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Resolving parenting disputes: Scotland compared to other countries

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This briefing aims to support parliamentary scrutiny of the Children (Scotland) Bill. The Bill would significantly reform the law which applies in relation to disputes between parents about their children. This briefing considers how various other legal systems deal with parenting disputes.

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Contents

Executive Summary

The Children (Scotland) Bill would substantially amend the Children (Scotland) Act 1995. The 1995 Act sets out the law which applies to resolve disputes between parents about their children. This briefing looks how various other legal systems deal with parenting disputes, both in terms of what the law says and how the law is applied in practice.

Three main legal systems are looked at in this briefing: Australia; England and Wales and Canada. Other legal systems discussed include New Zealand, the USA and the Scandinavian countries.

The courts and the legal aid system

A common theme in the countries examined, is that the courts and legal aid systems are under pressure. For example, there are delays affecting court cases involving children. A number of countries have a greater degree of judicial specialisation than Scotland, both in terms of specialist family courts and specialist family judges. However, it appears that specialisation, of itself, is not a complete solution to common problems.

The rise of ADR

While all legal systems looked at have a role for the courts, the courts are increasingly used as a last resort. Some countries offer alternatives to court (ADR) wholly or partly funded by the state.

Some countries require parents to attempt mediation before beginning court action. Other legal systems require parents to go to an information meeting about mediation before starting proceedings. Most countries have exceptions to the mandatory requirements for families affected by domestic abuse. However, in some systems, concerns have been raised about whether the associated screening processes are fit for purpose.

Children's participation in decision-making

One key issue that many countries are wrestling with is how to ensure children's participation in court decisions affecting them.

In New Zealand, it is common for children to have their own lawyers (for cases likely to go to court) and for judges to speak to children directly. However, in other systems, the main approach is for a court-appointed official to write a report for the court including the child's views. Common themes across the countries include an element of dissatisfaction among users with existing systems and of children's participation not being realised fully in practice.

What to do when someone disobeys a court order

How to respond when someone disobeys a court order is a difficult issue for courts and policymakers. Some countries focus on sanctions, others take a more problem-solving approach. In Australia, family consultants, who also write reports for the court on children, can have an enforcement and monitoring role. The Australian Law Commission recently recommended strengthening this role, so, for example, the family consultant (as well as the parent) could apply to the court for further steps to be taken when a court order is disobeyed.

Unmarried fathers

Unmarried fathers in Scotland acquire parental responsibilities and rights in respect of their children, not through being a genetic parent, but through joint registration of the child's birth. Joint registration is very common in practice but requires the mother's cooperation. Approaches in other countries vary. For example, Australia bases parental responsibility on being a genetic parent, England and Wales takes Scotland's approach.

Statutory checklists - welfare of the child

When the courts are resolving disputes, the welfare of the child (often termed 'the best interests of the child') is a key principle in legal systems around the world. Many countries have statutory checklists to guide judicial decision-making on welfare or best interests in individual cases. Several modern checklists are more lengthy and detailed than what the Bill now proposes for Scotland.

'Shared parenting' versus 'safety first'

Most countries have wrestled with i) how to ensure the involvement of both parents in a child's life, in suitable cases; versus ii) how to protect children who are at a risk of harm from that involvement. In response, some countries have created 'hierarchical' statutory checklists relating to the welfare of the child. One, or both, of the factors contained in i) and ii) appear as a **primary consideration** in such checklists. Other factors that the courts are to consider appear as **secondary or additional considerations**.

Other countries have gone further and introduced **presumptions** (or formal starting points for the courts) relating to one or both of these issues. Where presumptions have been introduced, the law has become more complex. Some countries have also been criticised for not sufficiently prioritising safety concerns.

Some legal systems have introduced presumptions tailored to different circumstances. For example, in some states in America, a general presumption in favour of shared parenting exists alongside a specific presumption **against** custody or contact where a parent is a perpetrator of domestic abuse.

Introduction and overview

The Children (Scotland) Bill ('the Bill') was introduced in the Scottish Parliament on 2nd September 2019. The Government also published a Family Justice Modernisation Strategy ('the Strategy') at the same time as the Bill, setting out other policy work in this area. The Bill and the Strategy followed a detailed Scottish Government consultation in 2018. [1]

Substantial parts of the Bill and the Strategy focus on Part 1 of the Children (Scotland) Act 1995 ('the 1995 Act'). Part 1 sets out the law which applies when parents are in dispute over some aspect of their children's care, as can happen after separation or divorce.

Three main legal systems are looked at in this briefing: **Australia**; **England and Wales** and **Canada**. Other legal systems SPICe has investigated include **New Zealand**, **the USA** and **the Scandinavian countries**. One limiting factor on the scope of the research has been the availability of English language material.

The briefing is divided into three parts:

- **Part 1** looks at the current law and practice in Scotland, as well as the main provisions of the Bill;
- **Part 2** gives an overview of the approaches to resolving parental disputes in the three main legal systems SPICe has considered; and
- **Part 3** looks at specific policy issues related to parenting disputes.

Part 3 looks at both key issues tackled in the Bill and those which are not addressed in the Bill (but which the Scottish Government consulted on in 2018). The bulk of the research was completed before the content of the Bill was known. The 2018 consultation was wide ranging, the Bill is narrower in scope.

Part 1: Scotland

This part of the briefing sets out the current law. It also explains how the system operates in practice and what the the Bill does (and does not) cover.

A preliminary point is that there is no specialist family court system in Scotland. Cases are usually considered by the local sheriff court, which deals with a wide range of civil and criminal matters. Also, sheriffs who specialise in family cases only exist in large urban centres, mainly in Edinburgh and Glasgow.

The Children (Scotland) Act 1995

Parental responsibilities and rights (PRRs) - an overview

Part 1 of the 1995 Act sets out various **parental responsibilities and rights** ('PRRs') in respect of children living in Scotland.

In practice, PRRs are powers which enable parents to take key parenting decisions on behalf of their children. As explored later, most, but not all, Scottish parents have automatic PRRs in respect of their children.

Section 11 of the 1995 Act gives the court various powers to decide an issue in a parenting dispute, if the adults concerned cannot resolve things themselves.

In deciding whether to grant any court order, section 11 says the court should use several overarching principles. The **welfare of the child**, sometimes referred to as the **best interests of the child**, is the paramount consideration (i.e. the most important and overriding one). Another key principle relates to **the child's views**. The courts must give the child an opportunity to express his or her views, as well as "have regard to" any views the child then expresses.

The types of court order which the court can make include a **residence order**, setting out where the child is to live, which can be with one or both parents. Also important is a **contact order**, which sets out the arrangements for a child to have contact with a parent (or other relative) he or she does not live with. Other types of court order are also possible.

