



RESPONSE TO THE SCOTTISH GOVERNMENT'S CONSULTATION ON 'REVIEW OF PART 1 OF THE CHILDREN (SCOTLAND) ACT 1995 AND CREATION OF A FAMILY JUSTICE MODERNISATION STRATEGY'

September 2018

About CELGIS

CELGIS is Scotland's centre for excellence for children's care and protection, based at the University of Strathclyde. We work to ensure the best international evidence is reflected in policy and practice, strengthening the skills and capacities of people who care for children and young people. CELGIS is part of the Institute for Inspiring Children's Futures, working together to build brighter futures for children in need of care and protection around the world.

General comments

We welcome the opportunity to respond to the Scottish Government's consultation on the review of Part 1 of the Children (Scotland) Act 1995 (the 1995 Act) and the creation of a Family Justice Modernisation Strategy. We fully support the ambitions of the review to ensure the interests of children, and their need to form and maintain relationships with key adults, are at the heart of decision making. We warmly welcome the references to the [United Nations Convention on the Rights of the Child](#) (UNCRC, 1989) throughout the consultation document, and lend our full support to any review which truly places the rights of all children at its centre.

Whilst the context of the consultation reflects this welcome focus on the UNCRC, it is disappointing that there is limited alignment with significant related policy areas, most critically Scotland's national approach to improving outcomes and supporting children's wellbeing [Getting It Right For Every Child](#) (Girfec), which is not mentioned at all in the consultation document.

The review encompasses a range of complex and detailed areas of legislation, policy and practice. CELGIS' evidence-informed response particularly relates to the needs, views and experiences of children and young people with care experience; children and young people at risk and in need of protection; and the people who care for and work with these children and their families. Our response is focussed on improving the wellbeing and experiences of these children, and ensuring their needs are met and their rights are upheld.

Key messages

- Any proposed **legislation must be implemented** in order to achieve change. This requires full, national, multiagency awareness of legislative changes, mechanisms to support new practices, and evaluation of impact. Rather than relying simply on top-down enactment and communication of legal standards, successful implementation requires excellent leadership, and involves detailed consideration of context, and the use of the best strategies and tools in particular implementation contexts.¹
- **All children (regardless of their age or abilities) have views, and they all have the right to express them and to be heard.** Adults have responsibilities to ensure children are supported to express their views, and responsibilities to take children's views into account when decisions are made.
- **Change to legislation is necessary to ensure children and young people with care experience are supported to maintain relationships with their siblings,** and to ensure mechanisms for legal redress if their rights in this respect are not upheld.
- **Decision making about looked after children's contact with family members is complex, and children's views about contact are not always recorded.** There is a need for further action to ensure those making decisions have the knowledge, skills and expertise to do so robustly, in a manner which consistently promotes and safeguards children's welfare and wellbeing.
- **We strongly encourage the improvements in the treatment of children and vulnerable witnesses in criminal courts to be extended to the civil courts.**

We take an evidence-informed policy approach, utilising a wide range of robust information sources, including academic research, statutory and practice guidance, policy statements, project reports and statistical publications. We have engaged and collaborated with a range of organisations involved in developing and influencing policy and practice in the children's sector, and we have conducted four workshop events specifically focussed on issues the consultation raises for children in need of care and protection. These events were attended by approximately 50 practitioners, managers and stakeholders from local authorities, public sector bodies, family law practice, and third sector organisations. Through our own participation networks, and in collaboration with other organisations, we have sought the views of young people with care experience to develop and inform our response.

The consultation is extensive, pertaining to a number of complex areas of law, policy and practice. Questions range from very specific points of law, to broad open questions inviting more extensive comments. We have concerns that there is a risk in including such a range of issues for consideration in one consultation that important details may be lost. While ambition and determination to act in a range of areas is understandable, caution should be exercised when attempting to manage a number of complex change efforts concurrently. Efforts at

implementing systems change across the globe have shown that to achieve socially significant outcomes, it is necessary to use the best available evidence related to designing, installing and embedding new approaches. This must be informed by an understanding of the particular population's needs; the available evidence about what works; and the local context, as well as sufficient financial and human resources to implement the changes as intended.² Based on a review of the literature related to successful implementation efforts, it should be expected that full and effective implementation of a well-defined approach will take approximately 4 years. Plans and resources should be structured to reflect this.

Background

As of July 2017, there were 2,631 children "at risk of significant harm" and thus on the child protection register in Scotland. There were 14,897 looked after children, and 5,653 young people eligible for aftercare nationally.³ These are children and young people living (or previously living) with foster carers (35%), with friends or family in formal kinship care arrangements (28%), in residential accommodation (10%), in secure care (<0.5%), or at home with their birth parent(s), with compulsory social work supervision (25%). These individuals all have care experience. Children and young people with care experience, and those in need of protection, are not a homogenous group. Their own individual and familial experiences, and associated reasons for state intervention, can be diverse, as are their needs, views and individual experiences within the care and protection systems.

But while the lives, needs and views of these children and young people are rich and varied, they have all experienced some major difficulties in their lives. Many have experienced trauma, such as abuse or neglect, the impact of which can be felt across an individual's life course. Due to the level of need and vulnerability of care experienced children and young people, and the state's responsibilities to safeguard their rights and promote their wellbeing, [Part 9: Corporate Parenting](#) of the Children and Young People (Scotland) Act 2014 (the 2014 Act), requires Scottish Ministers, local authorities, and a range of other public sector bodies to uphold particular responsibilities across all areas of their work. Corporate parents must be alert to matters which adversely impact on looked after children and care leavers, promote their interests, and enable them to make use of supports and services they provide. Simply put, they have statutory duties to these children and young people, and must pay particular attention to their needs and views in all areas of state activity, which includes this review.

Relationships with key adults (a stated central theme of this review) are of critical importance to children and young people in need of care and protection. Evidence indicates that supportive, enduring relationships with those who care for and about children (such as carers, teachers, befrienders, social workers and other significant adults) are the "golden thread" in children's lives, and the quality of these relationships should be prioritised.⁴ However, care experienced children and young people report feeling relationships are not prioritised and

they are not supported to sustain relationships with significant adults in their lives.⁵ Attention to prioritising supportive relationships in each area of the consultation is of critical importance, and can have a profound impact on children's wellbeing.

Consultation questions

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

Yes. All children have views, regardless of their age, and it is the responsibility of the adults around them to ensure these views are listened to and taken into account. As well as older and more articulate children (with whom adults may find it more straightforward to communicate) this includes babies, very young children, non-verbal children, and children who have particular communication needs. The rights of all children to participate in matters affecting them, and to have their views heard and given due weight, are enshrined in international instruments such as the UNCRC, ratified by the UK in 1991. Article 12 (1) of the UNCRC states:

"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." (UNCRC, 1989)

Children's right to express their own views freely in all matters affecting them is recognised as one of the general principles underpinning the UNCRC. Whilst it is right that a child's development, maturity and capacity are taken into account alongside their views (in order to ensure that decisions are made in their best interests, and avoid burden and undue responsibility being placed on children alone to make important decisions), the right to form and express a view exists for all children, without discrimination on the basis of age, or any other grounds.

Scotland's progressive, rights-based children's policy landscape reflects our shared understanding of this, and commitment to ensuring children's views are heard in all matters which affect them. The work of Scotland's [Independent Care Review](#), which commenced in February 2017, clearly reflects the central importance of listening to the views of infants, children and young people with care experience (and those who care for and support them) to inform, shape and guide the review's focus. The unique and ground-breaking approach taken by the Independent Care Review recognises that hearing and understanding children's views can take time, and requires a range of approaches to engaging with different individuals. For those who have previously felt unheard, this approach is warmly welcomed in Scotland. More broadly, Girfec explicitly places children's rights at the heart of services, and an underpinning principle of the

approach is ensuring the child – and their family – are at the centre of decision making. [Part 1 of the 2014 Act](#) places a duty on Scottish Ministers and a range of public authorities to report on the steps they have taken to secure better or further effect the requirements of the UNCRC. This is an opportunity to further align legislation more closely with the UNCRC and the principles of Girfec, building greater coherence in the law and policy in relation to children and young people in Scotland, which will facilitate good practice approaches, such as those taken by the Independent Care Review, on the ground.

We believe it is unhelpful to use chronological age alone as a benchmark in any circumstance. To do so is overly simplistic, and fails to allow recognition of the developmental needs of individual children, which require careful consideration particularly where children have experienced trauma and other adversity. These children may require additional help and support in a range of ways from trusted adults to feel safe to express their views. Neither this, nor their age, must be a barrier to their views being taken into account.

