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SPICe Briefing

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Children (Scotland) Bill: consideration prior to Stage 3

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This briefing looks at the Children (Scotland) Bill prior to Stage 3. This Bill would make significant changes to the law which applies when resolving disputes between parents about their children.



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About this briefing

This briefing looks at the parliamentary consideration of the [Children \(Scotland\) Bill](#) ('the Bill') in advance of Stage 3.

Sometimes parents end up in dispute with each other (or another family member) over the care of their children, for example when the parents are separating or divorcing. The Bill, if passed, would introduce important changes to how such disputes are resolved.

This briefing provides a background to the current law; the main provisions of the Bill; and what happened at Stage 1, both at committee stage and during the [Stage 1 debate](#). It also summarises the Stage 2 amendments, focusing on the key themes which have emerged during Stages 1 and 2.

For a more in-depth look at the Bill, SPICe produced two earlier briefings in November 2019 to support Stage 1. These are: [The Children \(Scotland\) Bill](#), which provides an overview of the Bill, including the background to the reforms, ¹ and [Resolving Parenting Disputes: Scotland compared to other countries](#), ² providing additional comparative information.

The main issues attracting attention at Stage 1 and 2 of the Bill were:

- how to ensure children's effective participation in decisions affecting them, including how to build the infrastructure to support this in practice;
- the regulation and future resourcing of child contact centres. These are neutral venues, run by third sector organisations, where parents and children meet;
- whether the new duty in section 10 of the Bill on local authorities is going to be sufficiently resourced to be effective in practice. Section 10 requires local authorities to promote contact between [looked after children](#) (i.e. those in the care of the local authority) and their siblings. It is one of the main provisions of the Bill which does not relate to private disputes between parents.

The main issues going into Stage 3 are:

- whether various unsuccessful non-government amendments at Stage 2 on child contact centres will be revisited at Stage 3;
- how statutory provision(s) aimed at protecting the confidentiality of information about children should be drafted. At Stage 2, the Government amendment had one form of words and the non-government amendment contained another form. Both sets of amendments were successful, but a single position is likely to be agreed for Stage 3;
- whether any changes to the Bill will be made in relation to grandparents; [shared parenting](#) and the current statutory terminology associated with parenting disputes, which some stakeholders argue is outdated;
- whether changes made to the Bill by Stage 2 non-government amendments on [alternative dispute resolution](#) (ADR) are retained at Stage 3. These amendments related to recommendations of the [Justice Committee](#) in its [Stage 1 Report](#) on the Bill ³ and its 2018 [report](#) on ADR. ⁴

About the Bill

The Bill's introduction and key documents

The [Children \(Scotland\) Bill](#) ('the Bill') is a Scottish Government Bill. It was introduced in the Scottish Parliament on 2nd September 2019, along with a [Policy Memorandum](#),⁵ [Explanatory Notes](#)⁶ and a [Financial Memorandum](#).⁷

The Government also published a [Family Justice Modernisation Strategy](#)⁸ at the same time as the Bill, explaining other (ongoing and future) policy work in this area.

The Bill and the Strategy followed a substantial [Scottish Government consultation](#) in 2018.⁹ [Responses](#) to the consultation, an [analysis of responses](#)¹⁰ and a [summary of responses](#)¹¹ were published in May 2019.

The [Justice Committee](#) was designated as lead committee for Stage 1 and Stage 2 scrutiny of the Bill. [Details of this work can be found on its webpages](#).

Background to the Bill

The Children (Scotland) Act 1995

This part of the briefing gives an overview of Part 1 of the [Children \(Scotland\) Act 1995](#) ('the 1995 Act'). The 1995 Act (Part 1) is the main piece of legislation amended by the Bill.

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, such as where they live, where they go to school and who they have contact with on a day-to-day basis.

Section 11 of the 1995 Act gives the court various powers to decide an issue in a parenting dispute. Section 11 says the court should follow certain key principles. The **welfare of the child** is the paramount consideration, that is to say, the most important and overriding one. The child must be given an opportunity to express his or her views - and the court must consider (although not necessarily follow) any views expressed.

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**. This sets out the arrangements for a child to have contact with a person he or she does not live with, for example, a parent or grandparent. The court can also grant or take away some (or all) of the PRRs and make court orders to settle disputes on other parenting issues.

The 1995 Act was last reformed in 2006, by the [Family Law \(Scotland\) Act 2006](#). The 2006 Act strengthened the position of unmarried fathers. Most, **but not all**, unmarried fathers now have PRRs in respect of their children. The 2006 Act also reformed section 11 of the

1995 Act. The policy aim was to encourage the courts to consider abuse (or a risk of abuse) when making court orders.

Part 1 in practice

It is thought that only a very small minority of parenting disputes go as far as court. This means that Part 1 of the 1995 Act is much more likely to be used by, for example, solicitors and mediators advising clients, than it is by the courts.

When cases do get as far as court, they are usually considered by the **local sheriff court**, which hears a wide range of civil and criminal cases. Individual [sheriffs](#) and [summary sheriffs](#) do not specialise in family cases, except, to some extent, in large urban centres, mainly Edinburgh and Glasgow.

Even among the cases that end up in court, few get as far as a **proof**, i.e. a full hearing where witnesses give evidence and are cross-examined. Instead, most are resolved at a **child welfare hearing** or a number of such hearings.¹² These are relatively informal proceedings with the litigants present, held in private.