The Family Law (Scotland) Act 2006

The last major amendments to Part 1 of the 1995 Act were in 2006, under the Family Law (Scotland) Act 2006 ('the 2006 Act').

One thing the 2006 Act did was **strengthen the position of unmarried fathers**. Unmarried fathers do not have automatic PRRs in respect of their children. Since 2006, unmarried fathers have been able to acquire PRRs by **joint registration of the birth**, so the father's name appears on the birth certificate. This step requires the cooperation of the child's mother.

The 2006 Act also amended the 1995 Act to introduce two new statutory factors which the court must consider when making a decision in an individual case. The aim was to make the courts think more about **abuse or a risk of abuse,** including abuse of a parent, when making court orders. The other factors the court consider when reaching a decision are set out in **case law**, that is to say the branch of law developed by decisions of judges in previously decided cases. Accordingly, since 2006, Scotland has had what one academic has referred to as a **partial statutory checklist** of factors. [2]

PRRs in practice

The courts, the legal profession and services offering alternatives to court (ADR), such as mediation, all have an important role to play in family cases. Collectively, this system is sometimes referred to as the **family justice system**.

Few court cases relating to the 1995 Act go to what is known as a **proof**, i.e. a full hearing where witnesses give evidence and are cross-examined. Instead, most disputes are resolved (by court order) at one or more **child welfare hearings**. Child welfare hearings are relatively informal and are held in private.

An important role is played by **child welfare reporters**. These are court-appointed officials, usually practising solicitors, who can report to the court on what the views of the child might be or what is in the best interests of the child. The solicitors typically come from private practice and charge a fee for their services. They are independent in the case they are appointed to report on and are separate from the solicitors representing the litigants.

What the Children (Scotland) Bill would do

The Children (Scotland) Bill would make changes including:

- removing a presumption (i.e. a starting point for the decision-maker) that a child 12 years and over is of sufficient age and maturity to express a view on a decision affecting them. A key policy intention is to encourage the courts to hear from younger children as well (**section 1**);
- the statutory regulation, for the first time, of child welfare reporters. This would largely be achieved by future secondary legislation (**section 8**);
- adding two further statutory factors which the courts have to take into account when reaching decisions under section 11 of the 1995 Act. These consider the possible impact of a court order on the role of the child's parents and on "the child's important relationships with other people" (**section 12**);
- a new duty on the court to investigate why a court order has not been obeyed. This could be carried out in practice by the court or by a child welfare reporter (**section 16**); and
- the court being required to consider the risk that a delay in a court case would pose to the child's welfare (**section 21**).

Proposals which are not in the Children (Scotland) Bill

Key proposals that the Scottish Government consulted on in 2018, but which **do not** feature in the Bill, include:

- requiring parents to attend an **information meeting about mediation**, prior to beginning court proceedings;
- creating a nationwide system of **child support workers** to help children participate in all stages of the court process;
- giving **greater rights to unmarried fathers**;
- **updating the language associated with PRRs**, so that, for example, residence and contact orders would be replaced with a child's order; and
- introducing various **presumptions**, or starting points for the court, to be used when it is reaching decisions under the 1995 Act. These included a proposed presumption relating to shared parental involvement in a child's life and an (alternative) presumption relating to the risks posed by domestic abuse.

Part 2: An overview of the approaches to resolving parental disputes in Australia, England and Wales and Canada

This part of the briefing provides an overview of the approaches to resolving parental disputes in the three main legal systems SPICe has considered.

Australia

Unlike Scotland, Australia has **a specialist family court system** where most family cases are heard. There is a national Family Court (with a separate Family Court of Western Australia). The Family Court sits in locations across the country.

Earlier this year, a report by the Australian Law Reform Commission (ALRC) recommended that, while specialist family judges should be retained, the national Family Court should be (eventually) abolished, with regional courts to hear most family cases. The aim was to improve the handling of cases involving abuse (including domestic abuse). This recommendation was contentious in practice. [3]

The relevant law which deals with parenting disputes is the Family Law Act 1975 ('the 1975 Act') which was substantially amended in 1995. In 1995, there were many similarities between the Scottish and Australian approaches, including that the key role played by the best interests of the child principle. There were also some important differences. For example, a detailed statutory checklist of factors was introduced to guide the courts on what was in the child's best interests in an individual case. [4]

The 1975 Act was amended again with the Family Law Amendment (Shared Parental Responsibility) Act 2006. The relevant reforms were far more radical than Scotland's 2006 reforms in several ways. In particular, the strong emphasis on **shared parental involvement** is what the legislation became known for. The new law was often interpreted in practice to mean that both parents were entitled to **equal time** with their children. (As explained later, this overstated what the legislation actually says.) [5]

The 2006 Act also **updated the language used** in relation to parenting disputes, for example, **parenting orders** replaced residence and contact orders.

Unlike the equivalent Scottish reforms, the 2006 Australian reforms were **not just about what the law says but about the mechanisms used to resolve disputes**. Another key aim was to divert suitable cases out of the court system to a range of other services, with an important role played by mediation. As a centrepiece of those reforms, a network of sixty-five publicly funded, community-based, Family Relationship Centres were set up. These provide some services directly, as well as information and signposting on a range of other services. They are often situated on prominent spots on the high street.

Australia's 2006 reforms to the law applied to parenting disputes were extensively evaluated by researchers in 2009-10. They concluded that shared parenting had been promoted to too great an extent and that the risk of family violence had been marginalised.

[6] As a result of this, the law was reformed again in 2011. These reforms aimed to shift the emphasis towards **prioritising safety concerns**.

The overall result of successive reforms is **a complex decision-making pathway** which the courts (and other interested individuals) have to follow in individual cases. [6] Recently, there have been two important reports recommending further reforms to the law. Key recommendations were to move further away from expectations of equal parenting time and, overall, to simplify the law. [7] [8]

England and Wales

Changes introduced by the Crime and Court Act 2013, mean that, since 2014, the courts dealing with family cases have been organised under the structure of a single **Family Court**. [9] In practice though, the Family Court sits in locations across the England and Wales. [10]

One aim of the 2014 reforms was to increase the specialisation of individual judges in family cases. Issues associated with a lack of judicial specialisation had been raised in the Family Justice Review in 2011. [11]

There are a variety of significant, current pressures on the Family Court, including rising numbers of cases and delays in court cases. Consequently, there was a consultation earlier in 2019 on further possible reforms. [12]

An important role in the family justice system is played by the Children and Family Court Advisory and Support Service (CAFCASS) and CAFCASS Cymru for Wales, public bodies which have no direct equivalent in Scotland. As explored later, their officers represent children's views and best interests in the Family Court. CAFCASS and CAFCASS Cymru operate independently of the Family Court, social services, education and health authorities.

