Joint briefing on the Stage 2 debate of the Children (Scotland) Bill: protecting children's rights in the civil justice system

June 2020

This is a joint briefing submitted by Scottish Women's Aid, Children 1st, Professor Kay Tisdall (University of Edinburgh) and Dr Fiona Morrison (University of Stirling).

We warmly welcome Stage 2 of the Children (Scotland) Bill. We support the general principles of the Bill, and its provisions aiming to improve compliance with the UN Convention on the Rights of the Child (UNCRC), in particular ensuring that children's participation rights are upheld and their best interests are promoted and protected by our family courts.

As a group of organisations and academics working to uphold children's rights and the protection of those who have experienced domestic abuse, we believe that transformative reform is urgently needed to ensure that children's rights are not continually eroded in the family courts. We welcome many of the amendments brought forward by MSPs to strengthen the Bill on these matters.

Our briefing follows the structure of the Groupings of Amendments for Stage 2. We have not commented on every amendment, but only on those that we strongly support, are concerned about or feel require further attention. In particular, we wish to note our strong support for amendments 1-5, lodged by Ash Denham, which improves the Bill's compliancy with the UNCRC by stating that all children are presumed capable of offering a view. We also encourage MSPs to vote in support of amendments that protect children's rights when their information is shared with the courts.

Having regard to the voice of the child

Amendment 1, lodged by Ash Denham: WE SUPPORT

1. *In section 1, page 1, line 19, at end insert— <(1CA)In considering whether the child is capable of forming a view, the person is to start with the presumption that the child is.>*

We strongly support this amendment and the ones that follow in this regard (1-5). Ensuring that children and young people are presumed capable of forming a view offers further protection for their right to participate, and makes the Bill compliant with the UNCRC in this regard. We have set out further detail on the importance of children's participation in the family courts in our written and oral evidence, in research and in our joint briefing on Stage One of this Bill.[1]

Amendment 47, lodged by James Kelly: WE SUPPORT & SEEK CLARIFICATION

47. In section 1, page 2, leave out lines 35 and 36 and insert— <"(a) seek to make reasonable arrangement for the child to express the child's views in a manner that the child has indicated the child prefers, and">

We strongly support this amendment (and amendment 48 below) to ensure that decision-makers ask children how they wish to express their views. We note that this was a recommendation from the Justice Committee's Stage 1 report (para. 188). As stated in our previous written and oral evidence and in the joint response that Children 1st and Scottish

[1] Children 1st, Scottish Women's Aid, Dr Fiona Morrison and Professor Kay Tisdall (2020) Joint briefing on Stage One of the Children (Scotland) Bill https://bit.ly/2UZa8wc; Morrison, F, Tisdall, E. K. M., Warburton, J., Reid, A, Jones, F (2020) Children's Participation in Family Actions – Probing Compliance with Children's Rights Research Report https://bit.ly/2WMWqhl;

Women's Aid provided to the Financial Memorandum,[2] children may wish to express their views in a variety of ways. It is in children's best interests, and the interests of the court and the parties involved, to ensure that children feel happy and comfortable in the way that they express their views and for these views to be transmitted directly to the court. However, resources must be made available so that courts can make arrangements for children to express views in the manner which they prefer. It is our view that this flexibility will mean that even very young children can express their views to the court.

However, we note that this Amendment pre-empts Amendment 2, lodged by Ash Denham. We have concerns that removing lines 35 and 36 from the Bill replaces a child being *given* an opportunity with a duty on courts to *seek* to make reasonable arrangements. This section must not simply be about asking children their views, but also about taking them. To ensure that a child's participation entitlements under the UNCRC are met, it must be clarified that there is also a duty on the court for the child to *express* their views. We are therefore not comfortable with lines 35 and 36 being removed until this is clarified.

Amendments 2-4, lodged by Ash Denham: WE SUPPORT

2. *In section 1, page 2, line 35, after <child> insert <concerned>*
3. *In section 1, page 2, line 41, at end insert— <(2A) The child is to be presumed to be capable of forming a view unless the contrary is shown.>*
4. *In section 1, page 3, leave out lines 4 and 5*

Please see our comments on Amendment 1. We strongly support these amendments. Ensuring that children and young people are presumed capable of forming a view offers further protection for their right to participate, and makes the Bill compliant with the UNCRC in this regard.