An important role in court cases under Part 1 is played by **child welfare reporters**. These are court-appointed officials, usually solicitors from private legal practice. They are separate from the solicitors representing the litigants. They report to the court on what the views of the child might be or what is in the welfare of the child. [The lack of statutory regulation of reporters has been controversial in policy terms.](#)

What the Bill does

The main provisions of the Bill are as follows:

- **Children's participation:** sections 1 to 3 and 15 propose changes to the 1995 Act and other legislation to help children participate in decisions about them. One aim is to encourage the court to hear the views of younger children (under 12s) before reaching its decision. Another is to explain (most) court decisions to (most) children.
- **Statutory factors:** sections 1 and 12 would restate, and add to, the statutory factors the court must take into account when deciding an individual case. Courts have always had their own list of factors, which have evolved over time, as cases are decided. In 2006, some statutory factors were added to the 1995 Act, related to abuse or a risk of abuse. The Bill would add further factors to the statutory list, so the courts must look at the impact of any court orders on the child's relationships with i) his or her parents; and ii) other important people in his or her life.
- **Vulnerable people:** sections 4 to 7 aim to improve the experience of vulnerable people in the courtroom in family cases, such as those affected by domestic abuse. Where a litigant does not have a solicitor to represent him or her in court, a prohibition on his or her personal conduct of the case (as an alternative to a solicitor doing it) may apply. The provisions would extend protections for vulnerable people to hearings where formal evidence is not taken, including child welfare hearings. Here a range of protective measures are proposed, such as a person being able to speak from behind a screen or having a supportive person sitting beside them.

- **Greater regulation:** sections 8, 9 and 13 propose statutory regulation of several aspects of the 'machinery' associated with the 1995 Act, including child welfare reporters and child contact centres.
- **Siblings:** as mentioned earlier, section 10 says that, for [looked after children](#) a local authority must, with some qualifications, promote "personal relations and direct contact" with siblings.
- **Failure to obey a court order:** where someone fails to obey a court order under section 11 of the 1995 Act, section 16 would impose a duty on the court to investigate why this has happened. This duty could be carried out by a child welfare reporter.
- **Delay:** section 21 says that, in various types of family cases, including those under the 1995 Act, the court must consider the risk to the child's welfare that delay would pose.

Consideration at Stage 1

An overview of Stage 1

The Justice Committee issued a [call for views](#) in respect of the Bill on 20 September 2019, with a closing date of 15 November 2019. The Committee received 75 responses to its call for evidence and 12 supplementary responses during its Stage 1 scrutiny of the Bill. All written submissions can be found [here](#).

To support the Committee's work on the Bill, the Committee also commissioned external research from [Dr Lesley-Anne Barnes Macfarlane](#) of Edinburgh Napier University. This looked at whether the existing law and the Bill are compatible with the rights of parents and children, as set out in the [European Convention on Human Rights](#) (ECHR) and the [UN Convention on the Rights of the Child](#) (UNCRC). The [research report](#)¹³ and [summary](#)¹⁴ were published on 15 November 2019.

The Committee took formal evidence on the Bill at eight meetings:

- [on 26 November 2019](#), from the Scottish Government Bill team (the officials responsible for assisting the Minister for Community Safety in developing the policy and drafting of the Bill);
- [on 17 December 2019](#), from [Dr Fiona Morrison](#), University of Stirling, [Professor Kay Tisdall](#), University of Edinburgh, and representatives of the [Children and Young People's Commissioner Scotland](#) and [Scottish Women's Aid](#); and then from Professor [Elaine Sutherland](#), University of Stirling, and [Dr Richard Whitecross](#), Edinburgh Napier University;
- [on 7 January 2020](#), from representatives of the [Children and Young People's Commissioner Scotland](#), [Children 1st](#), [NSPCC Scotland](#), [ASSIST](#) and [Scottish Women's Aid](#);
- [on 14 January 2020](#), from Dr Sue Whitcombe, Chartered Psychologist, and representatives of [Grandparents Apart UK](#), [Shared Parenting Scotland](#) and [Relationships Scotland](#);
- [on 21 January 2020](#), from representatives of [CELCIS](#), [Social Work Scotland](#), [Who Cares? Scotland](#), [Children's Hearings Scotland](#) and the [Scottish Children's Reporter Administration](#);
- [on 28 January 2020](#), from Susan Edington, [Edingtons WS](#), [Nadine Martin](#), [Harper Macleod LLP](#), and representatives of [Clan Childlaw](#), the [Faculty of Advocates](#) and the [Family Law Association](#);
- [on 20 February 2020](#), from [The Hon. Lady Wise](#) and Sheriff Tait; and
- [on 25 February 2020](#), from the [Minister for Community Safety](#), [Ash Denham MSP](#), and Scottish Government officials.

On Tuesday 4 February 2020, members of the Committee met informally and in private with five young people from YELLO!, the young expert group for the [Improving Justice in Child Contact](#) (IJCC) project. A note of that meeting can be found [here](#).

The Justice Committee published its [Stage 1 Report](#) on 1 May 2020, recommending to Parliament that the general principles of the Bill be approved.³ The Scottish Government published its [response](#) to this report on 21 May 2020.¹⁵

One of the Justice Committee's recommendations related to the training of judges, [the responsibility of the Judicial Institute for Scotland](#). Another recommendation related to the possible need for more specialist judges in family cases. On 26 May 2020, the Lord President, Scotland's senior judge, as head of the judiciary, [responded](#) to the Committee's Stage 1 report on the issues of judicial training and judicial specialisation.¹⁶

The [Finance and Constitution Committee](#) issued a call for views on the [Financial Memorandum](#) to the Bill and received ten responses. The Finance and Constitution Committee [wrote](#) to the Justice Committee on 21 November 2019 summarising the issues raised in the submissions.¹⁷

The [Delegated Powers and Law Reform Committee](#) considered the [Delegated Powers Memorandum](#) for the Bill. It [reported](#) on 19 November 2019 that it was content with the delegated powers provisions in the Bill.¹⁸

The [Stage 1 debate](#) took place on 27 May 2020 and the general principles of the Bill were agreed to.