The relevant legislation on parenting disputes is the Children Act 1989 ('the 1989 Act'). Unlike the equivalent Scottish legislation, it has a statutory checklist of factors which the courts use when assessing the welfare of a child.

The 1989 Act was amended by the Children and Families Act 2014. The language around parenting disputes was then updated, with residence and contact orders being replaced with **child arrangement orders**.

Another element of the 2014 reforms was **promoting the involvement of both parents** in post-separation parenting. In terms of the extent of the change, legislators were more cautious than Australia was in 2006. However, some of the complexity of the Australian legislation was introduced into the courts' decision-making. Courts have been required to consider complex legal arguments where the legislative provision on shared parenting has clashed with other factors on the statutory welfare checklist.

Practice Direction 12J sets out a mandatory approach for the Family Court in disputes where there is alleged abuse or harm. Despite the Direction being revised several times, concerns are still being expressed by court users and interest groups that the Family Court

is still not giving enough emphasis in practice to safety issues. [13] The former President of the Family Court has recently added to the critical comments. [14]

The UK Government also introduced reforms to encourage family cases to be resolved outside the court system. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 was very significant. It **withdrew legal aid for most family court proceedings**, **while strongly supporting the alternative avenue of mediation.** Legal aid is still available for victims of abuse who can produce evidence of that abuse.

Canada

Canada makes a distinction between parenting disputes involving married (but divorcing) couples and those involving children born to unmarried parents. Those involving married parents are dealt with at a federal (national) level. Those involving unmarried parents are dealt with at a provincial (regional) level.

Canada also differs from the other main legal systems looked at, in that **the model of a specialised, unified family court is only partly implemented across the country**. The most populated province (Ontario) has such a court, but three of the other most populated provinces (Quebec, British Columbia and Alberta) do not. [15]

Where specialist courts do exist, they encourage constructive, non-adversarial techniques to resolve issues and provide access to support services through community organisations. These services typically include parent-education sessions, mediation, and counselling. [15]

The Divorce Act 1985 ('the 1985 Act'), a piece of federal (or national) legislation, contains the provisions equivalent to the 1995 Act in Scotland for married couples.

In June 2019, an important government bill (C-78) was passed by the Canadian Federal Parliament. This significantly reforms the 1985 Act. (Equivalent reforms have already taken place in some provinces for unmarried couples).

The new law comes into force on **1 July 2020**. It will change the terminology associated with parenting disputes. **Parenting orders** will replace custody and access orders. There are also two new concepts of **parenting time** and **decision-making responsibility**. These aim to describe clearly the different aspects of parenting on which court decisions can be made.

The new law introduces, for the first time, a statutory list of factors to determine the best interests of the child. However, unlike the Australian and English reforms, there is no specific statement encouraging **shared parental involvement**. (This is despite arguments made for this change by interest groups during the Bill's parliamentary passage.) The new law retains the position that **the total time a child spends with each parent** should be decided according to the child's best interests.

There are also various parts of the new law designed to encourage (but not compel) parents and professionals **to settle disputes out of court**, using mediation, negotiation or collaborative law. (See later in the briefing for more on mediation and collaborate law).

In addition, there are changes **aimed at cases involving domestic abuse**. For example, the divorce court has a **statutory duty** to consider whether other courts may have had relevant (criminal or civil court) proceedings relating to abuse. The idea is to improve the flow of information between courts and to the place the onus on the court (not the litigant) to achieve this.

Part 3: Key policy issues associated with the 1995 Act

This part of the briefing looks in more depth at policy issues associated with the 1995 Act.

The courts and the legal aid system

Scotland

The court system

In 2016, the Scottish Government held a summit to help with what ultimately became the (recent) Strategy. Key points raised by participants about the court system in Scotland included: [16]

- **Cases involving children take far too long,** both before and after they reach court. Various reasons were suggested for this, including:
  - delays in obtaining legal aid;
  - lack of court time, with criminal cases being prioritised; and
  - the sheriff's management of the case.
- There was strong support for the **creation of specialist family courts and sheriffs** to address some of the issues in the court system.

Several court cases heard on appeal (including one before the UK Supreme Court) have also been strongly critical of delays in cases involving children. [17]

Legal aid in family cases

Another issue affecting the system is the falling number of solicitors willing to take on legal aid work, including in family cases.

Solicitors have been critical of the level of fees associated with legal aid cases, arguing that these have remained static or declined in real terms since 2010/11. [18]

In 2018, the Scottish Government announced a 3% increase in legal aid fees from April 2019, [19] which the legal profession regard as helpful but not a complete solution. [20] The Government has recently consulted on further reforms to the legal aid system. [21]

Other countries

In the three main legal systems looked at by SPICe, there was a **greater degree of judicial specialisation** in family cases than exists in Scotland. This is both in terms of the existence of specialised courts and specialisation by individual judges. [22] **New Zealand** is another example of a country with a well-developed family court. The Family Court of New Zealand has existed since 1981.

Another important theme in the countries looked at is **systems under some strain**. Various issues are arising, some of which are familiar to the Scottish context. For example, rising numbers of cases relating to children; increasing numbers of cases where litigants represent themselves in court; and a view that court cases relating to children are taking too long. Another key issue is whether courts are responding appropriately to cases involving domestic abuse. [22] Australia and England and Wales provide examples of systems where these issues are ongoing.

Another recurring theme (with the possible exception of Norway) is **concern about whether the legal aid systems provide adequate access to legal advice and representation** for those who cannot afford it. For example, an academic, writing in 2012, says Canada's system of legal aid for family cases excludes large numbers of lower and middle income citizens. [23] In New Zealand, in 2016, the Law Society expressed concerns about falling numbers of lawyers willing to take on legal aid work in family cases, with a knock-on effect on access to justice. [24]

Alternative dispute resolution (ADR)

The term 'alternative dispute resolution' (ADR) is traditionally used to describe a collection of methods designed to help people to resolve disputes outside the court system.

Scotland

The current system

Mediation (explained later in the briefing) is the main form of ADR used in family cases in Scotland. Various other types are also used, including collaborative law and arbitration (also explained later). Mediation is mainly provided by third sector organisations, who are members of Relationships Scotland, or by solicitors who are also qualified as mediators.

People can 'self-refer' to ADR. A sheriff can also refer a case to mediation at any stage of the court action. For people on low incomes mediation can be (wholly or partly) funded by legal aid, although other types of ADR for family cases are not available under the legal aid system.