Amendment 48, lodged by James Kelly: WE SUPPORT & SEEK CLARIFICATION

48. *In section 1, page 3, leave out lines 11 and 12 and insert— <"(a) seek to make reasonable arrangements for the child to express the child's views in a manner that the child has indicated the child prefers, and>*

We support this amendment, for the same reasons as outlined in our response to amendment 47.

As we stated in our response to amendment 47, we note that this Amendment pre-empts Amendment 2, lodged by Ash Denham. We have concerns that removing lines 35 and 36 from the Bill replaces a child being *given* an opportunity with a duty on courts to *seek* to make reasonable arrangements. This section must not simply be about asking children their views, but also about taking them. To ensure that a child's participation entitlements under the UNCRC are met, it must be clarified that there is also a duty on the court for the child to *express* their views. We are therefore not comfortable with lines 35 and 36 being removed until this is clarified.

[2] https://www.parliament.scot/S5_Finance/General%20Documents/Scottish_women_Aid_Children_.pdf

Amendment 5, lodged by Ash Denham: WE SUPPORT

5. In section 1, page 3, line 17, at end insert— <(2B) The child is to be presumed to be capable of forming a view unless the contrary is shown.".>

Please see our comments on Amendment 1. We strongly support this amendment. Ensuring that children and young people are presumed capable of forming a view offers further protection for their right to participate, and makes the Bill compliant with the UNCRC in this regard.

Amendment 49, lodged by James Kelly: WE SUPPORT & SEEK CLARIFICATION

49. In section 2, page 3, leave out lines 29 and 30 and insert— <"(a) seek to make reasonable arrangements for the child to express the child's views in a manner that the child has indicated the child prefers, and>

We support this amendment, in line with our response to amendment 47.

As we stated in our response to amendment 47, we note that this Amendment pre-empts Amendment 2, lodged by Ash Denham. We have concerns that removing lines 35 and 36 from the Bill replaces a child being *given* an opportunity with a duty on courts to *seek* to make reasonable arrangements. This section must not simply be about asking children their views, but also about taking them. To ensure that a child's participation entitlements under the UNCRC are met, it must be clarified that there is also a duty on the court for the child to *express* their views. We are therefore not comfortable with lines 35 and 36 being removed until this is clarified.

Amendments 7-8, lodged by Ash Denham: WE SUPPORT

7.In section 2, page 3, line 34, at end insert— <(4C) The child is to be presumed to be capable of forming a view unless the contrary is shown.",>

8. In section 2, page 3, line 35, leave out <"(4B)"> and insert <"(4C)">

Please see our comments on Amendment 1. We strongly support this amendment. Ensuring that children and young people are presumed capable of forming a view offers further protection for their right to participate, and makes the Bill compliant with the UNCRC in this regard.

Amendment 50, lodged by James Kelly: WE SUPPORT

50. In section 2, page 4, leave out lines 3 and 4 and insert— <"(a) seek to make reasonable arrangements for the child to express the child's views in a manner that the child has indicated child prefers, and>

We support these amendments, in line with our response to amendment 47, above.

Amendment 9, lodged by Ash Denham: WE SUPPORT

9. In section 2, page 4, line 10, at end insert— <(5B) The child is to be presumed to be capable of forming a view unless the contrary is shown.",>

Please see our comments on Amendment 1. We strongly support this amendment. Ensuring that children and young people are presumed capable of forming a view offers further

protection for their right to participate, and makes the Bill compliant with the UNCRC in this regard.

Amendment 51, lodged by James Kelly: WE SUPPORT

51. In section 3, page 4, leave out lines 16 and 17 and insert— <"(a) seek to make reasonable arrangements for the child to express the child's views in a manner that the child has indicated the child prefers, and>

We support these amendments, in line with our response to amendment 47.