In its [Stage 1 Report](#), the Justice Committee asked the Scottish Government to respond on various issues in advance of Stage 2. It did so in a [letter](#) to the Committee on 15 June 2020.¹⁹

The Stage 1 report

This section of the briefing summarises the key recommendations made by the Justice Committee in the [Stage 1 Report](#).

Resolving disputes out of court (no provision in the Bill)

The [Stage 1 report](#) considered [alternative dispute resolution](#) (ADR) in family cases, a topic the Scottish Government also [consulted on](#), but did not include in the Bill. ADR is a collection of methods, such as mediation or arbitration, designed to enable people to resolve disputes outside the court system.

At present, legal aid is only available for mediation. In the [Stage 1 Report](#) (at para 72) the Committee repeated an earlier recommendation from its [report](#) on ADR in 2018. It said that the Scottish Government and the [Scottish Legal Aid Board](#) should consider making legal aid available for other forms of ADR too.

Mirroring another [recommendation from 2018](#), the Committee also said that **mandatory information meetings** relating to the availability of ADR should be piloted, with an exception for domestic abuse cases ([Stage 1 Report](#), para 73). This approach has been implemented in England and Wales. It involves litigants receiving information about ADR prior to commencing court proceedings, with the aim of diverting suitable cases out of the court system.

Children's participation in decisions affecting them (sections 1-3)

Sections 1-3 of the Bill propose changes to the 1995 Act (and other legislation) to help children participate in decisions about them. In the [Stage 1 Report](#) (at para 177) the Committee asked the Scottish Government to bring forward amendments at Stage 2 to address concerns raised by various stakeholders. Stakeholders said that the drafting of the Bill as introduced did not go far enough in ensuring that the views of all children, particularly younger children, are heard.

The Committee also referred to "powerful evidence" ([Stage 1 Report](#), p 1 and para 180) that the infrastructure for taking children's views needs to be strengthened for the Bill to make a difference in practice, particularly in relation to younger children. It asked the Scottish Government to bring forwards detailed proposals on this topic. In particular, the Committee asked the Scottish Government to commit to children's advocacy services, sometimes called **child support workers**, for all cases under section 11 of the 1995 Act ([Stage 1 Report](#), para 183).

Child welfare reporters (section 8)

Section 8 of the Bill would regulate child welfare reporters, with much of the detail of the regime left to secondary legislation.

The regulatory regime for child welfare reporters is not due to come into force until 2023.

The Committee heard mixed evidence on the benefits of keeping a list of child welfare reporters at a national level, as proposed by the Scottish Government, as opposed to at a local level (as under the current system). The Committee recommended a hybrid approach, with lists maintained at a local level but the required regulatory standards for training and qualifications set at a national level ([Stage 1 Report](#), para 334).

The Committee also made a range of other recommendations relating to child welfare reporters, including on training and fees. It also asked the Scottish Government to explain, in advance of Stage 2, how it will encourage non-lawyers, such as social workers and psychologists, into the profession ([Stage 1 Report](#), paras 336-337 and 340-341).

The Committee recommended that the Bill should be amended so that the relevant secondary legislation, setting out the details of the scheme, would be made under the [affirmative procedure](#), not the [negative procedure](#) ([Stage 1 Report](#), paras 345). This was intended to provide greater opportunity for future parliamentary scrutiny.

Child contact centres (section 9)

Section 9 of the Bill proposes the regulation of child contact centres, although, again, much of the detail would be left to secondary legislation.

The regulatory regime for contact centres is not due to come into force until 2023.

The Justice Committee supported regulation of contact centres in principle but expressed concerns about the impact of regulation on the ability of contact centres to continue to operate.

It asked the Scottish Government to provide details on how it will ensure sufficient funding will be available for contact centres to meet both their current level of service provision and the new regulatory requirements ([Stage 1 Report](#), paras 468-469).

The Committee also made a range of other recommendations on specific points, several of which were reflected in [non-government amendments at Stage 2](#).

Siblings (section 10)

In the Bill as introduced, section 10 said that, for [looked after children](#), a local authority must promote "personal relations and direct contact" with siblings "where practicable and appropriate." The Committee recommended amending section 10 to remove the qualification **where practicable**, as it had heard evidence that this qualification might allow decisions to be led by a lack of resources ([Stage 1 Report](#), para 572).

The Committee also asked the Scottish Government, before Stage 2, to provide further details on how the changes which will result from the [Independent Care Review](#) will enable local authorities to fulfil the duty relating to sibling contact, including a reference to proposed timescales and specific budgets ([Stage 1 Report](#), para 569).

Failure to obey a court order (section 16)

The Committee heard mixed evidence on the usefulness of section 16, which would impose a duty on the court to investigate the reasons why a court order has not been followed. In advance of Stage 2, it asked the Scottish Government to explain why section 16 is necessary ([Stage 1 Report](#), para 507).