Participants at the Government's 2016 summit said that a current challenge is that not all Scottish solicitors know enough about ADR and so cannot fully explain it or promote it to their clients. Furthermore, accessing ADR quickly is only an option for those who can

afford it - legal aid is not always available and too much of the funding burden lies with third sector organisations. [16]

What the Bill proposed - and other developments

In 2018, the Scottish Government consulted on introducing, with some exceptions, **a requirement on parents to attend an information meeting about mediation** prior to raising court proceedings. [1] Although a popular option on consultation, [25] no relevant proposal appeared in the Bill.

There is currently a proposal for a Member's Bill by Margaret Mitchell MSP. With exceptions, the idea is that, when a case first comes to court, a **duty mediator** would be required to meet with the litigants in an information session about mediation. Earlier in 2019, there was also a major report on mediation, launched by Scottish Mediation, which aimed to transform the use of mediation in Scotland. One important recommendation was a **presumption** that a court should refer a case to mediation unless there is a good reason not to. [26] Both proposals suggest exemptions for domestic abuse cases.

Other countries

The rise of ADR

All of the legal systems looked at in this briefing have a role for the courts in family cases, but the precise scope and timing of that role varies, with **courts increasingly seen as the destination of last resort**.

Increasingly, various forms of ADR are being used in parenting disputes. This includes to keep disputes out of the court system altogether. Also, where a dispute does reach the court, to resolve it without resort (or with less resort) to adversarial processes. [23]

One leading Scottish academic explains these developments in the following terms:

> “ The growing popularity of ADR is motivated the belief that it offers a kinder, more constructive way to address family conflict, avoiding the delay and acrimony often associated with litigation, something that becomes particularly important when the adult parties will continue to be involved with each other as parents. There is also the attraction of saving on the costs associated with protracted legal disputes.”
>
> Sutherland, 2012[22]

However, there are also critics. For example, one New Zealand academic, writing in 2013 on 'conciliation' (the collective term for the types of ADR then available at the Family Court) says that there are:

> “ dangers and traps in a process, which, when first explained, seem so appropriate and so capable of solving all the problems and tensions of break-up. The strength of conciliation is that it is a process which relies on human interaction and connection. This is also its great weakness. Like all human processes, both the good and the bad qualities of human nature can emerge.”
>
> Henaghan, 2013[27]

He argues that lawyers and courts are important in dealing with situations where there are significant power imbalances in the relationship, such as when there is domestic abuse. [27]

Established types of ADR in family cases

The table below sets out the main methods of ADR used in disputes between parents in the countries looked at by SPICe.

As in Scotland, **mediation** is the dominant form of ADR in family cases. Other forms of ADR are also growing in popularity. These include **collaborative law**, for example, which is more developed in the USA than in Scotland and is rapidly growing in use in Canada.

Types of ADR used in family cases

Type of ADR	Description	Countries where it used
Mediation	Mediation involves an independent and impartial person helping parents to negotiate a potential solution to a problem in a confidential setting. The parents, not the mediator, decide the terms of any agreement. The outcome is not usually legally binding, without further legal steps being taken.	Widely used in countries around the world and, in many countries, the dominant form of ADR in family cases. Used, for example, in the USA; Canada; Australia; New Zealand; Germany; Spain, Italy; the Netherlands; the Scandinavian countries; Ireland and England and Wales. [23] [28] [29]
Collaborative law	In this method the two parents and each of their lawyers meet together in a four-way conference, aiming to negotiate a fair settlement. **A key aspect of the process is that everyone enters into a contract at the outset. This prevents the couple from instructing the collaborative lawyers to raise a court action if their negotiation fails. The aim is to incentivise all those participating to reach a successful outcome.**	Well-developed in USA and on the rise in Canada and England and Wales. [23] Available through the legal aid system in Ireland, for those eligible for legal aid. [30] (More commonly used for cases involving financial issues though). [28]
Arbitration	In arbitration, a third party, who often has specialist expertise or knowledge, will decide how the dispute should be resolved. The arbitrator gives a legally binding decision.	Use of arbitration is much more limited for disputes involving the care of children compared to family disputes about property and finances. Some legal systems do not permit it at all in parenting disputes (e.g. Quebec; Australia; New York; California). Others extend its potential use to this area (e.g. Ontario, British Columbia, Michigan and New Jersey). [31]
Mediation-arbitration ('med-arb')	This is a two-stage process. The first stage involves the parents meeting with a mediator to try and negotiate an agreement. If that is unsuccessful, the parents meet with an arbitrator who will issue a decision. The mediator and the arbitrator can be the same person or different people.	Well-developed in Canada [32]

Note that family group conferencing also seems to be used in a number of countries (having originated in New Zealand). However, this seems to be mainly where there is some degree of state intervention in the life of a child, for example, in child protection cases.

Mandatory requirements to attempt mediation

For a number of countries, trying to resolve a dispute through mediation is optional. However, several countries (e.g. **Australia**, **New Zealand** and **Norway**) have a mandatory requirement to attempt mediation before being allowed to commence court proceedings. [33] [34] [35] For example, in Australia, the relevant statute says its purpose is to agree a **parenting plan** in relation to care of the child in future. [36]

In **New Zealand** and **Australia** there are exceptions to the requirement to attempt mediation where there are good reasons not to (e.g. where there has been domestic abuse). However, in both countries, critics have argued that the screening processes used by courts (and ADR providers) to identify relevant risk factors are inadequate. [7] [27] In **Norway**, there has been academic criticism of the complete absence of a screening process for pre-court mediation. [35]

Mandatory information requirements

In **England and Wales**, it became a statutory requirement under the Children and Families Act 2014 to attend an information meeting about mediation (a 'MIAM') before being able to begin court proceedings (subject to certain exceptions and possible exemptions). The meeting also involves an assessment of a person's potential suitability for mediation.

The MIAM reform was introduced at the same time as legal aid being removed for (most) family cases. An unintended consequence of the reforms was that, despite legal aid being still available for mediation, **the number of publicly funded mediation cases then fell significantly.** Legal aid solicitors in family cases, it seems, had been important in terms of highlighting the availability of mediation to their clients. [37]

In **Ontario**, Canada, most parents have to complete a (free) Mandatory Information Program as a first step in any court case. It gives information about a variety of topics, including parenting after separation and alternatives to court. Participation in mediation itself remains voluntary. **New Zealand** also has a mandatory requirement on a parent to complete a (free) 'parenting through separation' course prior to commencing court proceedings.

The role of solicitors in promoting ADR

Several countries have introduced **statutory duties on solicitors advising clients to promote the availability of ADR services**. This includes countries where there are mandatory requirements on parents to attempt mediation (e.g. Australia, New Zealand) and those where the emphasis is on voluntary participation (e.g. Canada, Ireland).