We recognise there is reason to exercise caution in relation to the removal of the presumption that a child aged 12 or over is of sufficient age and maturity to form a view. As the consultation document highlights, the presumption is often misinterpreted to mean that children under the age of 12 are not capable of expressing their views, and it is not necessary to consider them. There is a risk that without the presumption, the situation becomes yet more restrictive and the age at which the views of some children and young people (particularly those with communication difficulties, or developmental needs associated with past experiences of trauma) are heard actually increases. It is critically important not to conflate the rights of all children to express a view and to be heard, with their legal capacity, for instance to instruct a solicitor. There are arguments to be made around the consideration of age in determining a child's legal capacity, however this consultation focusses on children expressing their views. This distinction is not helped by the language within the consultation document, for example paragraph 2.17 which states, in relation to ensuring more children under the age of 12 are heard,

“care would need to be taken to ensure that tests of sufficient capacity did not end up being more restrictive than the current provisions”

There should be no doubt that children do not require a test of their capacity in order to express their views. The Committee on the Rights of the Child clarify this in paragraph 20 of [General Comment 12](#) (2009):

“States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity”

To make this clear, we suggest that there is a clear expectation that children's views will be heard in all matters which affect them (including in court settings),

and if they are not, the court or decision maker must provide a clear and legitimate explanation as to why. The cases in which children's views are not heard, and the reasons for this, should be regularly monitored in order to learn more about the circumstances of these children, and how improvements can be made to the exercise of their Article 12 rights.

Additionally, hearing the views of children, regardless of their age, is not sufficient. These views must also be taken into account when decisions are made. Concerns exist that in some cases, children's views are heard in a tokenistic manner, and how weight is given to them is vague, unclear and potentially inconsistent.⁶ For children's rights to be realised, their views must be given weight in the decision making process. Determinations of weight must involve considerations of maturity and capacity, which should be seen in an evolving context, not uniformly linked to chronological age, and assessed on a case-by-case basis.⁷

Unfortunately, changes to the wording of legislation are unlikely to be sufficient alone to lead to significant, lasting practice change, in this area and others throughout this consultation. Indeed, within the Council of Europe's Guideline on Child Friendly Justice, it is recognised that the introduction of guidelines promoting child centred approaches themselves will not lead to practice change. To achieve meaningful change significant attention to implementation is required. For instance, tools like guidelines must be promoted, widely disseminated across all agencies, adequately resourced, their use and impact monitored, and their principles must underpin policy making and practice at national level.⁸

Question 2): How can we best ensure children's views are heard in court cases? a) The F9 form; b) Child welfare reporters; c) Speaking directly to the judge or sheriff; d) Child support workers; e) Another way (please specify).

Children and young people must be able to access a range of methods to ensure their views are heard. All children and young people are unique individuals, with developing and evolving strengths, skills, preferences and needs. No one method is desirable over all others, for all children, all of the time. Children and young people of all ages communicate their views through their behaviour, and considerable care and attention should be paid to ensuring the views of babies and very young children, as well as children with special communication needs and disabilities, are heard. Courts and other settings where decisions are made must be appropriately equipped, and practitioners appropriately skilled, to facilitate views being heard in different ways. Systems should be designed and established to provide children with mechanisms to be heard, in addition to making decisions which protect children where this is necessary.⁹

Despite children's right to express their views, adults often act as 'gatekeepers' to children's access to this right, particularly in formal settings.¹⁰ When additional support is provided, children and young people can have more positive

experience of participation. For children involved in care and protection proceedings, the quality of the relationships between the child and the adults working with them are often key determinants of the extent of the child or young person's participation in decision making.¹¹ The experience of adversities such as abuse, loss and trauma in their early lives can have an enduring impact on children and young people's sense of self, of the world, and their propensity to trust in others. Establishing trusting relationships with children and young people, where they feel safe, and are respected and listened to, is critical in being able to support and empower individuals to express their views. Relationships may take time to develop, but it is by listening to children and young people, and responding positively to them as individuals, that trust can be established. Children and young people should be supported by people who they know and trust, to express their views in whatever way is most suited to their needs and preferences. For some children and young people, this should involve high quality independent advocacy; for others it may involve the support of a teacher, social worker, kinship carer, foster carer or residential care worker. Ensuring suitably qualified, skilled advocates are available to all children who need one requires robust planning, sufficient resource and close attention, over multiple years, to implement a new system that functions properly. Learning should be heeded from the ongoing work to ensure the requirement of [Section 122 of the Children's Hearings \(Scotland\) Act 2011](#) is met, in relation to the provision of advocacy for children involved with a Children's Hearing.

We fully support the work of the Children's Parliament to explore children's views on the use of the F9 form, and how children's views are heard in court; and the Children and Young People's Commissioner Scotland (CYPCS) and Scottish Women's Aid 'Power Up Power Down' participative project, exploring with children the processes and decisions involved in court-ordered contact. We urge the analysis of this consultation to take full account of these projects and their submissions. Of particular importance is the recognition that many children will find the idea of sharing their views with a Sheriff to be overwhelming and anxiety provoking, and that children themselves are asking for support to understand the process at each stage, to be able to give their views in a way that suits them, and have them taken seriously.¹²

Given the wide range of circumstances, characteristics, preferences and needs of children, and their right to be heard, it is important that there is access to a range of methods through which children's views are heard in matter that affect them, including in court proceedings. The adults and practitioners supporting children, and making decisions, must have the knowledge, skills, understanding and capacity within their other duties to facilitate children to give their views, and to take them into account.

Question 3): How should the court's decision best be explained to a child? a) Child support worker; b) Child welfare reporter; c) Another option (please specify).

Decisions must be communicated in a manner which best meets the needs of the individual child or young person, in an unbiased way, generally by (or with support from) someone the child knows and trusts. To ensure this happens consistently for all children, we suggest that there should be a duty on the court or decision maker to establish how, when and by whom this will happen, at the time of the decision being made. Children and young people should have access to support and information in an accessible format to understand how decisions have been made, and how their views have been given weight and informed the process. Children and young people should be able to ask questions about the things they do not understand, and to seek clarification repeatedly (if necessary) in the days, weeks and months following a decision being made. This is particularly important in cases where decisions are made which do not align with the views of the child, as in such situations where there are no explanations regarding why and how the decision was made, children will struggle to understand why their views were sought at all.¹³ This may lead to children and young people become disenfranchised from participation in future.

Question 4): What are the best arrangements for child welfare reporters and curators ad litem?

Training, regulation and oversight of professionals who hold significant responsibility to work in the best interests of children, to ensure minimum standards are consistently upheld, is supported. In full consideration of this question, we recommended account is taken of the learning from the establishment and operation of the [National Safeguarders Panel](#), managed by Children 1st, given the similarities between its establishment and proposal set out in the consultation document.

In relation to language and terminology (expanded on in our response to Question 18), we suggest review of the use of the term 'curator ad litem' considering its replacement with simpler language which is less intimidating and more accessible to children, young people and their families.

Question 5): Should the law be changed to specify that confidential documents should only be disclosed when in the best interests of the child and after the views of the child have been taken into account?

We strongly support changes to the law to ensure that confidential documents and children's information (in any form) can only be disclosed when in the best interests of the child, and when the views of the child have been taken into account. Children's views on who receives this information should be given weight, and the default position should be that this should be the minimum information required, shared with the fewest number of individuals necessary, for the express purpose of protecting the child's best interests. Developing trusting relationships with supportive adults is challenging for many children, especially those who have experienced trauma, abuse, neglect and other adverse childhood experiences. The impact of children's confidential information, shared in a therapeutic trusting setting, being discussed with individuals such as Sheriffs, solicitors, and family members (about whom the child may be

speaking) is likely to have a significant impact on to child's capacity to trust adults in future, which could prevent them from receiving the therapeutic support they need, and are entitled to under Article 40 of the UNCRC. This understanding must form a key consideration when determining the child's best interests, alongside their views. Where information is disclosed, close attention to supporting children in the aftermath must be paid.

We are aware of situations in which children's confidential information has been disclosed in situations when there were significant concerns that this has not been in the child's best interests, and legal change to ensure this is no longer possible is fully supported. We suggest full consideration of the response from Children 1st in relation to this question, given their direct experience of this specific issue and the impact of such disclosures on vulnerable children's wellbeing.

Question 6): Should child contact centres be regulated?

In relation to questions of 'contact' generally, greater attention is required to the use of language. Maintaining and developing important family relationships for children and young people is about more than simply 'contact', a somewhat clinical phrase which fails to reflect the importance of these relationships to children and young people's identity and belonging. The use of stigmatising language and jargon are particular issues affecting those with care experience, for example children are exposed to professionalised language to the extent they speak about going to "sibling contact", as opposed to going to spend time with their brother or sister. The need to address this is reflected in [Intention 11](#) of the Independent Care Review, which states:

"The words used to describe care will be easily understood, positive and not create or compound stigma"

Whilst 'contact' has a meaning within this consultation, and within the law, the language that is used with children and young people day to day must reflect a commitment to the intention articulated by the Independent Care Review.

In addition to facilitating court ordered contact in situations of family breakdown, child contact centres may also be used to facilitate contact between children and family members in situations where children are looked after by the local authority, or at risk of becoming looked after. This can include situations where contact is supervised, such as when a panel at a Children's Hearing make a Compulsory Supervision Order which directs that contact between the child particular persons must be supervised. Under such circumstances, it is critical that contact is supervised by a suitably skilled individual who understands the child and their needs, understands the purpose of the contact (please see further information in response to Question 23), can assess the quality of the contact in relation to its purpose, and can ensure the child's wellbeing is not placed at any risk. This is complex work and to ensure it is undertaken to a consistently high standard, regulation of contact centres may be beneficial.