The Committee also heard concerns from the judiciary and others that it would encourage people to disobey court orders in order to reopen issues already decided by the court. It asked the Scottish Government to respond to those concerns ([Stage 1 Report](#), para 507).

The Committee recommended that, if section 16 was retained, it should be amended to make it clear that the views of the child should be sought in any investigation ([Stage 1 Report](#), para 508.)

Finally, the Committee asked the Scottish Government, in advance of Stage 2, to provide details on the steps it will take to encourage appropriate people (i.e. from families not affected by abuse) to use ADR to resolve issues around breaches of court orders ([Stage 1 Report](#), para 511).

Other key recommendations

Other key recommendations made by the Committee included:

- asking the Lord President (as head of the judiciary) to consider whether there could be greater use of specialist judges in family cases ([Stage 1 Report](#), para 507).
- asking the Government to undertake a review, to ensure that the approach to children and other vulnerable individuals in court is the same across all criminal and civil proceedings, including children's hearings ([Stage 1 Report](#), para 77).
- recommending the amendment of section 12 of the Bill. This was to provide for a fuller list of statutory factors for the courts to consider when deciding disputes, in line with the [UNCRC](#), and to make it clearer the list of statutory factors in section 12 was not intended to be exhaustive ([Stage 1 Report](#), paras 261 and 263).
- asking the Scottish Government to respond to concerns expressed about section 21 of the Bill, relating to delays in family cases. These concerns were that, on the one hand, the proposed duty may encourage undue haste and, on the other hand, not address the root causes of the delays ([Stage 1 Report](#), para 534).
- on the topic of children's contact with their grandparents, asking the Scottish Government to respond, before Stage 2, on the steps the Government intended to take to promote the (non-statutory) [Charter for Grandchildren](#) ([Stage 1 Report](#), para 268).
- asking the Scottish Government to respond, before Stage 2, in relation to concerns expressed about the current terminology associated with parenting disputes. The Committee had received evidence that the terms 'residence' and 'contact' may suggest one parent has a closer (legal and emotional) relationship with the child than the other ([Stage 1 Report](#), para 610).

Response to the Stage 1 report

The Scottish Government [responded](#) to the Stage 1 Report on 1 May 2020.¹⁵ Key points in the Scottish Government's response to the Stage 1 Report are as follows:

- The Government was not convinced about mandatory information meetings relating to ADR. It would consider the possibility of funding other forms of ADR through legal aid as part of its [wider legal aid reforms](#), which it acknowledged had been delayed by the impact of Coronavirus (COVID-19) on government work.
- The Government accepted several of the Committee's key recommendations relating to the drafting of sections 1-3 of the Bill, which were designed to strengthen children's participation in decisions affecting them. (For more detail, see [Consideration at Stage 2](#)).
- While the Government said it was still considering the issue of child support workers, it also said it had "concerns about whether it would be in the child's best interests to bring another adult into the mix" (para 36).

- The Government accepted there should be a review designed to ensure that the approach to children and vulnerable individuals is the same across all criminal and civil proceedings. It said this would be a longer-term piece of work, taking account of the impact of Coronavirus (COVID-19) on the justice system.
- The Government said it remained of the view that a list for child welfare reporters should be held at a national level, [rather than the hybrid approach the Committee had suggested](#).
- While the Government agreed to a full public consultation on aspects of the proposed regulatory regime for child welfare reporters, it rejected the Committee's recommendation that the relevant regulations should be subject to the [affirmative procedure](#) in Parliament.
- The Government committed to providing further information on various issues in advance of Stage 2, including the funding of contact centres (section 9); the sibling contact duty (section 10) and the steps to be taken to promote the [Charter for Grandchildren](#). (See the Government's later [letter](#) of 15 June for its update on these issues).
- The Government agreed to reflect on the qualification "where practicable" in relation to the sibling contact duty in section 10.
- The Government did not agree that the statutory factors the court would take into account in section 12 should be extended to include those associated with the [UNCRC](#), nor did it agree section 12 needed to be clearer on the fact that the list of factors was intended to be non-exhaustive.
- The Government remained of the view that section 16 was necessary but accepted that section 16 should be amended to make it clear that the views of the child should be sought in any investigation.
- The Government also retained its position that it did not think the terminology associated with the 1995 Act, in particular the terms 'residence' and 'contact,' needed to be changed.

On the topic of the possible need for greater judicial specialisation in family cases, the Lord President, in his [response](#) to the Committee on 26 May 2020, referred to his earlier [letter](#) of 9 July 2018 to the [Public Petitions Committee](#) on the topic, [highlighting concerns previously raised about specialist judges which he still considered valid](#).

The Stage 1 debate

As noted earlier, the [Stage 1 debate](#) took place on 27 May 2020. Members from all sides of the Chamber supported the Bill and a range of topics were explored in the debate.

The impact of the Coronavirus (COVID-19) pandemic

Both the Minister for Community Safety, Ash Denham MSP ('the Minister') and the Convener of the Justice Committee, Margaret Mitchell MSP ('the Convener') acknowledged the impact of the Coronavirus (COVID-19) pandemic on many topics

covered by the Bill, including the functioning of the family courts; parents' ability to access to contact centres; and its affect on arrangements between separated parents, as well as between parents and other family members (such as grandparents).

Grandparents (section 12)

More generally, a number of members spoke about the position of grandparents in relation to their grandchildren and the difficulties grandparents could face.

The Minister rejected a call for an automatic right of contact for grandchildren with their grandparents. She highlighted the Government's intended steps to promote the [Charter for Grandchildren](#). She also pointed to "the child's important relationships with other people" as a proposed factor to guide the court's decision-making (found in section 12 of the Bill).

