that if someone believes an order under section 11 of the 1995 Act has been breached the person can go back to court and:

- Seek a further order (such as a variation of the order or a switch in residence), and/or
- Ask the court to hold the person breaching the contact order in contempt of court.

3.119. This would not have any financial implications or impacts on organisations as it would be maintaining the status quo. However, this option would not be in the best interests of the child as procedure would continue to vary across Scotland.

Option 2: Require the court to investigate the reasons for non-compliance

3.120. **This is the option that is included in the Bill.** It requires the court to investigate non-compliance with an order. The investigation can either be by the court themselves or in more complex cases by appointment of a Child Welfare Reporter. This would have financial implications. The Financial Memorandum for the Bill has estimated the costs to be between £0.71m and £1.43m per year. This option would have an impact on the courts and Child Welfare Reporters as there could be more situations where the court

investigates the reasons for non-compliance.

### Option 3: Amend the procedure in relation to enforcement of contact orders

3.121. This option would amend the procedure to either make it a criminal offence to breach an order under section 11 of the 1995 Act or to introduce other penalties such as unpaid work, parenting classes or fines.

3.122. This option would have cost implications in relation to establishing alternative sanctions. This option would be likely to have an impact on the courts, organisations who administer unpaid work and individuals who may be subject to the new penalties.

3.123. This option may also not be in the best interests of the child concerned as it would not establish the reason behind an order not being complied with.

### Option 4: Introduce Family Court Facilitators

3.124. One option is to introduce Family Contact Facilitators. The Justice Committee during its scrutiny of the Family Law (Scotland) Act 2006 expressed concerns about the difficulties associated with enforcement of court imposed contact orders.

3.125. As a result of this concern, the then Scottish Executive announced plans to pilot family court facilitators in two courts (Glasgow and Edinburgh – but with the capacity to take on cases elsewhere in the Lothian and Borders). The pilots were to run for two years initially. It was envisaged that the Family Contact Facilitators would work closely with court staff, particularly sheriff clerks and the sheriffs dealing with family cases.

3.126. The functions of the post-holders were likely to include the following:-

- facilitate between parents, solicitors, courts;
- early intervention in high risk cases as directed by the court;
- liaise with contact centres, health and education officials, children's panel;
- give support and practical advice to the parents including provision of information about relevant services;
- research/data gathering;
- case tracking; and
- analysis of trends.

3.127. A procurement exercise was run but only two bids were received. Both organisations' original tenders failed to meet the requirements and they were invited to resubmit their bid. Both failed to improve their bids sufficiently. As a result, the Scottish Executive decided not to take forward the pilot.

3.128. This option would have an impact on the organisation who is awarded the contract and individuals appointed to act as Family Court Facilitators.

This would also have a significant financial cost in running the contract. Previous experience also suggests this would be difficult to run, as is shown by the failed attempt to pilot this previously.

### **Recognising specified processes for unmarried fathers and second female parents to acquire parental responsibilities and rights in jurisdictions outwith the UK**

3.129. There are four options:

- Do nothing;
- Recognise specified processes for acquiring PRRs;
- Give all fathers PRRs automatically; and
- Limit the recognition to only those unmarried fathers/second female parents who have jointly registered the birth of the child in a country where this would give them PRRs.

#### Option 1: Do nothing

3.130. This option would maintain the status quo and would have no financial costs or implications on any individuals or organisations. However, this could have a detrimental effect on the welfare of the child concerned as the fathers or second female parents with parental duties, right and responsibilities in other jurisdictions would not have PRRs in Scotland.

#### Option 2: Recognise specified processes for acquiring PRRs

3.131. **This is the option that is included in the Bill.** It gives the Scottish Ministers the power to make regulations in relation to the conferral of PRRs on unmarried fathers and second female parents where the child's birth is registered overseas and the parent has obtained overseas parental duties, rights or responsibilities in a similar way to obtaining PRRs in Scotland. This would have the benefit to a child of their father or second female parent enjoying parental responsibilities and rights in Scotland which are similar to the parental duties, rights or responsibilities they enjoyed in the other jurisdiction.