If contact centres are regulated, it is important that regulation facilitates consistently high quality experiences for children and their families, rather than focusing on scrutiny and compliance around minimum standards. National [Health and Social Care Standards](#) were implemented across all health and social care services in April 2018. The Health and Social Care Standards set out what anyone using health, social care or social work services in Scotland should expect, and they apply to a diverse range of settings. The standards focus on principles designed to ensure individuals experience high quality, nurturing and sensitive support which promotes wellbeing. There is a clear opportunity to hold these rights-based standards as central to regulation arrangements, if established.

As noted in the consultation document, regulation would have significant cost implications. Any arrangements must be met with sufficient financial resources both for the regulator and for contact centres to ensure costs, for example training and upskilling, can be met.

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

We welcome the recognition that when children are cared for outwith their family home, they should be supported and enabled to continue to have relationships with family members who are important to them, in line with Article 9 of the UNCRC. There is a need for changes to legislation, guidance, culture and practice to ensure children's rights to contact with their siblings are upheld. This is discussed fully in Questions 9 and 10.

There is a requirement that the views and wishes of children are taken into account in decision-making in a Children's Hearing.¹⁴ Concerningly, research suggests that children's views in relation to contact are represented in paperwork provided to the Hearing in only 36% of cases.¹⁵ Specific wishes (such as increase/decrease/no change to contact) were recorded in only 12% of all cases, and only 22% of cases where children were aged 8 or above. In comparison, the views and wishes of contactees (of whom 93% were adults) were recorded more frequently in Hearings paperwork (45% of cases). Whilst children's views may be sought directly from those in attendance, and thus considered in the decision making process, a record of their views and wishes is important for a number of reasons including to reinforce the importance of children's views; as a record of what their views were (which may be important for their own understanding into adulthood); demonstration of how/whether their views influenced decisions; and establishing a picture of changes in their views over time. In relation to further steps that should be taken to help ensure children continue to have relationships with family members who are important to them, improvements in seeking, recording and listening to children's views on these matters is absolutely critical.

For children and young people with care experience, supportive, enduring relationships with those who care for and about them are the “golden thread” in their lives, and the quality of these relationships should be prioritised.¹⁶ Greater priority must be given to enabling relationship-based practice, based on empathy, respect and ‘stickability’.¹⁷ Children, young people and significant adults, such as social workers, former carers and residential workers, should be supported to maintain positive relationships, where this aligns with the wishes and best interests of children and young people. Experiencing positive, enduring relationships is critical to young people feeling supported throughout their childhoods, and when they come to make life transitions.¹⁸ Risk averse practice, culture and bureaucratic barriers can detract from children and young people’s positive experience of enduring relationships, and attention should be focused in addressing these areas. Relationships provide opportunities for role modelling, and it is also through these relationships that children and young people experience the world, and build the skills and expectations which enable them to develop future healthy relationships with others. Studies examining the prevalence of Adverse Childhood Experiences (ACEs) have highlighted that children who do well despite adversity have usually had at least one stable committed relationship with a supportive adult.¹⁹

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

We do not support the establishment of such a presumption. Many grandparents play a significant and important role in the lives of children, and are vital source of support, love and care for their grandchildren. However, it is not true that children benefit from contact with all of their grandparents in **every** case, and to introduce a legal presumption to this effect is therefore fundamentally flawed. Where family relationships break down and informal agreements cannot be reached about children’s contact with their grandparents, legal mechanisms exist to address this. Grandparents (and other adults who claim an interest) can already apply for a court order to grant them contact under Section 11 of the 1995 Act. In making a decision about such contact, the court should hold the child’s welfare as the paramount consideration, and give due regard to their views.²⁰ These should be the primary considerations in every case, and to introduce a presumption increasing the rights of adults detracts from the central aim of this consultation, which is to place children’s rights at the heart of decision making.

Question 9): Should the 1995 Act be clarified to make it clear that siblings, including those aged under 16, can apply for contact without being granted PRRs?

Yes. We welcome the inclusive definition of ‘sibling’ used within the consultation document. Modern families can have complex structures, and the recognition of the importance of a child’s lived experiences and their own perception of who their siblings are, rather than relying on rigid biological definitions, is necessary and welcome.

Sibling relationships are some of the longest lasting across the life course, and contribute greatly to one's sense of identity and belonging. Article 8 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#) (ECHR) recognises the rights to respect for family life. Four key relationships have been observed to amount to family life, one of which is the relationship between siblings.²¹ Where siblings are separated (whether due to parental separation or other private changes to a family's structure; or through the involvement of the state), the needs, views and wishes of siblings to keep in contact with one another should be of primary consideration. Wherever possible, this should be arranged according to the best interests of the children concerned, and facilitated by adults who have the children's best interests at heart. In situations where this does not occur, it is important that siblings have effective legal mechanisms through which to challenge decisions and ensure their rights to family life are upheld. Currently, such legal mechanisms are intended to exist under Section 11 of the 1995 Act, under which the court can make an order which regulates direct contact between a child and another person with whom the child is not living (for example, a sibling). Applications for contact under Section 11 are **not** dependent on the applicant being over the age of 16, or their being granted parental rights and responsibilities. However, courts can be reluctant to allow children to become parties to these actions, due to confusion that this automatically involves also granting them parental responsibilities and rights.²²

Clarification on this point of law (to explain that Section 11 orders do not necessitate the granting of parental responsibilities and rights, they may relate to sibling contact, and siblings of any age can apply for contact under Section 11) is required to ensure consistency of children's access to their rights.

Consideration is needed of additional steps required to ensure legislation is consistently understood and interpreted. Such steps may include dissemination of information and awareness raising about siblings' rights and the benefits of maintaining sibling relationships with solicitors, courts and decision makers, and clear information about sibling's rights and legal mechanisms to realise them, which are accessible and readily available to children and the adults supporting them.

Question 10): What do you think would strengthen the existing guidance to help a looked after child to keep in touch with other children they have shared family life with?

The form of words used in Question 10 could be interpreted to mean family life must have been shared (i.e. by living in the same household) for siblings to be supported to keep in touch. This is not always the reality, for example in the case of siblings who are looked after away from home and have a newborn brother or sister with whom they have never lived. To clarify, we would welcome the use of the same definition of siblings used under Question 9. It must be clear that efforts to strengthen and improve experiences for separated siblings must apply to all forms of sibling relationships.

Background

Brothers and sisters with care experience have often endured adversities in their early lives together, and have a unique understanding of one another's life experiences. Whilst their relationships may be complex, often their bonds are exceptionally strong. Research evidence suggests that childhood mental health is promoted through siblings being placed together; and sibling groups tend to experience more placement stability when placed together.²³ Despite this, when decisions are made about where looked after children will live and who will care for them, sibling relationships are often not prioritised by adults and wider systems, resulting in children and young people being separated from their brothers and sisters, with limited support to maintain their relationships. A recent study found that estrangement from their siblings is a common experience for Scotland's looked after children, with 40% of children in adoptive or permanent fostering families living apart from all of their birth siblings, and around 70% of children in adoptive or permanent fostering families separated from at least one of their birth siblings.²⁴

The impact of sibling separation and limited, poor quality contact can be devastating. This has been articulated clearly by many care experienced children and young people, and is noted by the national advocacy agency, Who Cares? Scotland, as consistently one of their most common advocacy requests.²⁵ The importance of this matter to Scotland's care experienced children and young people is reflected in its inclusion in the twelve intentions of the Independent Care Review:

"Relationships which are significant to infants, children and young people will be protected and supported to continue unless it is not safe to do so. This recognises the importance of brothers and sisters, parents, extended family and trusted adults" ([Intention 3](#), announced June 2018)

Separation in sibling relationships often initially occurs alongside the significant loss and change associated with becoming looked after away from home, compounding this adversity. Concerningly, research shows that children's views in relation to contact with their siblings are poorly documented in case files, and (where recorded) contact appears to diminish over time.²⁶ Children and young people can struggle to re-establish close relationships with their siblings later in their journey, particularly if estrangement has been prolonged. Where arrangements are in place for brothers and sisters to spend time together, concerns often exist over the quality of these arrangements. Brothers and sisters can be expected to spend time together in unwelcoming office rooms, whilst a parent with whom they may have a complex relationship (and sometimes a supervising social worker/professional) is also present. This type of setting and environment does not support brothers and sisters to play, talk, re-connect, and spend relaxed, quality time together as children.

Policy context

The prevailing policy context strongly supports the maintenance and development of sibling relationships for those with care experience.

Guideline 17 of the [United Nations Guidelines for the Alternative Care of Children](#) is clear that siblings with existing bonds should not be separated by placements in alternative care unless there is a clear risk, or it is otherwise in the child's best interests. These guidelines state that in each case, every effort should be made to enable siblings to maintain contact with one another.