The funding of ADR

There are a number of examples of ADR services being funded or subsidised by the state. These are set out in the box below.

In **Australia**, the 65 community-based Family Relationship Centres (FRCs) were created by the development of, and a significant public investment in, existing services run by third sector organisations. [28] FRCs provide one hour of free mediation for every family. Thereafter, costs depend on the mediation provider (as there are various options here). Some services are offered free for people on low incomes or the scale of fees reflects capacity to pay. [38]

Provinces in **Canada** have been offering subsidised mediation and information services for many years. For example: [28]

- In **Ontario** two hours of free mediation is offered at a family court location on the day of the court hearing. Up to eight hours of (government-subsidised) mediation is also available in any circumstances, with a fee based on income. [39]
- In **Quebec** up to five one hour sessions of mediation are available to first time litigants free of charge. Parties revisiting a settled matter or asking for a variation of a court order are entitled to a further two and half hours of free mediation sessions. [40]
- In **British Columbia** free mediation services are provided in Family Justice Centres and, for people on low incomes, the Justice Access Centres.

In **Ireland**, The Family Mediation Service is provided for free (without means testing) by the Legal Aid Board (although a couple may choose to use a private mediator). However, there seems to be some issues around the service being overburdened and under-resourced. [28]

In **Norway**, where all couples with children under 16 must attend one hour of mandatory mediation, this is paid for by the state. Up to seven hours of free mediation can be provided in total. At one point, funding cuts were threatened, [28] but these do not seem to have come to pass. [35]

In **New Zealand**, the mandatory mediation (and any preparatory counselling recommended) is paid for by the parents privately or is available through (means-tested) legal aid. [41]

Emerging types of ADR in family cases

In Western countries, approaches are beginning to be developed to apply ADR to what are sometimes known as **high-conflict families**, a diverse group with a range of complex challenges. For example, some families may be affected by alcohol or substance abuse.

Mediation may be conducted exclusively in separate meetings (caucuses) where the parents sit in different rooms and the mediator moves between the rooms (sometimes known as shuttle mediation). The parents may be offered services such as parental education, individual discussions or therapy in addition to mediation. Mediation may be combined with other types of dispute resolution processes, such as regular court proceedings. [35]

Australia has been making increasing use of **Legally Assisted Dispute Resolution**, for complex cases, where sessions are run by a mediator but the couple's lawyers are also present to assist with negotiations. The recent report of the Australian Law Reform Commission recommended that the Australian Government should work with the Family Relationship Centres to develop this approach. [8]

A further challenge associated with ADR is how to ensure the views of the child are heard in the process. Another emerging development is mediation involving the child directly (for example, in Australia, New Zealand and Canada). However, at the time of writing, its use is not widespread. [42]

The participation of children in decision-making

A major policy issue for both Scotland and other countries is how to ensure the participation of children in decisions affecting them.

Scotland

A key principle of the 1995 Act is that a court, when reaching a decision, must give a child an opportunity to express their views. Also, it must "have regard to" (but not necessarily follow) any views the child expresses.

The court can take account of the child's age and maturity. A child who is aged 12 or over is **presumed** to be mature enough to form a view.

The 1995 Act does not set out **how** a child is to express his or her views. In practice, approaches for section 11 cases include: [43] [44]

- the child expressing a view in writing through completion of the Form F9;
- the child welfare reporter writing a report for the court;
- the child speaking to the sheriff directly;
- the child speaking to a trusted adult in their life, such as their teacher, who then gives the court information; and
- the child instructing their own solicitor who can, for example, help the child to complete the Form F9 or represent his or her views in court.

Research suggests that a minority of children express their views directly to the sheriffs or instruct a solicitor themselves. Most speak to a child welfare reporter or complete the Form F9. [44] [45]

Section 1 of the Bill would abolish the current (12+) presumption, with the aim of encouraging the courts to hear from younger children.

Section 8 of the Bill would give powers to Scottish Ministers to make secondary legislation regulating child welfare reporters.

Section 15 of the Bill would place a new requirement on the court to explain (most) court decisions to (most) children, with the aim of increasing children's participation in the court process more generally.

As noted earlier, the Scottish Government consulted on creating a system of **child support workers** to help children participate in all stages of the court process. No relevant proposal appears in the Bill and the Government says it is still working on this area. [46]

Other countries

The Scottish Government funded a collaborative project between academics at the Universities of Edinburgh and Stirling and CLAN Childlaw on children's participation in court actions. The report is due to be published at the end of November 2019.

SPICe is grateful to the collaborators for early sight of the emerging findings of this project, some of which form part of the key themes discussed below.

When you look at children's participation in decision-making in other countries, **some key themes** are apparent [47] [8] [48]

- While the courts can take account of the child's age and maturity in relation to the child's views, the Scottish **presumption relating to children aged 12 and over** is not replicated in other countries
- With the exception of New Zealand, **children giving their views directly to the court is uncommon.** This includes judges speaking to children or, for example, children giving their views via an audio recording.
- It is also **rare for children to have their own lawyers** who act according to their instructions. Again, New Zealand is the exception, although reforms in 2014 mean their use is more limited now than previously.
- The most common way the child's views are presented to the court in other countries is via **a report prepared by a court-appointed official** (e.g. from a legal, social work or psychology background).
- The available research literature from other countries seems to offer **mixed views on who is best placed to obtain a child's views**, i.e. a judge, a lawyer, a psychologist or social worker.
- One issue is that **the child's views usually appear as part of a wider report on the child's best interests**. Some academics fear the expression of the child's views will

get lost or distorted in this process. Ontario (Canada) has a new approach, involving a separate report on the views of the child, which may help address this problem.

- The extent to which children participate in decision-making varies across the different legal systems. In some systems, **funding pressures** have been a factor affecting services.
- There is **dissatisfaction with how children's participation works in practice**, even in New Zealand.
- **Children affected by domestic abuse** would like a greater say in decision-making. However, there are concerns from adults about involving children in these circumstances. There is very limited research evidence available on how to support this group of children.

The participation of children in decision-making in individual countries is now considered in more detail.

New Zealand

New Zealand has a long history of judges interviewing children. Although common, it is at the discretion of the individual judge. [47]

Before 2014, a separate lawyer was appointed for the child in virtually all cases. Since 2014, a lawyer has been appointed for the child where the court considers it necessary for the child's safety and wellbeing. [49] It is still common in practice.