Several members highlighted the long-term nature of this policy issue, with one member (Pauline McNeill MSP) noting that the [Charter for Grandchildren](#) had been around since 2006.

Children's participation in decisions affecting them (sections 1-3)

Members welcomed the Government's commitment to amend sections 1-3 of the Bill to strengthen children's participation in decisions affecting them. A number of members argued it was important to strengthen the infrastructure associated with children's participation and that an important role could be played by child support workers.

Disclosure of information (not in the Bill as introduced)

A number of members highlighted an issue on which the Justice Committee had also heard evidence , but had not made any specific recommendations. This related to the treatment of information children had given in confidence, e.g. to a support organisation or to a child welfare reporter. The key issue is the extent to which this information should be disclosed to other people, such as a parent in a court action. Furthermore, MSPS debated whether guidance or statute should set out the considerations here for the court.

The Minister said she was considering an amendment at Stage 2 making it clear that the welfare of the child was a primary consideration in this context. Several members spoke in favour of further work on this issue at Stage 2.

Child contact centres (section 9)

One of the focal points for the debate was child contact centres. The need for adequate resourcing was a key issue covered in this context.

Section 9 says all referrals by the court should be to a regulated contact centre. [Mirroring a recommendation of the Justice Committee in its Stage 1 Report](#) (at para 471) the

Convener argued that all referrals should be to a regulated contact centre, including self-referrals and those by solicitors. The Minister said that, while she was sympathetic on this point, she was not clear what sanction could be imposed on solicitors or individuals when the referral was to a non-regulated centre.

The Convener also urged a response by the Scottish Government to the [Care Inspectorate's](#) important feasibility study [report](#) relating to the regulation of contact centres. The Minister said this had been held up by the impact of the Coronavirus (COVID-19) pandemic on the Government's work.

John Finnie MSP said it was important that referrals to contact centres were supported by a multi-agency risk assessment. This was a point on which the Justice Committee had earlier made an associated recommendation ([Stage 1 Report](#), para 473). Bob Doris MSP argued disabled facilities were important at contact centres.

Siblings (section 10)

A number of Justice Committee members referred to the power of the evidence they had received from a care-experienced man in relation to the duty relating to sibling contact in section 10. Several members urged the removal of the qualification "where practicable" from the duty on local government and discussed the importance of resources to implement the duty in practice.

Failure to obey a court order (section 16)

Members debated the merits of section 16, which, as discussed earlier, imposes a duty on the court to investigate when a court order is disobeyed. Several members approved of the Scottish Government's commitment to ensure the views of the child are sought as part of any investigation.

Other issues

Continuing themes that the Justice Committee had explored, several members urged the Minister to do more to ensure the promotion of ADR in the context of disputes in family cases.

Several members also questioned the current terminology of the 1995 Act, with its reliance on the terms 'residence' and 'contact.'

James Kelly MSP questioned whether the requirement on the courts to "have regard to" the impact of a delay in a court case on the welfare of the child went far enough and suggested that this may be an issue for an amendment at Stage 2 of the Bill.

Consideration at Stage 2

The Justice Committee considered the Bill at Stage 2 on 23 June 2020. A [version of the Bill as amended at Stage 2](#) was subsequently published on the Parliament's website.

This section of the briefing discusses the main issues associated with the Bill, and how they have progressed through Stage 2 consideration. It does not attempt to deal with all the Stage 2 amendments lodged.

Judicial specialisation (no provision in the Bill)

In its [Stage 1 Report](#) (at para 507) the Justice Committee asked the Lord President (as head of the judiciary) to consider whether there could be greater judicial specialisation in family cases.

In his [response to the Stage 1 Report](#), the Lord President said this could cause delay in family cases, under one possible approach to specialisation, and could cause difficulties with accessing courts in rural and island areas, under another possible approach.

Amendment	Result
<p>Amendment 59, in the name of Jeremy Balfour MSP, would empower the Lord President to decide that cases under section 11 of the 1995 Act are suited to being heard by specialist judges.</p> <p>It would also empower sheriff principals in individual sheriffdoms to designate sheriffs and summary sheriffs as specialists in section 11 cases.</p>	<p>Amendment 59 was disagreed to (by division).</p> <p>The Minister recognised there was a legitimate debate to be had on judicial specialisation but did not support the amendment for reasons including that there were existing powers on this topic in sections 34-37 of the Courts Reform (Scotland) Act 2014.</p>

Resolving disputes out of court (no provision in the Bill)

In the [Stage 1 Report](#) (at paras 72-73), the Justice Committee had made [recommendations relating to the use of ADR in family cases](#) (as had similarly been the case in an earlier [report on ADR from 2018](#)).

Amendments	Result
<p>Amendment 57, in the name of Margaret Mitchell MSP, would require Scottish Ministers, by regulations, to make legal aid available for various forms of ADR.</p> <p>A draft of the regulations must be laid before Parliament not later than six months after Royal Assent.</p>	<p>This amendment was agreed to (by division).</p>
<p>Amendment 58, in the name of Margaret Mitchell MSP, would require Scottish Ministers, by regulations, to make provision for a pilot scheme requiring parties in a dispute to attend a mandatory information meeting on the options available to resolve a dispute. The requirement does not apply where the dispute involves domestic abuse.</p>	<p>This amendment was agreed to (by division).</p>

Renaming residence and contact orders (no provision in the Bill)

The types of court order which the court can make include a **residence order**, setting out where the child is to live. It can also make a **contact order**, setting out the arrangements for a child to have contact with a person he or she does not live with. The appropriateness of the current terminology was an issue which arose during Stage 1 consideration of the Bill.