[Guidance on Looked After Children \(Scotland\) Regulations 2009 and the Adoption and Children \(Scotland\) Act 2007](#) also recognise the need to prioritise and nurture sibling relationships for children and young people with care experience. This guidance states:

- *"local authorities should try to ensure that siblings (children in the same family) are placed together, except where this would not be in one or more of the children's best interests"* (p43)
- *"where it is not in children's best interests for them to be placed together, or this has proved unachievable, then it may be appropriate for frequent contact to be maintained. This should be recognised in its own right and not purely as part of contact with parents."* (p43)
- *"where siblings are placed separately, reunification should be considered at the first and all subsequent reviews"* (p43)
- *"contact with siblings living elsewhere and with other extended family members and friends needs similar attention as contact with parents."* (p42)

Legislative change

Despite clear policy and guidance, siblings continue to be separated and to have infrequent and poor quality opportunities for contact. We therefore support suggestions to change primary legislation, to ensure sibling relationships for looked after children are given greater priority in their own right. Introducing enforceable legal duties will give siblings mechanisms through which to ensure their rights are upheld, and challenge when they are not.

We support the suggestion from Clan Childlaw that Section 17(1) of the 1995 Act is amended to include a duty on the local authority to

- consider placing siblings together; and
- promote and facilitate personal relations and direct contact between a looked after child and any siblings of that child.

Such amendments would be subject to existing safeguards in Section 17, which ensure contact and placements together are only promoted where suitable and in the child's best interests.

Additional amendments to legislation should also be considered. Specifically, amendments to the Children's Hearings (Scotland) Act 2011 and the Adoption and Children (Scotland) Act 2007, to ensure siblings have rights to be notified of hearings and of permanence proceedings; to seek contact with their siblings; to appeal decisions in relation to sibling contact; and to receive notice of hearings and permanence proceedings. This is particularly vital in cases of adoption and permanence, as when such an order is made there is no opportunity for a sibling to seek contact at a later stage. These suggestions are detailed fully within the February 2018 publication '[Prioritising Sibling Relationships for Looked After Children](#)'. We support full consideration of (and public consultation on) the legislative changes proposed in this paper.

A significant ruling issued by the Court of Sessions on 31st July 2018 recognises the current difficulties in a sibling accessing their rights to participate where their sibling has a Children's Hearings by being deemed a 'relevant person'. Currently, being deemed a relevant person (and thus being notified of Hearings, being able to attend, receiving paperwork, and being able to appeal decisions) depends upon whether or not the sibling meets the legal test under [Section 81\(3\) of the Children Hearing \(Scotland\) Act 2011](#) of having (or recently having) 'significant involvement in the upbringing of the child'. The court ruled that changes are required to this wording of the test to ensure it allows siblings to participate where appropriate, and thus is compatible with Article 8 of the ECHR.²⁷ At the time of writing, the case is due to call again to discuss proposed new wording. This significant development is warmly welcome as a mechanism to ensure siblings can participate in decision making at their brother or sister's Children's Hearing. However, it is not always desirable for a sibling to have all the rights of a relevant person, and this ruling does not detract from the need for legislative change in other areas discussed. Comprehensive legislative changes would contribute to keeping siblings together, and ensuring where they are living separately, positive relationships are supported and they do not become estranged.

Lastly, we fully support the introduction of a broad definition of sibling in legislation, as utilised in the consultation document.

Implementation and embedding practice change

Whilst we believe legislative changes are necessary, they are not sufficient alone to change policy, practice and culture, and thus significant changes in the experiences of siblings. There is a requirement for robust national guidance to go alongside primary legislation to set out matters such as:

- The need to consider the views of siblings in making an assessment and plan in relation to a looked after child, utilising the Girfec framework;
- Consideration of reunification at every review;
- Ensuring siblings spend time together in the best setting for them;
- Considering and facilitating the many forms in which sibling contact can take place, such as communications using text, video messaging and social media, as well as face to face contact;

- Supporting siblings who are experiencing difficulties to repair their relationships, rather than automatically curtailing contact;
- Recording all sibling relationships in official records; and
- Ensuring access to lifestory work for children permanently separated from their siblings.

Supports to implement legislative change and guidance must be robust and ongoing.²⁸ This will involve:

- Fully analysing current barriers which inhibit keeping siblings together and prioritising positive sibling contact (such as prevailing culture, available resource, capacity within the system to accommodate large sibling groups, difficulties protecting placements for sibling groups, and varying understanding of children's rights);
- Learning from existing good practice, collaborating and innovating to overcome barriers; and
- Making available sufficient resources to develop and sustain the skills and capacity of the workforce (for example, to undertake high quality life story work), and of those who care for children (for example, long term support to carers to manage the complex needs that sibling groups may have, on a day to day basis).

CELCIS is a member of [Stand Up For Siblings](#), a Scotland-wide partnership aimed at improving and changing legislation, policy and practice to protect the rights and promote the wellbeing of siblings whose relationships have been disrupted when children become looked after. We support the response to this consultation from the Stand Up For Siblings partnership.

Question 11): How should contact orders be enforced?

We support arguments made by CYPSCS, taking account of the views of children with lived experience of disputed contact through the Power Up/Power Down project. Whilst breaching any court order is clearly a serious matter, we do not agree that parents or carers receiving a custodial sentence for breach of a contact order would be in the best interests of the children they are caring for.

A 2013 report for CYPSCS found that in 97 cases relating to 155 children where there were allegations of abuse, 45% of children had a contact outcome that was consistent with their views, 20% had an outcome partially accommodating their views, and 34% had a contact outcome which bore no resemblance to their views.²⁹ If children and young people are unwilling to participate in contact with a non-resident parent, their views on this matter should be taken fully into account prior to the contact order being made. This may reduce instances in which parents or carers are in the difficult position of sending children and young people to have contact which they do not want or find distressing.

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

Rather than 'family cases' per se, particular further attention is required on the issue of cross-UK border placements for children and young people placed in secure care, particularly those being placed from England into Scottish secure care centres. Scottish Government statistics show almost one third of placements in Scottish secure care centres relate to children and young people from outside Scotland, most of whom are from England.³⁰ Since 2015, there has been a significant increase in such cross-UK border secure care placements. This is in the context of a 2016 High Court Ruling which concluded legal orders made by English courts placing a child in secure care in Scotland could not be enforced or recognised in Scotland.³¹ Amendments to aspects of the Children and Social Work Bill were subsequently tabled to enable such placements, and the Scottish Government gave legislative consent to these amendments. A forthcoming information briefing from the Centre for Youth and Criminal Justice (CYCJ) discusses the background, complexity and strategic implications of this issues. Various concerns are raised which must be addressed, including ethical issues relating to children's fundamental rights; the lack of public debate and consultation on the issue; and financial and system capacity implications.

Additionally, greater focus to understand the needs, experiences and outcomes of all children and young people looked after away from home in a placement which is a cross-UK border placement would be beneficial. There is limited practice evidence concerning Scotland's children and young people in this position. However, the UK Government's 2012 [Report of the Expert Group on the Quality of Children's Homes](#) and Ofsted's 2014 [From a Distance](#) report provide a reflection of the experience for England and Wales. Together the reports found that while placements could provide stability for children, notifications, accountability and information sharing between originating and receiving authorities were weak, and corporate parents did not place serious priority on understanding the risks and challenges faced by looked after children placed away from home in these situations.

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

No. Step parents are currently able to obtain parental responsibilities and rights through the courts, who must hear the views of the child and consider their best interests in making a decision. We are concerned that without this process, the views of children will not always be considered, and their rights not respected. This is a further example of suggestions to increase the rights of adults, rather than placing children's rights at the centre of family actions. The details around this proposal are also concerningly limited. For example, it is unclear under what circumstances someone is considered to become a step parent (through marriage, through co-habiting, after a certain time period), and whether they continue to be a step parent if their relationship with the parent breaks down. There could be situations where a significant number of adults hold parental responsibilities and rights in respect to a child, of which few have ongoing relationships with the child.

Question 17): Should the term “parental rights” be removed from the 1995 Act

No. We welcome the policy intention of this suggestion, to ensure the child is at the centre of processes and decisions, and to bring their rights into sharper focus. However parental rights are important. The balance of thinking, talking about and viewing parental responsibilities and rights could be improved, to clarify that parental rights are not unequivocal, and that they exist to enable the holders to fulfil their parental responsibilities, which include ensuring children’s rights are upheld and respected. This is best addressed through public awareness.

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

We understand and support the intention to ensure legal terminology is more child centred, and encourages adults to focus on the best interests of children. With the introduction of the 1995 Act, the terms ‘contact’ and ‘residence’ replaced the previous terms ‘access’ and ‘custody’. Whilst these terms were an improvement at the time, they are no longer felt to be suitable. It is somewhat likely that new terminology introduced today will become outdated in a number of years. The suggested term ‘Child’s Order’ has some weaknesses, as it implies children themselves must comply with directions. We suggest that if new terms are introduced, these should be developed in a participative way with children and young people, to reflect their views and preferences.

