

## Annex B: Consultation questions

Question 1):

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

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

**The presumption of capacity at age 12 is consistent with other legislation, particularly the Adoption and Children (Scotland) Act 2007. Under S.32 of that Act, when the child or young person is 12 or over, his or her consent is required before the adoption may be granted. The Court may dispense with this consent only if it considers that the child is incapable of consenting. S.32(2).**

**Similarly, S 84 of the 2007 Act states that a Permanence Order may not be made in respect of a child who is aged 12 or over unless the child consents except where the Court is satisfied that the child is incapable of consenting to the order. S 84(6) holds that a child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view.**

**A Permanence Order is intended to be a reflection of a private law order under s.11 of the 1995 Act.**

**Removing this presumption under the 1995 Act would create a clear contradiction and a distinction in capacity between a child in private and public law proceedings.**

**The presumption does not mean that the views of the child under the age of 12 are not considered. Legislation relating to private and public law proceedings provide ample safeguards to ensure that the views of any child must be sought and taken into account throughout the decision making process. The child's age, maturity and ability to understand are assessed by the Court. Good practice should be reinforced in this respect to ensure that the child is afforded the opportunity to be heard and to participate in the process appropriately.**



**Where possible, the child should be asked beforehand how he or she would like his or her views communicated and informed of what to expect so that they can select the best method for their involvement in proceedings.**

**Professionals, such as play therapists, social workers, child psychologists and health visitors who are trained and skilled in interpreting each child's verbal and non-verbal behaviours can provide a valuable insight and advice to the Court**

**An adult familiar to and trusted by the child could assist in enabling the child's informed and full participation. This could be a family member, friend, teacher, social worker or advocate. The adult should be provided with sufficient information about the proceedings, the options open to the Court and the likely outcomes so that they can support the child in communicating his or her views to the Court.**

**The objective is to create an environment where the child will be able to express his or her views openly, honestly and without fear so that the Court has best evidence on which to base an informed decision which represents the child's best interests.**

Question 3):

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

- a) Child support worker. x
- b) Child welfare reporter. x
- c) Another option (please specify). x

Why did you select your answer above?

**This again is dependent on the individual child and the circumstances of the case. The child should be told the outcome of the case as soon as is practical by someone in a position to explain the decision and the implications for the child. The information should be communicated in a way that best suits the child and allows for the child to ask questions at the time and afterwards and that these questions will be answered as fully as possible.**

**The child should be told how their views were considered, the weight that was given to them and particularly where the decision does not correspond to these wishes, why the decision was reached.**

**There should, therefore, be no restriction on who should inform the child, but that person should be identified by the decision maker and parties advised of the chosen method of communicating the decision to the child to avoid any confusion or distress to the child.**

Question 4):

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

Please select only one answer.

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

Why did you select your answer above?

**Further consultation would be required to determine how effectively the current system is operating in this regard.**

**Consistency of practice, training , monitoring, accountability and remuneration is necessary to ensure that there is a high standard of service to Courts and families throughout the jurisdictions.**

Question 5):

Should the law be changed to specify that confidential documents should only be disclosed when in the best interests of the child and after the views of the child have been taken into account?

Yes

No x

Why did you select your answer above?

**The Court's decision- making must be transparent and informed. Parties must have knowledge of the facts on which the Court has relied and the reasons for the conclusions arrived at. This means that where the Court has taken account of information contained within confidential documents, this must be made available to family members whose rights are affected by the decision. This is consistent with Articles 6 and 8 of the European Convention on Human Rights.**

**The minimum disclosure which allows for the exercising of these rights and which protects the child's right to privacy is frequently challenging, but a change to this aspect of domestic law could result in an absence of compatibility with European law.**

Question 6):

Should child contact centres be regulated?

Yes

No

Why did you select your answer above?

**Further consultation on the benefits or drawbacks of regulation would be needed before an informed answer could be provided.**

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?

**Families are dynamic in nature both in terms of the child's needs and stage of development and what is happening in their lives and in those of other family members. Therefore, the terms of any Court orders may be rendered inappropriate or indeed harmful as circumstances change.**

**This along with the principle of minimum intervention would indicate that voluntary arrangements should be explored before recourse to the courts.**

**In making any decision, the court should take into account the views of the child and in so doing, determine the best way to support relationships with the child which are in the child's best interests.**

**The child's views may change in the future and so there could be some provision to allow the child to choose to re-form or discard a relationship. How this arrangement would be facilitated is uncertain.**

Question 8):

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

Yes

No x

Why did you select your answer above?

**There should be no such presumption. Decisions about contact should be made on the basis of the paramountcy of the child's best interests. Where the grandparent wishes to claim an interest, he or she can apply to the Court under S.11 of the 1995 Act. The Court then, in full possession of the facts, can if necessary make any such Order where the child's welfare has been properly considered, and the views of the child and parties have been heard.**

Question 9):

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

Yes x

No

Why did you select the answer above?