The appointed lawyer acts according to the child's views and instructions, but he or she must also promote the child's best interests. The lawyer explains any expert report or court orders to the child. He or she also acts as a 'go-between' between the judge and the child, arranging and attending any meetings the child has with the judge. [47]

A major report of an Independent Panel in 2019 (on the 2014 reforms) suggested that fee rates for lawyers needed to be reviewed, as the current rates were creating recruitment difficulties. Also, that children needed to be kept better informed about the progress of court proceedings by the lawyer. Furthermore, some people offering views to the Panel had said the role should be given to child development experts. Alternatively, that the lawyer for child should work with child development experts. [50]

Australia

In Australia, judges rarely meet with a child. Evidence suggests judges are concerned about their skills interviewing children and are concerned about the implications of hearing evidence directly from children. [47]

The most common method of obtaining a child's views is through a **family report** prepared by a **family consultant**, who is a psychologist or a social worker. Their report includes the views of the child as part of their recommendations on what is in the best interests of the

child. [1] Some family consultants are 'in-house' consultants, employed directly by the Family Court. Others are private practitioners who charge a fee for their services. [8]

In addition, the court can, and almost invariably does, appoint an **independent children's lawyer**. This is either from those employed 'in-house' (by the legal aid system) or from a panel of private practitioners. [8]

A children's lawyer is not the child's legal representative and is not obliged to follow the child's instructions. [8]

The children's lawyer is meant to perform three distinct roles: i) facilitating a child's participation in the court process; ii) gathering evidence relevant to the child's best interests; and iii) ensuring that the actual litigation is conducted in a child-focused manner. [8]

Contrary to the associated guidance, the majority of these lawyers do not meet with children directly. They rely on the reports prepared by family consultants. [8]

Available research in Australia suggests that children want to have a say in decisions made about them, but are unhappy with the level and type of involvement they have had. [8]

Users of the system have had **mixed experiences with family consultants**, particularly private providers. One criticism is the limited time they spend with families. Some interested individuals and organisations argued that the role currently played by private providers should be abolished in favour of an entirely 'in-house' system. [8]

There are also **many concerns about children's lawyers**, including about the quality of their work, their failure to meet with children directly and whether they were performing the full range of their expected duties. [8]

Funding cuts in relation to both family consultants and children's lawyers has been highlighted as a key contributing factor to the current problems. [8]

On consultation in 2018, the Australian Law Reform Commission had suggested creating a new professional role, a **children's advocate**, to support children **at every stage** in the court process (and assume some of the functions of the children's lawyer). Relevant professionals were to have expertise in child development. [51] The children's advocate was very similar to the child support worker proposed for Scotland.

Ultimately, the Australian proposal was abandoned in favour of recommendations designed to address problems with existing professional roles (e.g. statutory guidance for children's lawyers and a mandatory accreditation scheme for private family consultants). [8]

Canada

In Canada, there has been growing interest among judges in the idea of judges speaking to children directly. However, overall, there has been a reluctance among judges to develop this idea further. An exception is the province of **Quebec** where children have a legal right to speak to a judge directly where they wish to. [47]

In the province of **Ontario**, the Office of the Children's Lawyer (OCL) represents children (under 18) in parenting disputes. The court may request that the OCL appoint a children's litigation guardian. However, the OCL has discretion as to whether it appoints an independent lawyer for the child, a clinician (a social worker) or both. [47] They are private practitioners who charge a fee for their services. [52]

In most provinces in Canada, a person appointed to write a report will report on the child's best interests and the child's views (in one document). A recent innovation in **Ontario** has been the introduction (in 2018) of separate **Voice of the Child Reports** (VCRs). These are for **children over the age of seven**. They are based on one or more interviews between a child and legal or mental health professional. VCRs may be contain comment or opinion from the professional concerned on the child's views, or they may simply summarise those views (without comment). [47] [53]

England and Wales

Various options for obtaining children's views in court are set out in Practice Direction 12B for the Family Court. One option is speaking directly to a judge. This is not routine and has been discouraged, although there is 2010 guidance on the topic for judges. [47]

Another option is speaking to a CAFCASS official (see below), writing a letter to the court and/or being represented in the court proceedings. In the majority of cases, children's views are represented in reports to the court or from the accounts of other people, for example, parents. [47]

Cafcass (for England) and Cafcass Cymru (for Wales) are public bodies independent of the court service. Under the 1989 Act, in a disputed family case, a court can request a **child welfare report.** A Cafcass officer (or, in Wales, a Welsh Family Proceedings Officer) will prepare this report. They typically have a background in social work. The officer is required to obtain the child's views. However, his or her recommendation to the court is based on what is in the child's best interests. [47]

Enforcement of court orders

A case can return to the court for enforcement (sometimes more than once) if someone disobeys a court order. These are difficult cases for both policy-makers and the courts to address. They usually involve families experiencing high levels of conflict and they may be families affected by domestic abuse. [54] [55]

Scotland

Where a court order is disobeyed ('breached') one remedy is for the person affected by the breach to ask the court to find them in **contempt of court**. Contempt of court is punishable by fine, imprisonment or both. Imprisonment is used as a last resort. The court can also **vary the terms of the existing court orders** relating to residence and contact. Where a variation in the court order is being considered, the welfare of the child remains the paramount consideration.

In its 2018 consultation, the Scottish Government suggested adding **alternative sanctions** (e.g. unpaid work, attending a parenting class or paying compensation to the person affected by the breach). [1] Views were mixed on consultation and no related proposal appears in the Bill. [25] In its Strategy, the Government also refers to the possible **use of mediation** in this context. However, it highlights the difficulties this presents in the context of domestic abuse cases. [46]

When someone fails to follow a court order, **section 16 of the Bill** would impose a new duty on the court to investigate why the order has not been complied with. The investigation can be done either by the court itself or by the court appointing a child welfare reporter.