3.132. This option would have an impact on unmarried fathers and second female parents who have registered the child's birth overseas and the person acquired parental duties, rights or responsibilities through a specified process with the consent of mother of the child. It may also have an impact on the Registers of Scotland as there may be a drop in the number of applications to register in the Books of Council and Session a Parental Responsibilities and Rights Agreement, although numbers are very small. This is likely to have a neutral impact on the courts as a reduction in number of applications to seek to obtain PRRs from unmarried fathers and second female parents would be counteracted by an increase in the number of applications to have PRRs removed.

3.133. This option would not have financial implications as it will not be creating a new administrative process.

Option 3: Give all fathers PRRs automatically

3.134. This option could promote and encourage father's responsibilities and involvement in the upbringing of the child. However, concerns have been raised about the unmarried father of a child conceived as a result of rape or incest being given automatic PRRs. In addition, the introduction of a father who has not previously been involved in a child's upbringing may affect the welfare of the mother and may not be in the best interests of the child.

3.135. This option would have a significant impact on unmarried fathers and second female parents who currently would need to complete a Parental Responsibilities and Rights Agreement form with the mother of the child or seek a court order, and also on mothers who are unwilling to give the father of the child PRRs due to safety concerns.

3.136. This option is unlikely to have financial implications as an increase in court cases to remove the PRRs of unmarried fathers and second female parents is likely to be balanced out by a reduction in court cases of unmarried fathers and second female parents seeking PRRs.

Option 4: Limit the recognition to only those unmarried fathers/second female parents who have jointly registered the birth of the child in a country where this would give them parental duties, rights or responsibilities which are similar to PRRs

3.137. This option would give a number of unmarried fathers and second female parents PRRs but may inadvertently exclude individuals who have obtained PRRs through a process other than joint registration of the birth of the child. For example in the Netherlands a father can obtain such rights and responsibilities if both parents register this in the parental responsibility register.

3.138. This option would have an impact on unmarried fathers and second female parents and also mothers but this impact would be less than option 2. This option is unlikely to have financial implications as it will not be creating a new administrative process.

**Allowing orders under Part 1 of the Family Law Act 1986 from elsewhere in the UK to be enforced in the sheriff court as well as in the Court of Session**

3.139. There are two options: do nothing; and amend the Family Law Act 1986 to allow orders under Part 1 of the Family Law Act 1986 to be enforced in the sheriff court as well as in the Court of Session.

#### Option one: Do nothing

3.140. This option would maintain the status quo and would have no cost implications or effects on other individuals or organisations.

#### Option two: Amend the Family Law Act 1986

3.141. This option would mean that orders from elsewhere in the UK would still be registered in the Court of Session but could be enforced in the sheriff court as well as in the Court of Session. This is unlikely to have significant financial implications as there are very few cases which are registered in the Court of Session. In addition, in most cases registration and enforcement would take place at the same time.

3.142. **This is the option that is included in the Bill.** Although the numbers of individuals who may be affected are low, those who are affected will benefit from being able to enforce and order in the sheriff court as well as the Court of Session. It is likely to affect the courts as it will be possible to enforce orders in the sheriff court as well as the Court of Session.

#### **Impact of delay in court proceedings on welfare of the child**

3.143. The Scottish Government have heard complaints from court users that court cases are taking too long and this is not in the best interests of the child concerned.

3.144. The Scottish Government considers there are three options in this area:

- Do nothing;
- Set out in primary legislation that the court has to have regard to any risk of prejudice to the child's welfare that any delay in proceedings would pose; and
- Seek to set out a presumption regarding delay in court rules.

#### Option 1: Do nothing

3.145. There is the option of not amending the law and not making provision in primary legislation about avoiding undue delay in cases involving children. This would not advance the best interests of the child. The Scottish Government thinks it important to address the issue that delay will often be prejudicial to the welfare of the child.

3.146. This would not have any financial implications or impacts on organisations as it would be maintaining the status quo. However, this option would not be in the best interests of the child as procedure would continue to

vary across Scotland.