In line with our response to Question 17, the primary concern should be about how children’s contact with important people and their living arrangements are determined, taking their views and best interests fully into account, rather than what legal orders are called. What is important in practice is the language we use and how we communicate with children and young people day-to-day, to talk about their lives and their circumstances. As discussed in Question 6, this is particularly relevant for those working with and caring for care experienced children and young people, who may be exposed to stigmatising language and jargon including terms like ‘contact’, rather than talking about spending time, or keeping in touch, with family.

Questions 19 – 22: Parental Responsibilities and Rights and fathers.

We recognise the complex arguments surrounding the arrangements for establishing parental responsibilities and rights for fathers. Our comments on this subject are limited, but we urge a balanced consideration of the arguments presented by other stakeholders, holding the best interests of children at the centre of any legislative and policy decisions made.

Where children do not have contact or ongoing relationships with their father, they nevertheless have rights to know the identity of both of their parents (UNCRC, Article 7). This knowledge is important to children’s understanding of their life history and their own identity. It is also important for children’s medical

histories: for all children, and particularly those who are the subjects of adoption and permanence proceedings, in order that any medical needs are known and taken into account when matching children with potential permanent carers or adopters.

There is recognition that fathers tend to be less involved than mothers in the planning, support and input of children and families' professionals. Concerns are raised that fathers are less trusted, and they (and the child's wider paternal family network) are less systematically involved in child care and protection cases, even where they could be a positive influence.³² Sometimes risks are evident to children from their fathers or paternal networks which must always be taken seriously and children kept safe and protected, however where it is safe and in the child's best interests to do so, services should take steps to ensure fathers are better included and supported. Expectations on fathers should be as high as those placed on mothers, and their involvement encouraged.

Question 23: Should there be a presumption in law that a child benefits from both parents being involved in their life? and **Question 24: Should legislation be made laying down that courts should not presume that a child benefits from both parents being involved in their life?**

We do not support either of these presumptions, for the reasons set out in our response to Question 8.

Supporting, maintaining and developing children's relationships with their family members is critically important. For some children who become looked after away from their birth parents, complex and difficult decisions about their contact with their parents and other family members may be required, and our answer to Questions 23 and 24 are given in this context.

It is of paramount importance that parental involvement in a child's life is in the child's best interests. Contact with parents must promote and safeguard the child's welfare and wellbeing, and fully take into account their views. As specified in [Section 17 of the 1995 Act](#), local authorities have a duty to make decisions which safeguard and promote a looked after child's welfare. The local authority also has a duty to promote contact between a child and persons with parental responsibilities, however when making any decision about a child, [Section 16 of the 1995 Act](#) states the welfare of the child must be the paramount consideration, alongside the views of the child.

Consideration of the level and nature of contact with significant people in a child's life should be part of all looked after and accommodated children's Child's Plan, bringing together statutory duties in the 1995 Act and [Part 5 \(Child's Plan\)](#) of the 2014 Act. Where abuse and neglect have been experienced, decision making about looked after children's contact with family members (particularly with parents) can be complex, and there is a need to take further steps to ensure those making decisions have the knowledge, skills and expertise to do so robustly, in a manner which consistently promotes and safeguards children's

welfare and wellbeing. To make decisions about the level and nature of contact which keep the child's best interests at the centre, clarity about its purpose is required. Broadly, in this context, there are two circumstances in which contact may promote and safeguard a child's welfare:

- **Contact as part of a time limited assessment**, involving purposeful activity that allows parents to understand what they are being asked to change, and to demonstrate their parenting skills. Intervention and support from high quality services and supports should be targeted to parents or caregivers to develop their skills, understanding and make the necessary changes to their parenting or lifestyle that led to the child being removed from their care.³³ Recommendations about their ability to resume the safe care of the child can then be made based on the outcome of this work.³⁴
- Where a return home is not possible the purpose of **contact is as part of the child's plan to maintain relationships with significant people** and enable planned positive connections with their family which best meets the child's needs. At its most basic, ongoing contact can help children stay in touch with their roots and maintain their identity.
- Successful contact may help children to attend to the hurt they have experienced, and/or give them permission to settle in their new placement.³⁵ Whilst ongoing contact as part of a permanence plan for children looked after away from home can, in some cases, add to a child's sense of emotional well-being and development, it is only likely to do so if the adults around the child agree with the plan and support the permanent living arrangements.³⁶

Within Children's Hearings, tensions exist between attempts to prioritise the needs of children for safe and permanent care, and parents' responsibility and right to retain contact with their children. It is important to recognise a parent's right to contact with their child is not unqualified. As the consultation document itself states, parents have rights which exist to enable them to meet their parental responsibilities, as long as this is in the best interests of the child. The parental right to contact exists only to enable the parent to fulfil his/her parental responsibility to maintain contact.

Concerns exist that decisions to establish or continue an adult's contact with a child are sometimes made on the basis of whether the contact causes harm to the child. This is not the legal test, as established by Lady Smith's 2012 judgement which states:

*"Regarding the matter of contact, first, we note that at its highest, the submission for the appellants was that there was no evidence of LSK having come to harm from there being ongoing contact. That, however, is not the test. The issue was **whether or not ongoing contact would safeguard and promote LSK's welfare.**" (para 49, 2012)³⁷*

Additionally, there is a need for clarity that Children's Hearings should make decisions about contact based on the above test, rather than concerns over preempting the decisions of Sheriffs in cases regarding permanence. Where a decision is competent in law there is no expectation or legislative requirement to be concerned about subsequent future decisions, and such misunderstandings can lead to high levels of contact being maintained where this is clearly not in the child's best interests. Research suggests that there is a reasonably high correlation between social work recommendations and panel decisions about frequency (76% agreement) and length of contact (63% agreement), suggesting a largely shared understanding of the needs and best interests of children in relation to contact directions, however differences in interpretation of these best interests can be seen in the remaining variation between recommendations and decisions.³⁸ Panel members and all professionals attending Hearings would benefit from clear national guidance and continuous professional development, to gain a deeper understanding of the purpose of contact with birth families, and the legal requirements, to inform decision making. The work of the Permanence and Care Excellence (PACE) programme at CELCIS evidences that contact decision making can be a major source of confusion and delay within the Hearing system, and a focus of acrimony, contention and distress for those attending Hearings. There needs to be better clarity around the purpose of, and legal basis for, contact decision making. The current guidance produced by the City of Edinburgh Council is considered to be a best practice example, and we would support its use as a foundation on which to base national guidance.³⁹

Under the Children's Hearings (Scotland) Act 2011, the panel must state and explain their decisions and reasoning in relation to any contact direction made at a Children's Hearing. It is concerning that the Hearing's reasons for reaching decisions are not recorded in all cases, and there is variation in the quality of reasoning where this is recorded, suggesting the need for further work to improve both the quality and consistency of both Hearing's decisions and social work recommendations.⁴⁰

Question 25): Should the Scottish Government do more to encourage schools to involve non-resident parents in education decisions?

Yes, but whilst they may have some benefits, we do not believe the introduction of a statutory pupil enrolment form, or the issuing of guidance about the current enrolment form are the solution to parental involvement. What is needed is promotion of the place of parental engagement in children's learning, learning in the home, and family learning. To support the educational experiences of children and young people in need of care and protection, engagement with parents and carers, by teachers and other staff with an understanding of attachment, trauma and resilience are essential areas of focus.⁴¹ This complex work requires attention to systemic barriers, as well as nuanced understanding of the challenges that exist for vulnerable children, young people and their families; and practice within the GIRFEC framework.

The current definition of 'parent' within the [Scottish Schools \(Parental Involvement\) Act 2006](#) would benefit from reform. Referring only to *parental* involvement is not inclusive, and fails to reflect the range of circumstances in which many children live in Scotland. The definition should be updated to ensure that it covers all aspects of parental and caregiver involvement and engagement. Looked after children can live with a range of caregivers, including foster carers, kinship carers and residential carers, who should not feel stigmatised or alienated by language used to describe their role.

Many looked after children live away from their birth parents for a variety of reasons, in a range of care settings. A significant number of these children however continue to have meaningful and lasting relationships with their parents and want them to be involved in their life. Some looked after children also live in shared care arrangements which necessitates all carers involved being communicated with regarding a child's education. The views of the child should always be taken into account when making decisions around contact with non-resident parents, and the team around the child should ensure that decisions around contact and communication with non-resident parents are holistically assessed and decisions recorded and reviewed within each individual child's plan.

Current information management systems in schools (SEEMIS) limit schools' ability to simply communicate with more than one parent; the system allows only one 'primary contact' which has space only for one name and address. This is an example of a systemic barrier which inhibits the ability to mail merge or group call more than one contact without an additional manual process being performed by staff. In a home where both parents reside and communicate effectively this is unlikely to be problematic, however due to the prevalence of parental separation and in the case of looked after children, children living away from the family home in another care setting, these technical systems issues can lead to relevant people in a child's life not being included in crucial correspondence. Although manual administrative processes can be put in place to mitigate for this in some cases, it is unduly burdensome and relies on communication devoid of error.