Amendment	Result
Amendment 75 , in the name of Fulton MacGregor MSP, aimed to rename residence and contact orders.	The amendment was, by agreement, withdrawn. Mr MacGregor and the Minister committed to discussing the issue further in advance of Stage 3.

Children's participation in decisions affecting them (sections 1-3)

Review of the legislation after three years

In its [Stage 1 Report](#) (at para 181) the Justice Committee recommended that the Scottish Government should amend the Bill at Stage 2 to provide for a **review after three years** from the commencement of sections 1-3 of the Bill. This was to look at the impact of the Bill on children's participation in decision-making.

In its [response to the Stage 1 report](#) (at para 34) the Scottish Government said that it was happy to commit to a review but didn't think that the commitment needed to be enshrined in legislation.

Purpose of the amendment	Result
Amendment 86 , in the name of Liam McArthur MSP, would require Scottish Ministers to conduct a review of the effect of the Act on children's participation no later than three years after the date of Royal Assent.	The amendment was, by agreement, withdrawn. The Minister said that some parts of the Bill would not be implemented until 2023 so she did not think the Amendment 86 contained the right timetable. She could potentially support a different timetable and Mr McArthur said he would return to the issue at Stage 3.

A positive presumption in favour of being able to express a view

As discussed earlier, 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 (if he or she wants to) and "have regard to" any views expressed.

The court can take account of the child's age and maturity, and a child who is aged 12 or over is presumed to be mature enough to form a view. This creates an expectation that most children in this age bracket are able to express a view, although it was never intended to prevent younger children from doing so.

Similar requirements regarding the child's views can be found in the 1995 Act for when parents are reaching major decisions outside a court setting (section 6). Requirements also appear in the [Adoption and Children \(Scotland\) Act 2007](#) ('the 2007 Act') and the [Children's Hearings \(Scotland\) Act 2011](#) ('the 2011 Act').

Sections 1 to 3 of the Bill would remove the presumption that a child aged 12 or over is considered mature enough to give their views. This presumption would be removed from relevant provisions of the 1995 Act, as well as from the 2007 Act and the 2011 Act.

While there was broad support for the removal of the 12+ presumption at Stage 1, some evidence to the Committee raised concerns about the exception in the Bill which provides that a child's views do not have to be sought if "the child is not capable of forming a view" ('the capacity exception.')

Partly in response to these concerns, some stakeholders argued that the Bill should be strengthened to make it clear that all children should be given an opportunity to express their views. In particular, that the Bill should be amended to include an explicit **presumption** that all children, regardless of age, are presumed to be capable of forming a view.

The Justice Committee recommended that the Scottish Government should bring forward amendments at Stage 2, which address concerns ([Stage 1 Report](#), para 177) and, in its [response to the Stage 1 Report](#) (at para 29) the Government agreed to do this.

Amendments	Result
Scottish Government amendments 1, 3, 5, 7, 9 and 10 would create a presumption that a child is capable of expressing his or her view in the relevant sections of the 1995 Act, the 2007 Act and the 2011 Act.	Amendments 1, 3, 5, 7, 9 and 10 were agreed to (without division).

12+ presumption for instructing a solicitor

The Bill as introduced retained an existing presumption (in the 1995 Act) that a child of 12 years and over is sufficiently mature enough to instruct his or her own solicitor.

The Justice Committee recommended the Scottish Government amend the Bill at Stage 2 to remove this presumption ([Stage 1 Report](#), para 190). A 12+ presumption relating to capacity to instruct a solicitor also already exists the [Age of Legal Capacity \(Scotland\) Act 1991](#) and, in the Committee's view, did not need to be replicated in other legislation. In its [response to the Stage 1 Report](#), the Government accepted this recommendation.

Note the wider debate about the continued use of such a presumption (in the 1991 Act) is not something on which the Justice Committee commented.

Amendment 4	Result
Scottish Government amendment 4 would remove from section 11 Of the 1995 Act the presumption that a child aged 12 or over is mature enough to make a decision as to whether to instruct a solicitor.	The amendment was agreed to (without division).

How children's views are heard

The 1995 Act does not set out **how** a child is to express his or her views and, in practice, a variety of methods are used by courts. For court actions under section 11 of the 1995 Act, research suggests a minority of children express their views directly to sheriffs or instruct a solicitor themselves. Most children speak to a child welfare reporter (who writes a report for the court) or complete a form (the [Form F9](#)).¹²

The Bill would require decision-makers to give the child the opportunity to express his or her views "in a manner suitable to the child" (section 1, with similar wording in sections 2 and 3). In the [Stage 1 Report](#) (at para 188) the Justice Committee recommended amending the Bill at Stage 2 to make it clear in legislation that decision-makers should **ask children** how they wish to express their views.

In its [response to the Stage 1 Report](#) (at para 43) the Scottish Government did not accept this recommendation. However, the Government said it would reiterate in the guidance for litigants and children on attending court that it expects decision-makers should ask children how they wish to express their views.