Option 2: Set out presumption in primary legislation

3.147. The Scottish Government considers that delay in court proceedings, under section 11 and 16 of the 1995 Act, Children’s Hearings proceedings or adoption cases may often prejudice the welfare of the child. Lengthy court proceedings can lead to a significant period of uncertainty for a child which may not be in the child’s best interests.

3.148. **This is the option that is included in the Bill.** Setting out that the court should have regard to the risk of prejudice to the child’s welfare that any delay in proceedings would pose would have an impact on the courts as they would be required to consider the effect of any delay.

Option 3: Set out the presumption in rules of court

3.149. A further option would be for provision of this nature to be laid down by court rules, as originally envisaged by the Scottish Law Commission report of 1992<sup>5</sup>. However, the Family Law Committee of the Scottish Civil Justice Council (SCJC) decided in February 2017 that no changes to the rules were required:-

“Members held a detailed discussion about the issue of delay in family actions. ... a distinction should be drawn between the passage of time and delay, as the passage of time is often necessary to achieve resolution. Members agreed, and thought the problem was one of undue delay. ... suggested that it may be more appropriate to include a provision about avoiding delay in primary legislation, as is the case in England and Wales, rather than in rules. ... said that such a provision could be considered in the Scottish Government’s upcoming review of Part 1 of the Children (Scotland) Act 1995. The consensus amongst members was that no change to the rules was required.<sup>6</sup>

3.150. The option of amending court rules to include provision on undue delay is not deemed the best approach, given the approach taken by the Family Law Committee of the SCJC.

3.151. This option would have additional impacts on the Family Law Committee, the SCJC and the Lord President as they have responsibility for the rules of court.

<sup>5</sup> <https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf>

<sup>6</sup> <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-13-february-2017/approved-minutes-13-february-2017.pdf?sfvrsn=2>

#### **4. Scottish Firms Impact Assessment**

4.1 To appreciate the impact that the proposed legislation may have on businesses operating in Scotland, we met with organisations including CALM Scotland Mediation, the Faculty of Advocates, the Family Law Association, Law Society of Scotland, Scottish Courts and Tribunals Service, and Relationships Scotland.

4.2 All the organisations were asked questions on each of the areas the Bill.

4.3 Some of the options that were considered may affect family lawyers. For example, a number of family lawyers are also curators ad litem and child welfare reporters and therefore the options to regulate curators ad litem and child welfare reporters could impact on them.

4.4 Members of the Faculty of Advocates and Law Society may be affected by all the proposals as any changes could affect the people that they would represent in court.

4.5 The Scottish Courts and Tribunals Service will be affected by a large number of our proposals as they affect how a court case is run and who can appear before a court.

4.6 Relationships Scotland and the three independent contact centres will be affected by proposals to regulate contact centres.

#### **5. Competition Assessment**

5.1 We do not expect our proposals to have an impact on competition as they will not:

- Limit the number or range of suppliers
- Limit the ability of suppliers to compete
- Limit suppliers' incentives to compete vigorously
- Limit the choice and information available to consumers.

#### **6. Test run of business forms**

6.1 We do not envisage that any new forms will be introduced by the Scottish Government as a result the Bill.

## **7. Legal Aid Impact Test**

7.1. The Bill will have implications for the Scottish Legal Aid Board (SLAB). The Financial Memorandum has estimated costs to SLAB of between £0.14m and £0.28m a year. This is for additional cases as a result of clarifying that a person under the age of 16 may apply for and be granted an order under section 11 of the 1995 Act and that not all orders grant PRRs.

7.2 Child Welfare Reporter fees are currently paid either by the parties to a case themselves or by SLAB if parties are eligible for legal aid. Following the enactment of the Bill, this cost would no longer fall to SLAB. Instead, the cost of Child Welfare Reports would be met by the Scottish Government, either through the organisation contracted to manage the register of Child Welfare Reporters or directly if the Scottish Government should run the register in-house. In 2018/19 SLAB paid £3.7m in Child Welfare Reporter fees.