Other countries

In **England and Wales**, under the Children and Adoption Act 2006, new sanctions were added, including requiring the person in breach to undertake unpaid work or pay compensation to the person affected. In 2012, the UK Government also consulted on, but ultimately decided against, further sanctions, including the withdrawal of passports and driving licences. [54]

A research report from 2013 suggested that the new sanctions introduced in 2006 have not been well used. The report concluded that greater use by the courts of mediation and parenting programmes might be preferable to further additional sanctions. [54]

Other countries' courts use a wide range of tools when faced with breaches of court orders. For example, an EU study from 2007 suggests that, for countries such as **Denmark**, **Belgium** and **Finland**, reconciling the parents in a meeting, or proposing family mediation, is the first port of call. [56]

As mentioned earlier, in **Australia**, family consultants are psychologists or social workers who have a current role in the court process. The court can make a parenting order where a family consultant must **supervise or assist compliance** with that order. [57]

The recent report of the Australian Law Reform Commission recommended that the role of the family consultant in ensuring compliance with court orders should be expanded. In particular, that parents, following a contested hearing, should **routinely** meet with a family consultant to assist their understanding of the final parenting orders made. [8]

Also, for cases where the family consultant is to have an **ongoing role** after the order is made, the report recommends developing what the family consultant might do in this context. For example, signposting the couple to relevant support services (such as counselling) and monitoring their engagement with those services. [8]

Finally, instead of a parent having to raise fresh court proceedings in respect of the breach, the report recommended that the family consultant (as well as the affected parent) **should have powers to ask the court to take further steps relating to enforcement**. [8] Existing enforcement powers available to the court include varying the original court order; post-separation parenting programmes; community services orders; fines and imprisonment. [8]

Unmarried fathers

Scotland

In Scotland, unmarried fathers do not have automatic PRRs in respect of their children. In the 1995 Act, in its original form, the main way an unmarried father could get PRRs was by court order. While this is still possible, since the Family Law (Scotland) Act 2006, the main method by which an unmarried father can get PRRs is by **joint registration of the birth with the child's mother**. With joint registration, the father's name appears on the birth certificate. This step requires the mother's cooperation.

The Scottish Government's consultation contained various proposals designed to strengthen the position of the unmarried father to different degrees. These proposals were: [1]

- automatically giving PRRs to unmarried fathers, based on their genetic parentage, as the Scottish Law Commission had recommended in 1992 [58]
- backdating the change introduced in 2006, so that all unmarried fathers who had jointly registered a birth pre 2006 could, from a date to be specified, acquire PRRs this way
- introducing, with some exceptions, compulsory joint birth registration. The person registering the birth would be obliged to name both parents. (Exceptions to compulsory registration might relate to, for example, situations where there had been rape or domestic abuse).

On consultation, there was a fairly even split of views about each of the possible reform options. [25] **No relevant proposals appear in the Bill.**

Other countries

Other legal systems vary in how they approach unmarried fathers and their equivalents to PRRs. (Some examples are given below).

In **England and Wales**, the ways in which unmarried fathers can acquire 'parental responsibility' are virtually identical to those in Scotland, with the main method now being joint birth registration. [59] However, in the event of a dispute over registration or genetic parentage, the courts in England and Wales have the power to order paternity testing to resolve the dispute, which the Scottish courts do not. England and Wales has legislation on the statute book requiring compulsory joint registration, but this legislation has never been brought into force. [60] [1]

In **Australia**, since 1995, both parents have had joint parental responsibility, regardless of whether the father has ever been married to the child's mother. [61] The father's rights are based on being a genetic parent. Separately, joint birth registration is usually compulsory. [1]

In **New Zealand**, automatic rights for fathers are linked to being married to the child's mother or **living together** at any time during the period beginning with conception and ending with birth. In other instances, rights for unmarried fathers can be acquired by joint registration (which is usually compulsory) or by court order. [1]

The welfare of the child - a statutory checklist of factors

Scotland

When a court is deciding whether to grant any court order, section 11 of the 1995 Act says the **welfare of the child is the paramount consideration.**

Some factors which the court takes into account in assessing the welfare of the child appear on the face of the legislation and many remain in case law.

Under **section 1 of the Bill**, the two existing statutory factors added by the 2006 Act would be retained. These require the court to consider:

- the need to **protect the child from abuse** (or a risk of abuse) as part of the court's assessment of the welfare of the child; and
- whether it is appropriate to make an order requiring **parental co-operation**.

Section 12 of the Bill then proposes **two other statutory factors** which must be considered by the court in the context of the welfare of the child. These are:

- the effect that a court order might have on the involvement of the child's parents in bringing the child up; and
- the effect that a court order might have on the child's important relationships with other people.

Even if the Bill becomes law, **some factors the Scottish courts currently take into account will remain in case law.** [44] For example, the courts will continue to take into

account the **age, sex, and gender of the child**, although no associated statutory factors are proposed in the Bill. [62]

Other countries

Overview

Australia, **England and Wales**, **New Zealand** and, most recently, **Canada** have statutory checklists in their current legislation relating to the welfare or best interests of the child. There are also modern examples of checklists from the USA, for example, from **Pennsylvania**.

New Zealand has a well-developed statutory checklist, as well as a separate list of factors set out in a leading court case. [27] The combined effect is a lengthy list of factors, some of which seem to overlap.

The statutory checklists examined by SPICe vary in their level of detail, with Australia the most detailed and the oldest one (England and Wales) the least detailed. In its recent report, the Australian Law Reform Commission has recently recommended the simplification of Australia's statutory checklist. [8]

Key themes from the checklists

The checklists from the countries considered in this briefing have certain common themes.

First, the checklists all look at **the child's identity** and the various **needs and characteristics of the child**. The **child's age** is mentioned in three checklists in this regard, as well as **his or her gender** in two of them (Australia; England and Wales).

Existing arrangements for care of the child also feature in the checklists to varying degrees. Several checklists emphasise the **need for stability and continuity** (e.g. Canada; New Zealand and Pennsylvania). In a similar vein, others ask the courts to consider **the impact on the child of a change of circumstances** (Australia; England and Wales).

The nature and strength of the existing relationships of the child with **other family members** is referred to in several checklists (Canada; Australia and Pennsylvania). **Siblings** (Canada; Pennsylvania) and **grandparents** (Canada; Australia) are explicitly mentioned in some checklists.

Another common theme is **a parent's capacity and willingness to meet the child's needs**. Australia's checklist has the most to say about parenting capacity, with four factors covering this topic. One factor refers to past effort (or lack of effort) by the parent. Pennsylvania looks at the current parental duties performed by each parent on behalf of the child. Two checklists (Australia and Pennsylvania) consider how close a parent will be living to a child.

A key theme running through the checklists, with varying degrees of prominence and detail, is the **need to protect the child from harm**. This includes the risks presented by the child witnessing domestic abuse. Several checklists (Australia; Canada and New Zealand) specifically mention the need for the family courts to have regard to **other relevant criminal or civil proceedings relating to abuse.** The policy intention behind these provisions is to improve the consistency between courts' decisions in family cases and their decisions in other (civil and criminal) cases.

The new checklist from Canada also **looks to the future**, focusing on i) any agreed plans for the child's care; ii) the prospect of the parents being able to communicate and co-operate with each other; and iii) one parent's willingness to promote the child's relationship with the other parent. Pennsylvania has similar factors addressing points ii) and iii).