**Clarification of the definition of “sibling” would be required. Often children who are not blood relatives consider each other to be siblings in terms of their relationship.**

**Where a child under the age of 16 wishes to have contact with a sibling, an application should be considered by the Court. The Court will need to consider the welfare of both children in coming to their decision and it is essential that the child with whom the sibling is seeking contact has independent legal representation, the support of a suitable person and an opportunity to express their views to the Court about the issue of contact.**

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?

**Any changes to legislation or guidance which affect looked after children require thorough and particular consultation. There are far reaching implications in terms of permanence planning and local authority obligations in respect of looked after children. Consideration**

**of one area of practice could result in unintended consequences of inconsistency.**

**Notwithstanding that, the sibling relationship for all children including those who are looked after can provide immeasurable benefits to the child. The views of the child about the importance of maintaining or re-establishing contact should be sought on a regular basis. The same principles apply as in previous questions in how to obtain these views, how to communicate any decision to the child and crucially how to implement any decision.**

Question 11):

How should contact orders be enforced? Please select only one answer.

- a) no change to existing procedure.
- b) alternative sanctions (eg unpaid work, attending a parenting class or compensation).
- c) making a breach of a contact order a criminal offence with penalties including non custodial sentences and unpaid work.
- d) another option (please specify). x

Why did you select your answer above?

**Punitive measures should be avoided wherever possible. An already fraught and conflicted family situation could be further exacerbated for the child.**

**Courts should divert cases towards mediation to defuse the situation and to seek a realistic and workable solution.**

Question 12):

Should the definition of “appropriate court” in the Family Law Act 1986 be changed to include the Sheriff Court as well as the Court of Session?

Yes

No

Why did you select your answer above?

**No firm opinion on the matter.**

Question 13):

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

Yes

No x

Why did you select your answer above?

**The Courts have been proactive in addressing this.**

**In July 2018 a new judicial protocol was agreed regulating direct judicial communications between Scotland, and England and Wales, in children's cases.**

**The protocol provides for the direct exchange of information between judges in intra-UK cross-border cases involving children. It will allow for the prompt exchange of key information about any existing proceedings, and the legal options available to the court in each jurisdiction.**

<https://www.judiciary.uk/publications/new-judicial-protocol-for-childrens-cases/>

Question 14):

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

Yes x

No

Why did you select your answer above?

**There is no apparent justification for changing this presumption. To do so could arguably be seen as an unnecessary interference in family life.**

Question 15):

Should DNA testing be compulsory in parentage disputes?

Yes

No x

Why did you select your answer above?

**Under Article 8 of the European Convention on Human Rights it is a fundamental right for the child to have knowledge of their parentage in establishing their sense of identity. Every effort should be made to assist the child in gaining this knowledge. The importance of ascertaining this information for the child into later life cannot be underestimated and if the child's parentage is not established at this stage, the opportunity to do so may be last forever. However, in circumstances where the Court considers harmful the medical or psychological implications, it should have the power not to compel such testing. It is likely that such discretion will be exercised in very few situations.**

Question 16):

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

Yes

No x

Why did you select your answer?

**The removal or vesting of PRRs merits the involvement of the Courts to reflect the serious nature of any such arrangement. Courts are compelled to make decisions which represent the best interests of the child; to ensure that the child is heard and their views carry weight, and to impose an Order in relation to PRRs only where no such making of the Order would be preferable.**

**The Court can assess the individual circumstances of each child and make sure that there is genuine agreement among parties and an understanding of the implications of such an Order.**

**While a father may acquire PRRs with the consent of the mother, his inalienable connection with the child and shared parentage explains why this is appropriate without Court involvement.**

**Section 11 allows an adult who claims interest to apply to the Court to acquire PRRs and there is no convincing argument that the status quo should be changed.**

Question 17):

Should the term “parental rights” be removed from the 1995 Act?

Yes

No

Why did you select your answer above?

**Parental rights exist to support the parent in discharging their parental responsibilities. The removal of this term would create confusion in relation to other legislation and the body of case law that includes this concept.**

Question 18):

Should the terms “contact” and “residence” be replaced by a new term such as “child’s order”?

Yes

No x

Why did you select your answer above?

**There is no apparent benefit to doing this.**

If you answered yes what terms should be used?

Question 19):

Should all fathers be granted PRRs?

Yes x

No

Why did you select your answer above?

**It seems iniquitous to deprive someone of their PRRs on the grounds of their gender. The father’s biological connection to the child is equal to that of the mother and he should have the legal rights and responsibilities that allow him to parent the child appropriately. These automatic rights would mean that he could participate in decisions about the child’s life and future. This could provide the child with security, stability and safety.**

Question 20):

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

Yes

No x

Why did you select your answer above?