7.3 The Bill will improve access to justice as currently if a party is not eligible for legal aid they may have to pay for a child welfare report themselves. The Scottish Government has heard anecdotally from stakeholders that this can cost up to £10,000. Once these provisions in the Bill are in force then all Child Welfare Reporter Fees will be paid by the Scottish Government.

7.4 The prohibition on personally conducting a case requires a party who has been banned to have a lawyer appointed for the rest of the case if they do not instruct their own lawyer. Once a ban has been imposed a party would have the opportunity to either appoint a lawyer themselves – either privately or through SLAB if they are eligible for legal aid. If a party does not appoint a lawyer themselves then the court will order a lawyer to be appointed from the list held by the Scottish Ministers. The fees of the lawyers on the list held by Scottish Ministers will be paid by Scottish Government rather than through legal aid.

7.5 The Bill does not make any changes to the funding regime for child contact centres. Currently contact centres are funded through a variety of means including Scottish Government funding, Big Lottery grant, grants from other bodies, fees paid by SLAB and fees privately paid by individuals.

## **8. Enforcement, sanctions and monitoring**

8.1 The Bill does not change the current way a party can complain about the conduct of the sheriff or the outcome of a case. If a party wishes to complain about the conduct of a sheriff then this is handed by the Judicial Office for Scotland<sup>7</sup>. The usual way of complaining about the outcome of a case is to appeal the decision.

8.2 The Bill gives the Scottish Ministers the power to remove a Child Welfare Reporter or curator from the register if they fail to meet the required standards.

<sup>7</sup> <http://www.scotland-judiciary.org.uk/15/0/Complaints-About-Court-Judiciary>

8.3 In addition, a Child Welfare Reporter or curator will be subject to a regular reappointment process. If a person fails to meet the required criteria at the reappointment then their appointment may not be continued. The Bill also gives the Scottish Ministers the power to set by secondary legislation the procedure if a Child Welfare Reporter or curator is unhappy with a decision by Scottish Ministers to remove them from either register.

8.4 The Bill sets up a register of solicitors who may be appointed by the court if an individual is prohibited from conducting the remainder of their case themselves. The Bill provides that the solicitor may not be dismissed by the party for whom they have been appointed to act. This reduces the risk of parties who may not wish to be legally represented dismissing their solicitor without reason.

8.5 The Bill gives the Scottish Ministers the power to set the eligibility criteria for lawyers to be on the register. If a lawyer fails to meet the standards then they could be removed from the register. This would mean that they could no longer be appointed by the court to undertake this work.

8.6 The Bill regulates the provision of contact services in child contact centres. Part of the regulation is appointing a body to oversee that contact centres meet the required standards. One of the roles of the body would be to inspect centres to ensure they are meeting the required standards. If a contact centre fails to meet the required standards they would be required to improve their facilities and would be subject to a more frequent inspections. Ultimately, the inspecting body will have the power to remove the contact service provider from the list of registered contact service providers. This would mean that they would not be able to undertake court ordered contact sessions in their contact centres.

8.7 In addition, the regulation of contact centres introduces an independent complaints mechanism. If an individual is unhappy about the service they have received at a contact centre then initially this is to be raised internally with the contact centre. If an individual is not satisfied with the outcome of the investigation then this could be escalated to the body appointed to inspect contact centres.

8.8 In the event that a local authority makes a decision not to promote sibling contact where this was practicable and appropriate, a judicial review could be sought of their decision.

## **9. Implementation and delivery plan**

9.1 The Children (Scotland) Bill was introduced to the Scottish Parliament on 2 September 2019. Subject to the Bill successfully completing the parliamentary process, implementation is likely to be in a phased process due to the need for secondary legislation in a number of areas. It is envisaged that some provisions could be commenced soon after Royal Assent.

In particular provisions:

- encouraging the views of younger children to be taken into consideration in cases other than orders made under section 11 of the 1995 Act;
- introducing new special measures for vulnerable parties in cases under section 11 of the 1995 Act;
- promoting contact between looked after children and siblings;
- permitting appeals against relevant person decisions and appeals to Sheriff Appeal Court;
- Clarifying order making powers under section 11 of the 1995 Act;
- Establishing factors to be considered before making an order under section 11 of the 1995 Act;
- Extending the enforcement of Part 1 orders registered in the Court of Session to the sheriff court; and
- Requiring a court to have regard to any delay in proceedings as being likely to prejudice the child's welfare.