Australia used to have a factor in its checklist related to the prospect of parental cooperation. The factor was removed in 2011 because evaluations of the 2006 reforms had suggested that it caused issues in families affected by abuse. Parents were concerned that legitimate steps taken to protect safety would be interpreted as a lack of cooperation by the courts. [6]

Similar issues have been identified with the equivalent provisions in some American states. [63]

Possibly mindful of experiences in other countries, the checklists from both Canada and Pennsylvania attempt (in different ways) to take account of the special situation of domestic abuse (or child abuse) when considering the willingness of parents to cooperate.

How to promote key issues in the legislation: 'shared parenting' versus 'safety first'

Scotland

There has been ongoing debate in Scotland about **how to promote shared parenting of a child** where parents live apart. One suggested solution is a **presumption**, with interest groups representing fathers and grandparents leading voices in this campaign.

Presumptions are formal rules of law and starting points for the court in deciding cases. Normally, a court cannot overturn that presumption in an individual case unless enough evidence is produced to rebut (i.e. disprove) the presumption.

A presumption in favour of shared parental involvement featured as one proposal in the Scottish Government's 2018 consultation. [1]

Another key concern is **how to protect children and abused parents from harm**. Some commentators have argued that, for families at risk, the objective of protection cannot co-exist alongside the objective of encouraging shared parenting. The Scottish Government's

consultation proposed a second (alternative) presumption: that the courts should **not** presume a child benefits from both parents being involved in their life. [1]

On consultation, the first presumption attracted majority support but the second one did not. [25] The Scottish Government did not proceed with either presumption. [46]

Other countries - an overview

The debate which took place in Scotland has also happened in many other parts of the world. Policymakers want to promote shared parenting in cases where this would be beneficial. However, they also want to protect a child from harm where one parent's involvement would pose a risk. There can be a tension between these two ideas, including which one should have priority.

Primary considerations in the statutory checklist

One legislative response relates to the **statutory checklist of factors** used to assess the welfare or best interests of the child. Here some countries have given one factor or more on the list the status of a **primary consideration**, more important than the other considerations on the list.

Australia did this in 2006, introducing **two primary considerations**, one relating to the benefits of shared parental involvement with the child, the other relating to the need to protect the child from harm. In 2011, following criticism of the 2006 reforms, the law was amended to say that greater weight should be given to protection from harm.

In **Canada**, there is now **one primary consideration** in its statutory checklist - the need to give priority to the child's safety, security and wellbeing. Colorado (USA) has one **primary consideration** relating to safety. [64]

Presumptions

One step further than primary considerations in the statutory checklist is the use of **presumptions** (as Scotland consulted on). [1]

England and Wales

The Children and Families Act 2014 amended the Children Act 1989 to introduce a presumption that, unless the contrary is shown, the involvement of a parent in the life of his or her child will be beneficial to the child's welfare. **Involvement** is defined as "involvement of some kind", which includes both direct and indirect contact "but not any particular division of a child's time."

Practice Direction 12J, which sets out a mandatory approach for the Family Court in disputes where there is alleged abuse or harm, says the courts should "consider carefully" whether the presumption should apply in such cases. [65]

Australia

Australia has a complicated system. The courts have to consider the **child's best interests** as various stages in the decision making process, assessed according to a (hierarchical) **checklist of factors**.

There is also a **statutory presumption** that it is in the best interests of the children for the child's parents to have equal shared parenting responsibility. Various exceptions and qualifications apply, including ones relating to family violence or child abuse.

The presumption does **not** relate to the time a child spends with each parent. However, if a court wants to order equal shared parenting responsibility (much more likely because of the presumption) then the court is required to consider equal (or substantial and significant) **parenting time** for both parents. This will be granted **where this is practicable** and **in the child's best interests**.

The 2019 report of the Australian Law Reform Commission recommended: [8]

- the current presumption on equal shared parenting should be replaced with one relating to joint decision making about major long-term issues; and
- the requirement to consider equal (or substantial or significant) time with each parent should be removed

Sweden and Denmark

In a Scandinavian context, **parental responsibility** refers to decision-making responsibility, separate from the issue of where a child lives. In 1998, in Sweden, and in 2007, in Denmark, laws were introduced which were interpreted in practice as a presumption in favour of **joint parental responsibility**. This could be overruled in limited circumstances. [66]

In several instances, the courts decided in favour of joint responsibility where the parents had severe and understandable difficulties in co-operating, for example, where there had been domestic abuse. This led to further reform. In Sweden, in 2006, and Denmark, in 2012, the parents' ability to cooperate became an important factor the courts had to consider. [66]

The aim was to better protect children at risk of harm. In this way, both countries have pulled back from the 'high-water mark' of a commitment to shared parenting. However, some critics argue that the reforms have only been partially successful in terms of protecting families. [67]

New Zealand

New Zealand is an example of a country which has used a presumption tailored specifically for the situation where there has been abuse.

Between 1995 and 2013 New Zealand had **a presumption against unsupervised contact** where a parent had abused a child or been violent towards the other parent. [63] Some academics argued that its effectiveness was undermined by how it was being implemented in practice. [68] [63]

The legislation which removed the presumption was brought in because of concerns that use of the court system was pitting parents against each other and that parenting disputes were better resolved out of court. [63] [69]

The United States of America

The USA is another example of shifting policy responses over time.

Terminology

First, some terminology: **legal custody** refers to decision-making responsibility in respect of a child; **physical custody** relates to where a child lives.

Joint legal custody

In the 1980s, most states had some form of law encouraging joint legal custody of a child after separation or divorce. In some states there was an option or preference for joint legal custody, in others there was a **presumption** in favour of it. [70] Critics argued that joint legal custody was not appropriate for all circumstances and certainly not for families experiencing violence or abuse. [71]

Presumptions relating to abuse or violence

By the late 1990s and early 2000s, US states had begun to introduce presumptions for the situation where there was domestic violence in a family.

Specifically, that, **where domestic violence was proved**, there was a presumption that giving (legal or physical) custody to an abuser, or having contact with an abuser, was not in the child's best interests. [64] By 2016, 24 of the 52 states had such a presumption. However, as occurred in New Zealand, academics identified various issues undermining how effectively these presumptions are operating in practice. [63]

Tailored presumptions and parenting time

Today the balance struck by lawmakers between promoting shared parenting compared to safety concerns still varies across US states.

In some states, there are **presumptions tailored to different circumstances**. For example, there is a general presumption in favour of joint custody. However, this sits alongside a presumption against custody or contact relating to the specific situation where domestic violence is proved. [63]

In 2018, Kentucky introduced a **presumption in favour of equal shared parenting**, with an exception relating to domestic violence. Unlike the other presumptions so far discussed, this one relates to **how much time the child spends in each parent's home**. Some other states have been considering similar legislation in the last couple of years. [72] [73]

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