**There appears to be no benefit to this occurring. The children who would be affected are of an age where their views require to be taken into account in the making of any decision affecting them. This means that these views should be taken into account where a parent is seeking to obtain rights and responsibilities after a period of at least 12 years has elapsed. There is not advantage to the involvement of the Court to impose on the child a relationship in such circumstances.**

**The father had the right to apply to the court for PRRs under Section 11 of the Act throughout this period and if he did not do this or these were not granted, the retrospectivity of granting them now would seem illogical.**

Question 21):

Should joint birth registration be compulsory?

Yes

No x

Why did you select your answer above?

**This is and unnecessary intrusion into a family's life. There will be situations where this would be positively inappropriate (in cases of rape or incest) or dangerous (where there is domestic violence or any element of coercion).**

Question 22):

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

Yes x

No

Why did you select your answer above?

**For similar reasons to those stated before. The birth father has a right to be involved in the life of his child and, as such his status should be legally acknowledged.**

Question 23):

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

Yes x

No

Why did you select your answer above?

**This presumption exists and is upheld in domestic and international legislation. Attempts to remove or compromise this presumption would lead to inconsistency in statutes and case law which has flowed from these laws.**

**Under the 1995 Act, parents are expected to be involved in the child's life in order to exercise their parental rights and discharge their parental responsibilities. Where they are not living with the child, they are expected to maintain contact with the child. Local Authorities are obliged to support the continuation of contact between children and their parents where the child is looked after away from home where this is appropriate and practicable.**

**Under the Children Hearings (Scotland) Act 2011, parents are automatically recognised as Relevant Persons in the child's life. This entitles parents to have their views listened to in a Children's Hearing, to appeal Hearings' substantive decisions and to attend Hearings.**

**Under the Adoption and Children (Scotland) Act 2007, PRRs can be removed only where it can be evidenced that living with someone with PRRs is likely to be seriously detrimental to the welfare of the child. Adoption is only possible where the parent consents to the adoption or there is sufficient evidence and reason for the Court to dispense with this requirement**

**The ECHR recognises the right to respect for private family life and the UNCRC recognises the rights of both parents to be involved in their children's lives.**

**Statute and its interpretation in the Court already upholds this presumption.**

Question 24):

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

Yes

No x

Why did you select your answer above?

**For the reasons stated in question 23.**

Question 27):

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

Yes

No x

Why did you select your answer above?

**This appears to be sufficiently clear.**

Question 29):

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

- a) Yes – by an application to the criminal court following a conviction to remove that person’s PRRs.
- b) Yes – by giving the criminal court a duty to consider the removal of PRRs when a person is convicted of certain types of offences.
- c) No – leave as a matter for the civil courts. x
- d) No – another way. (please explain).

Why did you select your answer above?

**A decision to prosecute is based, inter alia on what is in the public interest and the criminal court is focussed on whether there is sufficient evidence to achieve a conviction. It is not the appropriate forum for making child centred decisions which represent the best interests of the child.**

**The views of the child, the evidence from child professionals, the evidence relating to whether or not the threshold test has been met are not placed before the criminal court. These are just a few of the factors which require to be taken into account before removing PRRs.**

**It would be entirely contrary to the principles upholding the rights of the child for such an important decision to be made without due consideration under appropriate proceedings.**

Question 35):

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

Yes

No x

Why did you select your answer above?

**There is no reason why a person should be discriminated against in this way in one area of the law. The Court Reform (Scotland) Act 2014 already provides for the court to deem someone a vexatious litigant and to deal with the behaviour appropriately. There is no apparent reason for this repetition when, presumably the test to declare someone to be a vexatious litigant would be the same.**

Question 39):

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

Yes x

No

Why did you select your answer above?

**There is overwhelming evidence in research and practice that decisions about children need to be made within the child's time frame. A recognition of this fact on legislation might support the reduction or eradication of drift and delay in cases which involve children.**

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 x

No

Why did you select your answer above?

**A Relevant Person in the Children's Hearing System has wide ranging rights and access to information about the child and his or her family as well as the right to attend and be heard at Hearings. Where the Principal Reporter believes that a deemed Relevant Person does not fulfil the statutory test of significant involvement in the upbringing of the child, he should be in a position to draw this to the attention of the Court.**

**The safety of the child and the child's welfare are paramount and where this is being jeopardised, the Principal Report should be enabled to take action to protect the child and the child's rights.**

Question 49):

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

Yes x

No

Why did you select your answer above?

**The system needs to be responsive to its service users, principally children and families. Where modernisation is deemed desirable, then there should be legislative provision to allow this to happen.**

Question 53):

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

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

Yes

No  x

If yes please provide your comments below.

Question 54):

Do you have any further comments?

Yes

No x

If you have answered yes please provide your comments below.