Amendment 10, lodged by Ash Denham: WE SUPPORT

10. In section 3, page 4, line 23, at end insert— <(4A) The child is to be presumed to be capable of forming a view unless the contrary is shown.".>

Please see our comments on Amendment 1. We strongly support this amendment. Ensuring that children and young people are presumed capable of forming a view offers further protection for their right to participate, and makes the Bill compliant with the UNCRC in this regard.

Amendment 38, lodged by Ash Denham: WE SUPPORT

38. In section 16, page 20, line 6, after <failure> insert <, and (b) in so doing— (i) give the child concerned an opportunity to express the child's views in a manner suitable to the child, and (ii) have regard to any views expressed by the child, taking into account the child's age and maturity. (2A) But the court is not required to comply with subsection (2)(b) if satisfied that— (a) the child is not capable of forming a view, or (b) the location of the child is not known. (2B) The child is to be presumed to be capable of forming a view unless the contrary is shown.>

We strongly support this amendment. Children and young people we work alongside who have experienced domestic abuse tell us it is important that they are given an opportunity to express their views on matters of non-compliance with orders.[3] Investigations into non-compliance routinely fail to hear from the children and young people at the centre of orders, and in order to uphold their participation rights, their views must be sought and given regard to.

Matters to be considered in making an order under section 11 of the Children (Scotland) Act 1995

Amendments 60-62, lodged by Rhoda Grant: WE SUPPORT

60. In section 1, page 1, line 24, leave out <(7C)> and insert <(7D)>

61. In section 1, page 2, line 12, after first <abuse,> insert <any continuing abuse>

62. In section 1, page 2, line 21, at end insert— <(e) the effect of the fact that two or more persons would be required to cooperate with one another with regard to matters affecting the child.>

[3] YELLO! (Young Expert Group) Written Evidence to the Justice Committee for consideration at Stage One of the Children (Scotland) Bill https://womensaid.scot/wp-content/uploads/2019/12/Yello-Response-to-Children-Scotland-Bill-call-for-views.pdf

We strongly support these amendments (and amendment 63, below). They do not introduce new factors into the Bill, but restate an existing, important legislative provision of protection for survivors of domestic abuse, which was introduced to the Children (Scotland) Act 1995 by the Family Law (Scotland) Act 2006 (current Section 11(7A)-(7E)).

When the 2006 Act was introduced, it was Parliament's intention that Section 11(7A)-(7E) was read together and in sequence in order to best inform decisions made in relation to children who had experienced domestic abuse and contact arrangements.

This was particularly relevant to the impact on survivors of domestic abuse of forcing them to engage with perpetrators around contact, given the evidence on the extent of the perpetration of domestic abuse post-separation and how child contact decisions facilitated the continuation of such abuse. Section 11(7D), the duty to consider the effect of 'parental co-operation' on the welfare of the child, was created as part of this suite of amendments specifically to address this situation. Therefore, the references to the court's duty to consider domestic abuse and the impact of this, as set out in Section 11(7A)-(7C) of the 1995 Act are inextricably linked to 11(7D), and these subsections must not be split and separated, as the Bill proposes.

The amendments seek to reinstate the duty on the courts to consider the effect of 'parental cooperation' when making an order back to its original place in the list of considerations that courts must make in regards to the effect of abuse on a child. Reuniting this consideration of 'parental cooperation' with wider consideration of the effect of abuse on the child's welfare ensures that protection for survivors of domestic abuse is not unintentionally diluted by the splitting of this section. It also honours Parliament's original intention in introducing these amendments in the Family Law (Scotland) Act 2006 as a list that must be considered in its entirety.

Amendments 45-46, lodged by Jeremy Balfour: WE DO NOT SUPPORT

45. *In section 1, page 2, line 21, at end insert— <"(3A) In deciding whether or not to make an order under section 11(1), the court must take into account the child's right to maintain a relationship with the child's grandparents.".*
46. *In section 1, page 2, line 31, at end insert— <"( ) the meaning of "grandparents" for the purposes of subsection (3A) is to be defined by the Scottish Ministers by regulations subject to the affirmative procedure.>*

Our organisations recognise the important and positive role that grandparents can play in children's lives. The Preamble of the UNCRC[4] is clear that children should "grow up in a family environment, in an atmosphere of happiness, love and understanding." We have seen first-hand the crucial role that grandparents can have in helping children feel loved, safe and secure. However, we have significant reservations about the practical application and interpretation of these amendments in terms of children's rights and potential unintended consequences relating to children's safety.