Amendments	Result and commentary
<p>Amendments 47 to 51, in the name of James Kelly MSP, would amend sections 1-3 to require the decision-maker to make "reasonable arrangements" for the child to express his or her views in a manner the child has indicated he or she prefers. This would affect the relevant provisions about the child's views contained in the 1995 Act, the 2007 Act and the 2011 Act.</p>	<p>Amendment 47 was disagreed to (by division). This amendment relates to proceedings under section 11 of the 1995 Act.</p> <p>Amendments 48, 49, 50 and 51 were agreed to (by division). These amendments related to the 2007 Act (adoption) and the 2011 Act (children's hearings), as well as to section 16 of the 1995 Act (local authority exercise of emergency powers).</p> <p>During Stage 2, the Minister had expressed concern that the amendments inadvertently weakened, not strengthened, the requirements on decision-makers. She sought to work with Mr Kelly in advance of Stage 3 on amendments that did not have that effect.</p>

Child advocacy services

In its [Stage 1 Report](#) (at para 183) the [Justice Committee](#) asked the Scottish Government to commit to children's advocacy services (sometimes called **child support workers**) for all cases under section 11 of the 1995 Act. In its [response to the Stage 1 Report](#), the Government said it was still reflecting on this issue but had concerns about a possible move in this direction.

Amendment	Result
<p>Amendment 84, in the name of Liam McArthur MSP, would require Scottish Ministers to make such provision as they consider "necessary and sufficient" to ensure that all children associated with proceedings under the section 11 of the 1995 Act have access to child advocacy services.</p>	<p>Amendment 84 was agreed to (by division).</p>

Disclosure of information (not in the Bill as introduced)

The circumstances in which information about children given in confidence should be disclosed was an issue which arose at Stage 1 of the Bill. The Scottish Government's position, in oral evidence to the Justice Committee at Stage 1 ([27 February 2020](#), col 28) was that the matter should be covered by guidance not legislation. By the Stage 1 debate, the Minister was considering legislative provision on the topic.

Amendment	Result
<p>Amendment 64, in the name of Liam McArthur MSP, would amend the 1995 Act to set out the circumstances in which any information relating to a child can be disclosed. The court must:</p> <p>a) take account of the welfare of the child (as its paramount consideration);</p> <p>b) disclose only where the benefit outweighs any likely adverse affect (and, furthermore, the disclosure is in the child's best interests); and</p> <p>c) have regard to any views expressed by the child (having given the child the opportunity to express those views in a manner suitable for the child).</p> <p>The requirements would apply under proceedings for an order under section 11 of the 1995 Act.</p>	Amendment 64 was agreed to (by division).
<p>Scottish Government amendment 33 would amend the 1995 Act to require the court, when deciding whether a person should have access to anything, in which information relating to a child is recorded, to regard the welfare of the child as a primary consideration.</p> <p>The requirement relates to the situation where the court is considering making an order under section 11 of the 1995 Act.</p>	Amendment 33 was agreed to (by division).

Note that both government and non-government amendments were agreed to covering the same policy topic. It is likely this issue will be resolved at Stage 3.

Child welfare reporters: qualifications (section 8)

Section 8 of the Bill would regulate child welfare reporters, with much of the detail of the regime left to secondary legislation. As discussed earlier, most child welfare reporters are currently lawyers, although the Scottish Government aims to encourage other professions, such as social workers and psychologists, to become child welfare reporters.

Amendment	Result
Amendment 65 , in the name of Liam McArthur MSP, would amend the Bill to say that only a registered social worker can be a child welfare reporter.	The amendment was moved and, no member having objected, withdrawn.
Amendment 66 , in the name of Neil Finlay MSP, would amend the Bill to say that child welfare reporters must know the child to which the report relates in a professional capacity.	The amendment was disagreed to (by division).

Child contact centres (section 9)

Section 9 of the Bill would regulate child contact centres, with the regime to be developed by secondary legislation.

Amendments	Result
Amendments 68 and 69 , in the name of Neil Findlay MSP, aim to ensure that a child to whom the court order relates is the responsibility of the contact centre for the duration of the child's time in the contact centre.	Amendment 68 was moved and, no member having objected, withdrawn. Amendment 69 was pre-empted (i.e. it could not be called because it was inconsistent with the decision already taken on another amendment). The Minister committed to working with Mr Findlay on the policy issue in advance of Stage 3.
Amendment 70 , in the name of Neil Findlay MSP, would require contact centre regulations to include provision for staff to be trained and to hold recognised professional qualifications in relation to issues that concern children.	Amendment 70 was disagreed to (by division). At present, contact centres make use of a mix of paid and volunteer staff.
Amendment 72 , in the name of Neil Findlay MSP, would add a function for the body appointed to oversee contact centre regulation to undertake risk assessments. Furthermore, it would require those risk assessments to be carried out by staff who are trained in undertaking such assessments.	Amendment 72 was agreed to (by division).
Depending on the circumstances, Scottish Government amendments 15 to 28 would allow an individual contact centre to be deregulated, rather than requiring a service provider to be deregulated. (This reflects the fact that that service provider may be successfully running other centres.)	Amendment 15 was agreed to (by division). Amendments 16 to 28 were agreed to (without division).
Amendments 52 and 53 , in the name of James Kelly MSP, would require all referrals to contact centres to be to a regulated centre.	Amendments 52 and 53 were pre-empted. The amendments mirror a recommendation in the Justice Committee's Stage 1 Report (at para 471).
Amendment 71 , in the name of Bob Doris MSP, would require contact centre regulations to make provision about access to, and facilities at, contact centres for disabled children.	Amendment 71 was not moved. This issue had also been raised by Mr Doris in the Stage 1 debate.
Amendment 74 , in the name of Neil Findlay MSP, would require regulated contact centres to be publicly provided and accountable to Scottish Ministers.	Amendment 74 was disagreed to (by division).
Scottish Government amendment 30 empowers Scottish Ministers may enter into a contract with a third party for the provision of contact centre services.	Amendment 30 was agreed to (without division).