Question 26): Should the Scottish Government do more to encourage health practitioners to share information with non-resident parents if it is in the child's best interests?

Guidance along the lines of those issued by the BMA and highlighted within the consultation document may be helpful. The subject of a non-resident parent's access to health information about their child is, for many, fairly straight forward i.e. the non-resident parent who has parental responsibilities and rights should be able to access information about their child as their responsibilities and rights in this regard are not altered by virtue of being non-resident. However, in practice, we are aware that parents (resident or non-resident) may not always act in the best interests of their children and that separated couples can use their children to play out tensions in the parental relationship.

This test of 'best interests' therefore is the crucial one. In addition, the test of whether a child wishes (and has capacity) to give or withhold consent to a parent accessing their health information also has to be considered. The best way for a non-resident parent to be advised of their child's health needs would be to attend any health appointments jointly with the resident parent. Where this is not possible, a direct request by the non-resident parent could be made to the health board. That request should then be dealt with on the above tests i.e. child's best interests and child's wishes/capacity.

Within any guidance, particular attention should be paid to the duties and responsibilities of corporate parents (including health boards and local authorities) when sharing information to meet the wellbeing needs of looked after children and young people. For example under [Part 3 of the Looked After Children \(Scotland\) Regulations 2009](#), a local authority must notify the relevant health board when a child become looks after to obtain an assessment of the child's health history and current state of health and development. This information must be shared timeously to inform the Child's Plan. This is then actioned and reviewed to ensure the highest standards of health care for looked after children. Particular concerns exist in ensuring continuity of health services when care experienced children and young people's place of residence changes to a new health board area. A 2011 report highlighted concerns that vulnerable children may not receive timely mental health care because of a lack of clarity about which health board is responsible.⁴² Similar difficulties can be experienced by care experienced young people whose care and treatment is negatively affected by the transition from child to adult services. Corporate parents have responsibilities to uphold the rights and safeguard the wellbeing of these children and young people, so addressing these issues will be of particular concern to them.

Question 27): Does section 11 of the 1995 Act need to be clarified to provide that orders, except for residence orders, or orders on PRRs themselves, do not automatically grant PRRs?

Please see response to Question 9. Given the current law is arguably already clear, it should be considered what else is required to ensure consistent understanding that applications for contact under Section 11 are not dependent on the applicant being granted parental rights and responsibilities. The best interests of the child, and the child's views, should be at the centre of decision making.

Questions 32 – 38: relate to Domestic Abuse

Article 19 of the UNCRC requires states to take all appropriate legislative and administrative measures to protect children from all forms of physical or mental violence, abuse, maltreatment and exploitation. Domestic abuse is amongst the most common grounds on which children are placed on the Child Protection Register,⁴³ and having a close connection with a person who has carried out domestic abuse was the third most common reason for children to be referred to the Scottish Children's Reporters Administration (SCRA) in 2017/18.⁴⁴ Significant

progress has been made in recent years in Scotland in relation to understanding of all forms of domestic abuse, and the impact on children. This includes legislative change through the introduction of the [Domestic Abuse \(Scotland\) Act 2018](#), which recognises the complex nature of coercive control; and makes reforms to criminal procedure, evidence and sentencing to ensure victims are protected from further abuse by the alleged perpetrator via the court process. The ongoing work of the Evidence and Procedure Review to ensure child and vulnerable witnesses are protected and not further traumatised by court processes is warmly welcomed, particularly the ambition for a long term future for the treatment of child witnesses to be trauma informed, and in line with the approach in the Barnahus model.⁴⁵ **We strongly encourage the extension of this work to the treatment of children and vulnerable witnesses within the civil courts.**

In terms of social work practice with families where domestic abuse is a concern, we note the success of the use of the '[Safe and Together](#)' model of child protection in some local authorities. Sharing learning regarding its implementation and best practice nationally would be beneficial. This model recognises domestic abuse as a parenting choice for which perpetrators must be held accountable. Women are often seen as primarily responsible for child safety despite perpetrators responsibility for abuse, and evidence suggests the social attitudes that fuel domestic abuse and attribute blame to women for men's violence can also be present in social work practice.⁴⁶ Practitioners often do not understand the context of abuse, and inappropriate demands are placed on women who go on to experience the threat of having their children removed. This threat can deny the efforts women have made to protect their child from abuse, and does not take into account the challenges and the increased risk of violence faced by women when leaving their abuser partner. Failure by social workers to recognise the context of women's lives and respond appropriately can re-traumatise women who have already experienced abuse and trauma.

We are aware of the extensive work of colleagues in the children's sector and beyond (such as Barnardo's Scotland, Children 1st, CYPCS and Scottish Women's Aid) who will address specific questions in this section comprehensively in their submissions. We support their work, and we encourage the Scottish Government to take full account of the contributions from these organisations.

Question 39): Should the Scottish Government introduce a provision in primary legislation which specifies that any delay in a court case relating to the upbringing of a child is likely to affect the welfare of the child?

The Scottish Government's 2015 strategy [Getting it Right for Looked After Children and Young People](#) recognises the importance of looked after children achieving stable placements as quickly as possible, and that life chances are better for those who achieve stability at a younger age. Timely decisions and reducing delay are critically important to protect children's longer term development and wellbeing.⁴⁷ The work of the Permanence and Care Excellence

(PACE) programme at CELCIS is focussed on supporting local areas to improve the timescales to achieve permanent placements for children. This is complex work, reliant on actors across the whole system working in partnership, collecting and utilising local data and evidence, and embedding a culture of continuous improvement. The impact of PACE on reducing the timescales between significant permanence milestones in various local areas can be further explored through the [Gathering PACE website](#).

Recognition of the importance of minimising unnecessary delay when determining the living arrangements for all children is welcome, however it is important that any provision in primary legislation makes a difference to practice, and children's experiences. Further actions to ensure this translates to meaningful change will be necessary, such as monitoring timescales and carrying out pilots and small 'tests of change' to determine what needs to happen differently in order for timescales to be improved. This could involve the introduction of suggested timescales for various processes, and working collaboratively with all partners involved to determine and eradicate sources of unnecessary delay.

Question 42): Should the Scottish Government do more to encourage Alternative Dispute Resolution (ADR) in family cases?

We support the recognition of the benefits of supporting families to settle disputes without involving the courts. This closely aligns with the Girfec approach, which aims to support children and families to reduce the escalation of difficulties and need for formal state intervention. Girfec is underpinned by a preventative approach, with the central objective being delivery of the right help, at the right time, in the right way, to children and families. Supporting families at an early stage, before the need for high level formal interventions (for example, by courts and Children's Hearings) is only possible with the full, properly resourced implementation of Girfec. Indeed, as Girfec represents the overarching framework for all children's policy and service delivery in Scotland, much greater consideration of it is needed when creating a Family Justice Modernisation Strategy.

From the options listed in the consultation regarding ADR, we particularly support the use of Family Group Decision Making approaches, where properly resourced and appropriate. The ethos underpinning such approaches is strengths based and solution focused, recognising the strengths and abilities of families to identify their own solutions to challenges. The approaches enable children and young people to be an integral part of decision making, and evidence indicates that families engage positively in these decision making processes concerning child welfare.⁴⁸ The quality of the independent coordinator is critical to the success of the approach, and it is vital that the approach is properly resourced, with skilled coordinators and practitioners to engage with families and support children's participation.⁴⁹ A recent evaluation of the expansion of Family Group Conferencing (a specific model of Family Group Decision Making) in Leeds City Council suggests the approach can be safe and effective in situations involving

domestic abuse, particularly where a restorative approach is taken, alongside effective perpetrator work and maintaining a focus on the needs of children and victims.⁵⁰

[Part 12](#) (Services in Relation to Children At Risk of Becoming Looked After, etc.) of the 2014 Act specifies that family group decision-making services, designed to facilitate decision-making by a child's family in relation to the services and support required for the child, should be made available by local authorities. A review of the implementation of this provision is forthcoming, the findings of which may inform further consideration of the use of Family Group Decision Making in ADR.

The [Lifelong Links](#) approach builds on the Family Group Decision Making model for care experienced children and young people, by identifying and engaging relatives and supportive adults connected to a looked after child, who are willing to make a life-long commitment to that child. This network are brought together in a family group conference to make a life-long support plan with the child or young person, ensuring ongoing emotional and practical support, and a sense of identity and belonging. This approach is currently being evaluated in seven English and three Scottish local authorities.