9.3 A number of the provisions will require significant lead in time as secondary legislation will be required. Establishing registers of Child Welfare Reporters and curators and regulation of contact centres is unlikely to be operational until 2023 based on the illustrative timetable below:

<b>Timing</b>	<b>Activity</b>
Children (Scotland) Bill gains Royal Assent	Summer 2020
Preparation of secondary legislation	September – December 2020
Consultation on secondary legislation	January – March 2021
Analysis of consultation responses and revising secondary legislation	April – September 2021
Secondary legislation laid in Parliament	October – December 2021
Tendering of contract	April 2021 – March 2022
Contract awarded	from April 2022
Set up time for new contractor	April 2022 – April 2023
New regime operational	April 2023

9.4 The provisions in the Bill in relation to ensuring the views of younger children are heard in cases under section 11 of the 1995 Act, requiring the court to provide explanations of decisions to a child, and also placing a duty on the court to investigate failure to comply with an order, will not be commenced until the register of Child Welfare Reporters is in place.

9.5 The provisions in the Bill banning a person from conducting the remainder of a case themselves will only be commenced once the register of lawyers is established. This is likely to follow a similar timetable to the illustrative timetable above.

### **Post-implementation review**

9.6 The Scottish Government will review the legislation to ensure that it is still fit for purpose within 10 years of enactment.

## **10. Summary and recommendation**

10.1 The recommended policy option(s) is to introduce primary legislation as set out in section 3 above. This will achieve the Scottish Government’s aims of:

- ensuring that the child’s best interests are at the centre of any contact and residence case or Children’s Hearing;
- ensuring that the views of the child are heard; and
- furthering compliance with the principles of the United Nations Convention on the Rights of the Child (UNCRC).

### **Summary costs**

10.2 The Scottish Government has estimated that the Bill will have costs in 2021/22 of £0.21m – £0.46m, in 2022/23 of £3.45m - £6.25m, costs in 2023/24 of between £7.32m- £13.22m and ongoing costs of £7.22m - £13.16m. This is described in more detail in the Financial Memorandum that accompanies the Bill. Below is a summary of estimated costs:

Estimated set up costs:

	<b>2022/23 (£m)</b>	<b>2023/24 (£m)</b>
<b>Direct set up costs to Scottish Government</b>	1.99 - 2.78	0.04
<b>Set up costs to SCTS</b>	0	0
<b>Set up costs to</b>	0	0

<b>SLAB</b>		
<b>Set up costs to contact centres</b>	0.76 - 2.52	0
<b>Set up costs to body appointed to oversee regulation of contact centres</b>	0.49	0
<b>Set up cost to Scottish Children's Reporters Administration</b>	0	0
<b>Total set up costs</b>	3.24 - 5.79	0.04

Estimated ongoing costs

	<b>2021/22 (£m)</b>	<b>2022/23 (£m)</b>	<b>2023/24 (£m)</b>	<b>2024 onwards (£m)</b>
<b>Direct ongoing costs to Scottish Government</b>	0	0	5.07 – 10.01	5.07 -10.01
<b>Ongoing costs to SCTS</b>	0	0	1.19 -1.94	1.19 - 1.94
<b>Ongoing costs to SLAB</b>	0.2 - 0.36	0.2 - 0.36	0.2 - 0.36	0.2 - 0.36
<b>Ongoing costs to contact centres</b>	0	0	0.32	0.32
<b>Ongoing costs to body appointed to oversee</b>	0	0	0.49	0.43

<b>regulation of contact centres</b>				
<b>Ongoing costs to Scottish Children's Reporters Administration</b>	0.01 - 0.1	0.01 - 0.1	0.01 - 0.1	0.01 - 0.1
<b>Total ongoing costs</b>	<b>0.21 - 0.46</b>	0.21 - 0.46	7.28 - 13.22	7.22 - 13.16



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