Siblings and others (section 10 and a new section 10A)

In the Bill as introduced, section 10 said that, for [looked after children](#), a local authority must promote "personal relations and direct contact" with siblings "where practicable and appropriate."

Amendments	Result and commentary
Scottish Government amendment 54 would remove the qualification where "practicable" from section 10.	Amendment 54 was agreed to (without division.) Amendment 54 reflects the Justice Committee's recommendation in its Stage 1 Report (at para 572).
Scottish Government amendment 31 would insert a new provision in the Bill. This would require children's hearings to consider contact between a child and their siblings. It would also require the children's hearing to specifically consider contact with the child's "relevant persons" (most often the parents.)	Amendment 31 was agreed to (without division). On 18 June 2020, just before Stage 2 of the Bill, the UK Supreme Court decided the case of ABC (AP) (Appellant) v Principal Reporter and another (Respondents) (Scotland) . This case concerned a 14-year old who wanted to be involved in decisions made about his brother at children's hearings. The case involved an ECHR challenge to the Children's Hearings (Scotland) Act 2011 . The Supreme Court ruled that, following adaptations to children's hearings since the start of the Supreme Court proceedings, the requirements of Article 8 ECHR (protecting the right to family life) were met in relation to siblings and other family members. Nevertheless, Scottish Government amendment 31 was acknowledged by the Minister during Stage 2 proceedings to be (partly) inspired by the case.

Grandparents and shared parenting (section 12)

The Scottish Government [consulted on](#) a possible presumption in favour of contact between children and their grandparents but did not include it in the Bill. Instead, section 12 of the Bill is a key part of its policy response.

Section 12 would add to the statutory factors the court must take into account when reaching a decision under section 11 of the 1995 Act. Under section 12, the courts must look at the impact of any court orders on the child's relationships with i) his or her parents; and ii) "other important people in his or her life".

Grandparents are not mentioned explicitly in section 12. The equivalent lists of statutory factors in some other legal systems (e.g. Canada and Australia) do refer specifically to grandparents. See [Resolving Parenting Disputes: Scotland compared to other countries](#) at p 28.

On the concept of shared parenting, a residence order can currently be made in favour of one or both parents. The court has discretion as to how the residence is shared in respect of a residence order made in favour of both parents. The Scottish Government [consulted on](#), but did not include in the Bill, a presumption that a child benefits from both parents being involved in the child's life.

The Government also [consulted on](#) a second (alternative) presumption: that the courts should not presume a child benefits from both parents being involved in their life, aimed at affording families better protection against abuse or risk of abuse. This also was not included in the Bill.

Some countries use, or have previously used, presumptions with these policy aims, i.e. promotion of shared parenting and the protection from abuse, arguably with mixed success. The SPICe comparative briefing considers the examples of [England and Wales](#); [Australia](#); [Sweden and Denmark](#); [New Zealand](#) and [United States of America](#).

Amendments	Result
Amendments 45 and 46 , in the name of Jeremy Balfour MSP, would require the court, when making a court order under section 11 of the 1995 Act, to take into account the child's right to maintain a relationship with his or her grandparents.	The amendments were not moved.
Amendments 79 and 80 , in the name of Alex Cole-Hamilton MSP, would require the court, when making an order under section 11 of the 1995 Act, to have regard to the child's right to maintain contact with the child's "lineal ancestors." Amendments 81 and 82 , in the name of Alex Cole-Hamilton MSP, would insert the child's right to maintain personal relations with "lineal ancestors" into the list of statutory factors the court would have to consider under the proposed section 12 of the Bill.	The amendments were not moved.
Amendment 83 , in the name of Liam McArthur MSP, would state, in section 12, that the child can reside "on an approximately equal basis" with each of the child's parents.	This amendment was not moved.

Failure to obey a court order (section 16)

Section 16 would impose a duty on the court to investigate the reasons why a court order made under section 11 of the 1995 Act has not been followed. It envisages that this investigation will be carried out by the court itself or by a child welfare reporter. The [Financial Memorandum on the Bill](#) (para 44) suggests that, in practice, 90% of investigations will be carried out by child welfare reporters.

Amendment	Result and commentary
Scottish Government amendments 36 and 37 would ensure that, in any investigation under section 16, the views of the child are sought.	Amendments 36 and 37 were agreed to (without division).
Scottish Government amendment 39 would give Scottish Ministers the power by regulations to amend the list of persons who may be appointed by the court to carry out the investigation under 16. The regulations would be made under the affirmative procedure .	Amendment 39 was agreed to (without division). At Stage 2 the Minister said this was intended to introduce the flexibility to have other professionals carry out the investigation.

Delay in proceedings (section 21)

Section 21 of the Bill that, in various types of family cases, including those under the 1995 Act, the court must consider the risk to the child's welfare that delay would pose.

Amendment	Result and commentary
Amendment 85 , in the name of Fulton MacGregor MSP, would amend section 21 to require disputes about contact to be resolved as soon as practicable and, in any event, no later than 60 days after the commencement of court proceedings.	Amendment 85, by agreement, withdrawn. The Minister said the reference to a fixed timescale may have unintended consequences. Mr MacGregor said Amendment 85 was intended as a probing amendment. He also said that he may lodge a revised amendment at Stage 3.

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