In considering alternative forms of dispute resolution, and indeed a wider Family Justice Modernisation Strategy, consideration should be given to the learning from the evaluation of the Family Drug and Alcohol Courts (FDACs) across a community of practice of nine local authorities in England.⁵¹ FDACs aim to keep families together, and improve outcomes for children and families where care proceedings are ongoing and parents are experiencing substance misuse. The process involves multi-agency collaboration from a range of services so that a family's needs and strengths are taken into account, with a focus on achieving the best outcome for the child within a timescale compatible to the child's needs. If families are not able to overcome their problems in time, parents are supported to avoid becoming trapped in a pattern of repeated pregnancies and subsequent removal of their child into care. The court proceedings are an integral part of the model. The same judge works with the family intensively throughout the process and part of the judge's role is to support and motivate the parent in their efforts to change. This is a less adversarial and more problem solving approach, which has evidenced effectiveness and cost savings.⁵²

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

We welcome any steps to improve provision of accessible information for children and young people experiencing formal processes. To ensure information is accessible to the widest possible group, it will be necessary to provide it in a range of formats, suitable for different stages of development and communication needs. Using co-design and co-production approaches with children and young people to produce the guidance will help to ensure it reflects the needs and views of those who will use it.

Question 45): Should a person under 16 with capacity be able to apply to record a change of their name in the birth register?

Yes. There should be the opportunity for applications by children with capacity, who do not have the support from an adult with parental responsibilities and rights. The [Age of Legal Capacity \(Scotland\) Act 1991](#) establishes that a person under the age of 16 may instruct a solicitor in connection with civil matters where they have a general understanding of what it means to do so, and that a person aged 12 or over is presumed to have such understanding. (Though this should not limit proper considerations of applications from children under the age of 12.) Children and young people should have access to advocacy to support them to submit an application.

Care experienced children and young people who have experienced numerous transitions between different living arrangements throughout childhood may require particular support and attention from trusted adults when considering their identity, including changing their name. Children may be experiencing complex and competing emotions, such as guilt, abandonment, hope and fear due to their experiences of loss and change in relationships with their family. Many children will have strong feelings of loyalty to their parents and birth family, and many will seek to quickly experience belonging and comfort, forming close connections with carers. Where children are experiencing such complex lives, their views and wishes regarding changes to their name must be listened to with care and understanding by the professionals and trusted adults in their lives. Children should be supported to build their identity and self-esteem, and adults have responsibilities to ensure they fully understand the long term implications of legal name changes before pursuing such options.

We are aware that Who Cares? Scotland are gathering the views of children and young people with care experience in relation to a range of issues, including this question, and we hope their views will be taken into full consideration in this matter.

Question 46): Should a person who is applying to record a change of name for a young person under the age of 16 be required to seek the views of the young person?

Yes. Changing the name on the birth register of an individual under the age of 16 without the involvement of the courts currently requires the consent of all adults who hold parental responsibilities and rights, yet does not require any consideration of the views of the child or young person themselves. There is an absolute need to amend this, given children's UNCRC Article 12 rights, and their rights to their identity under Article 8.

The implications of any legal change here which may affect children who are subject to adoption proceedings should be carefully considered. It is recognised in the [Guidance on Looked After Children \(Scotland\) Regulations 2009 and the Adoption and Children \(Scotland\) Act 2007](#), that as adopted children grow up

they require support to integrate their identity in relation to both their birth and adoptive families. Changes to name are an important part of identity, and whilst it may be challenging in some circumstances to ascertain the views of children who are being adopted in relation to changes to their name, all efforts should be made to do so, and decisions ultimately made in the best interests of the child throughout their life.

Question 48): Do you think the Principal Reporter should be given the right to appeal against a sheriff's decision in relation to deemed relevant person status?

Yes. Being deemed a relevant person bestows particular rights upon individuals, such as the rights to attend all children's hearings, to appeal decisions, and to receive copies of all paperwork. It is in children's best interests to ensure appropriate safeguards in the law to prevent persons being deemed relevant when they should not be. Under the current arrangements, the right to appeal a sheriff's decision in relation to deemed relevant person status is available to the child or another relevant person, but not to the Principal Reporter. Allowing the Principal Reporter this right of appeal could provide an additional safeguard by taking the onus off the child (or another relevant person) to submit an appeal, potentially helping the process to remain child-centred, rather than overly focussed on the wishes of adults. Timeframes in which to appeal sheriff's decisions are limited, and may not be sufficient for children and other relevant persons to reach certainty that they wish to appeal, and feel comfortable to do so. Family dynamics may be exceptionally complicated in some circumstances, and making the right of appeal available to the Principal Reporter would be helpful where the child or other relevant persons feel uncomfortable doing this themselves, or who do not know they can do so themselves.

It is important to ensure that any new rights for Principal Reporter's to appeal do not add unnecessary delay to the process of decision making in children's lives. In every case, the benefits for the child would need to be balanced against any negative impact of potential time delays in reaching a decision. The Principal Reporter should always be required to justify their reasons to appeal a decision, which must relate to whether or not the individual meets the legal test under [Section 81\(3\) of the Children Hearing \(Scotland\) Act 2011](#) of having (or recently having) 'significant involvement in the upbringing of the child'. As noted in our response to Question 10, this wording was found to be too restrictive by the Court of Sessions, and will soon be modified to make it more compatible with Article 8 ECHR.⁵³ There is an opportunity to consider whether this legal test would benefit from further review. The current test leaves room for inconsistency in decision making, as it involves concepts which are subjective, and may involve evaluating sometimes contested facts.⁵⁴ Given the significant rights and powers relevant persons hold, a test which more clearly holds the rights and best interests of children at its centre should be considered.

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

Yes. We support legislative amendments to allow for further modernisation of the Children’s Hearings System and enhanced use of technology. Care should be taken to ensure any such amendments are future-proofed as far as possible, to avoid the need for continued amendments as further technological advancements are made. Work is ongoing to improve and facilitate children and young people’s participation in their Hearings, including developing Hearings centres and rooms to be more child-friendly; welcoming children and young people for informal visits to the Hearing centre in advance of their Hearing; and developing a young people’s Board for the Children’s Hearings System: Our Hearings, Our Voice.⁵⁵ It is recognised that more could be done to better ensure children and young people’s meaningful participation in their Hearings.⁵⁶ By giving children and young people more choice in the ways in which they would like to participate in their Hearing, an increase in the use of modern technology could improve experiences and safeguard children’s wellbeing. The option to pre-record views, video link into the hearing, and use technology in a variety of creative ways to ensure their views are heard could increase all children and young people’s participation, and may particularly improve opportunities for children with disabilities to participate. In every case, children and young people’s choice in how they wish to participate in their Hearing, and give their views, must be the primary consideration, and should not be limited to only one method. Changes must not lead to children and young people being discouraged from physically attending their Hearing if they wish to do so, if (for example) it is inconvenient for transportation or logistical reasons.

As the 2016 [Children’s Hearings System Digital Strategy](#) recognises, considerable work is required, alongside legislative change, to ensure enhanced use of technology in the Children’s Hearings System. This includes ensuring all staff and volunteers maintain skills and confidence using digital technology; systems for sharing and managing information are secure; and the physical hardware and technology (and support to use it) is available and accessible for all children and young people across Scotland to use. All of this requires considerable ongoing attention and resource.

Question 50): Should safeguarder reports and other independent reports be provided to local authorities in advance of Children’s Hearings in line with other participants?

Yes, on balance. Once submitted, it is not legally possible currently for safeguarder reports to be shared with the local authority by the Reporter, although in order to allow for appropriate preparation and to avoid delay and distress, the [Practice Standards For Safeguarders](#) set out the expectation that the recommendations from safeguarder reports should be shared appropriately with “representatives from services and agencies”⁵⁷ in advance of Hearings. As the agency responsible for implementing the Hearing decision, there are clear benefits to the local authority being in receipt of all information in advance, in

order to put plans in place. There is general agreement amongst professionals that sharing the safeguarder's full report with the local authority in advance of the Hearing would be appropriate.⁵⁸

However, a number of care experienced young people raised concerns over this issue during our consultation process, particularly in terms of their rights to privacy and confidentiality. Children and young people did not want their detailed personal information to be shared unnecessarily, and felt the local authority could plan sufficiently based on knowledge of the safeguarder's recommendations, as per current practice. These concerns should not be dismissed or minimised, but on balance providing safeguarder reports to the local authority in advance is likely to be in the child or young person's best interests. As stated in the practice standards, children and young people should be fully informed about how their information will be shared, and have the opportunity to discuss any concerns they have about this.

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

Yes. Please see response to Q32-38. A core consideration of the Children's Hearing System is the welfare of the child. The personal cross examination of vulnerable witnesses, including children, should have no place in any Children's Hearings (Scotland) Act 2011 proceedings.

Thank you for providing us with this opportunity to respond. We hope the feedback is helpful; we would be happy to discuss any aspect in further detail.

Contact:

Lizzie Morton
Policy Associate
lizzie.morton@strath.ac.uk
0141 444 8504

-
- ¹ Ejler, N., Ostensen, J., Graff, D. & Dyrby, T. (2017) *New Approaches to Policy Implementation*. Copenhagen: Ramboll
- ² Van Dyke, M & Naom, S.F.(2015) 'The Critical Role of State Agencies in the Age of Evidence-Based Approaches: The Challenge of New Expectations', *Journal of Evidence-Informed Social Work*, 00(1-14)
- ³ Scottish Government (2018). [Children's Social Work Statistics Scotland 2016/17](#). Edinburgh: Scottish Government.
- ⁴ The Care Inquiry (2013) [Making Not Breaking: The Findings & Recommendations of the Care Inquiry](#)
- ⁵ Coram Voice (2015) [Children and Young People's Views on Being in Care - A Literature Review](#), University of Bristol
- ⁶ Daly, A. (2016) 'Hearing Children in Proceedings – What We Can Learn from Global Practice', *Seen and Heard* 26, p42
- ⁷ United Nations Committee on the Rights of the Child (2009) [General Comment No 12: The right of the child to be heard](#). Geneva: United Nations
- ⁸ Council of Europe (2010) [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#). Strasbourg: Council of Europe Publishing
- ⁹ Lehrmann, D. (2010) "Advancing Children's Rights to be Heard and Protected: The Model Representation of Children in Abuse, Neglect, and Custody Proceedings Act", *Behavioral Sciences and the Law*, vol 28, pp463-479
- ¹⁰ Daly, A. (2016) 'Hearing Children in Proceedings – What We Can Learn from Global Practice', *Seen and Heard* 26, p42
- ¹¹ Cossar et al (2014) "'You've got to trust her and she's got to trust you': children's views on participation in the child protection system", *Child and Family Social Work*, pp103-112
- ¹² Children's Parliament (2017) [If an adult just listens - Children's Parliament consultation on the F9 Form used to gather children's views for Sheriff Court](#). Edinburgh: Children's Parliament
- ¹³ Daly, A. (2016) 'Hearing Children in Proceedings – What We Can Learn from Global Practice', *Seen and Heard* 26, p42
- ¹⁴ The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules
- ¹⁵ Porter, R. (2018) Contact Decisions in the Children's Hearings: Research Report. Glasgow: CELCIS
- ¹⁶ The Care Inquiry (2013) [Making Not Breaking: The Findings & Recommendations of the Care Inquiry](#)
- ¹⁷ Scottish Care Leavers Covenant (2015) <http://www.scottishcareleaverscovenant.org/covenant/>
- ¹⁸ Swain, V. (2016) [Keep Connected: Maintaining Relationships When Moving On](#). TFN; Boddy J (2013) [Understanding permanence for looked after children](#): A review of research for the Care Inquiry. London: The Care Inquiry.
- ¹⁹ Couper, S. & Mackie, P. (2016) ['Polishing the Diamonds' Addressing Adverse Childhood Experiences in Scotland](#), Scot PHN
- ²⁰ Harvie-Clark, S. (2018) *Contact between grandparents and their grandchildren*. Edinburgh: SPICE
- ²¹ Jones, F. & Jones, C. (2018) *Prioritising Sibling Relationships for Looked After Children*. Edinburgh: Community Law Advice Network
- ²² ibid
- ²³ Meakings, S., Sebba, J. & Luke, N. (2017) [What is known about the placement and outcomes of siblings in foster care? An international literature review](#). Oxford: Rees Centre
- ²⁴ Jones, C. & Henderson, G. (2017) [Supporting Sibling Relationships of Children in Permanent Fostering and Adoptive Families](#), Glasgow: University of Strathclyde
- ²⁵ Who Cares? Scotland (2017) [Sibling Separation and Contact: Young Radicals Report](#). Glasgow: Who Cares? Scotland
- ²⁶ Jones, C. & Henderson, G. (2017) [Supporting Sibling Relationships of Children in Permanent Fostering and Adoptive Families](#), Glasgow: University of Strathclyde
- ²⁷ Lady Wise (2018) in a judgement of the Outer House, Court of Sessions ([Judicial Review of certain decisions of the Children's Hearing](#))
- ²⁸ Fixsen, D., Naoom, S., Blase, K., Friedman, R., and Wallace, F. (2005) *Implementation Research: A synthesis of the literature*. Tampa: University of South Florida
- ²⁹ MacKay, K. (2013) *The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse: A report to Scotland's Commissioner for Children and Young People*, Edinburgh: SCCYP
- ³⁰ Scottish Government (2018). [Children's Social Work Statistics Scotland 2016/17](#). Edinburgh: Scottish Government.
- ³¹ Sir James Munby (2016) in an Approved Judgement in the High Court of Justice: Family Division. ([Neutral Citation Number: \[2016\] EWHC 2271 \(Fam\)](#))
- ³² Clapton, G. (2017) *Good practice with fathers in children and family services*. IRISS Insight 38
- ³³ Wade, J., Biehal, N., Farrelly, N., and Sinclair, I. (2011) *Caring for abused and neglected children: making the right decisions for reunification or long term care*. London: Jessica Kingsley
- ³⁴ Turney, D., Platt, D., Selwyn, J. & Farmer, E. (2012). *Improving child and family assessments: turning research into practice*. London: Jessica Kingsley.
- ³⁵ Reder, P. & Lucey, C. (1995). *Assessment of parenting: psychiatric and psychological contribution*. London: Routledge
- ³⁶ Reder, P. & Lucey, C. (1995). *Assessment of parenting: psychiatric and psychological contribution*. London: Routledge; Turney, D., Platt, D., Selwyn, J. & Farmer, E. (2012). *Improving child and family assessments: turning research into practice*. London: Jessica Kingsley.
- ³⁷ Lady Smith (2012) in a judgement of the Inner House ([East Lothian Council for a Permanence Order re. LSK](#))
- ³⁸ Porter, R. (2018) Contact Decisions in the Children's Hearings: Research Report. Glasgow: CELCIS
- ³⁹ Children and Families Department (2014) *Keeping in Touch: Managing Contact for Looked After Children*. Edinburgh: City of Edinburgh Council

-
- ⁴⁰ Porter, R. (2018) Contact Decisions in the Children's Hearings: Research Report. Glasgow: CELCIS
- ⁴¹ CELCIS (2015) [Looked After and Learning: Improving the learner journey of looked after children](#), Glasgow: University of Strathclyde
- ⁴² Lachlan, A, Millard, A, Putnam, N, Wallace, A, Mackie, P and Conacher, A (2011) *Mental health care needs assessment of Looked after children in residential special schools, care homes and secure care*, Glasgow: ScotPHN.
- ⁴³ Scottish Government (2017) [Protecting Scotland's Children and Young People: It is Still Everyone's Job](#). Edinburgh: Scottish Government
- ⁴⁴ SCRA (2018) [Statistical Analysis 2017/18](#), Stirling: SCRA
- ⁴⁵ Scottish Courts and Tribunals Service (2017) [Evidence and Procedure Review: Child and Vulnerable Witnesses Project – Pre-recorded further evidence workstream project report](#). Scottish Courts and Tribunals Service
- ⁴⁶ Watson (2017) *Domestic abuse and child protection: women's experience of social work intervention*. IRISS Insight 36
- ⁴⁷ Mitchell, F. & Porter, R. (2016) [Permanence And Care Excellence \(PACE\): Background, Approach and Evidence](#). Glasgow: CELCIS
- ⁴⁸ Frost, N, Abram, F, & Burgess, H (2014) 'Family Group Conferences: Evidence, outcomes and future research', *Child & Family Social Work* 19:501-507
- ⁴⁹ Scottish Government (2016) [National Guidance on Part 12: Services in Relation to Children At Risk of Becoming Looked After, etc](#). Edinburgh: Scottish Government
- ⁵⁰ Mason, P., Ferguson, H., Morris, K., Munton, T. & Sen, R. (2017) *Leeds Family Valued: Evaluation Report*. Department for Education.
- ⁵¹ Roberts, E., Crowther, T., Brown, A. & Kerr, J. (2017) [Family Drug and Alcohol Court National Unit: independent evaluation](#). Department for Education
- ⁵² Bambrough, S., Shaw, M. & Kershaw, S. (2013) The Family Drug and Alcohol Court Service in London: A New Way of Doing Care Proceedings. *Journal of Social Work Practice: Psychotherapeutic Approaches in Health, Welfare and the Community*, DOI:10.1080/02650533.2013.801833
- ⁵³ Lady Wise (2018) in a judgement of the Outer House, Court of Sessions ([Judicial Review of certain decisions of the Children's Hearing](#))
- ⁵⁴ Norrie, K (2014) "[Children's hearings, relevant persons and the welfare of the child](#)". *Greens Family Law Bulletin* (128). pp. 4-7
- ⁵⁵ SCRA (2017) [Annual Report 2016/17](#). Stirling: SCRA
- ⁵⁶ Kurlus, I., Henderson, G. & Brechin, G. (2016) [The Next Steps Towards Better Hearings](#). SCRA on behalf of CHIP.
- ⁵⁷ Scottish Government (2015) *Practice Standards for Safeguarders*. Edinburgh: Scottish Government, p10
- ⁵⁸ McDiarmid, C., Barry, M., Donnelly, M. & Corson S. (2017) [The Role of the Safeguarder in the Children's Hearing System](#). Edinburgh: Scottish Government