Our understanding is that this amendment introduces a presumption in favour of a child's contact with grandparents when family relationships break down. In doing so, we believe that it undermines and detracts from children's best interests. Presumptions based on what may be beneficial in the majority of cases are often unhelpful, inapplicable and may be risky in the specific context of the minority of cases which result in litigation.[5]

[4] https://cypcs.org.uk/rights/uncrc/full-uncrc/
[5] Herring, J "The Welfare Principle and the Children Act: Presumably it's about Welfare?" (2014) 36 Journal of Social Welfare and Family Law 14

While this amendment is framed as a child's right, it is unclear under our current legal framework how children might be able to claim this right. Children are rarely parties to disputes about contact. We are concerned that this amendment will legislate for a right that is claimed by grandparents over children rather than children expanding access to their own rights. The UN Committee on the Rights of the Child's General Comment 14[6] establishes that preservation of the family environment extends well beyond the role of grandparents to include other adults, including aunts, uncles, friends, and the child's wider environment. Legislating for contact with only one of these groups undermines the wide range of factors that must be considered by the courts on a case-by-case basis, informed by the child's views, on whether an order for contact would be in their best interests.

Additionally, we are deeply concerned about the practical implementation of this arrangement and the prospect of courts enforcing contact arrangements that may not be safe. Specifically, it leaves open the possibility that children could be exposed to further levels of conflict and litigation that is contrary to their best interests. Research does not support claims made about the benefits of grandparent involvement to children in cases that involve conflict and litigation.[7]

Non- abusing parents and children we work alongside in services have shared examples of perpetrators of domestic abuse using family members to continue to exercise abuse and coercive control post-separation through court processes and contact arrangements. This includes examples of grandparents going against court orders to facilitate contact between children and perpetrators, or asking children to share information about their mum or their new address. Indeed, we know from our services that coercive control and abuse often escalates and intensifies post- separation. This can be very distressing for the children and young people in question, as well as directly impacting on their safety and that of the non- abusing parent.

We are in no doubt that this amendment has good intentions. However, this is a complex issue that cannot be easily resolved by legislation. All decisions made about children must be decided on a case-by-case basis, taking into full account the child's views and their best interests. For these reasons, we do not support this amendment.

Amendment 63, lodged by Rhoda Grant: WE SUPPORT

63. In section 1, page 2, line 31, insert at end— <( ) For the purposes of subsection (3)(e) (but, for the avoidance of doubt, not for the purposes of any other provision in this section), "person" means— (a) a person having parental responsibilities or parental rights in respect of the child or (b) a person who has a relationship with a child with the character of a parent but does not have parental responsibilities or parental rights in respect of the child.>

We strongly support this amendment for the reasons outlined in our comments on amendments 60-62.

Amendment 79, lodged by Alex Cole-Hamilton: WE DO NOT SUPPORT

79. After section 10, insert— <Promotion of contact between children and lineal ancestors (1) The Children (Scotland) Act 1995 is modified as follows. (2) After section 11ZA (paramountcy of child's welfare, and the non-intervention presumption) (which is inserted by section 1(4) of this Act), insert— "11ZAB The child's right to contact with lineal

[6] https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf
[7] Kaganas F and Piper C (2020) Grandparent contact: another presumption?, Journal of Social Welfare and Family Law, 42:2, 176-203, DOI: 10.1080/09649069.2020.1751932

ancestors (1) In deciding whether or not to make an order under section 11ZA and what order (if any) to make, the court must have regard to the child's right to maintain contact with the child's lineal ancestors. (2) For the avoidance of doubt, the child's right to maintain contact with the child's lineal ancestors is independent of any other familial relationship.".>

As outlined in our response to amendments 45 & 46, promoting or including presumptions of a child's contact with specific adults undermines a child rights-based approach. For this reason, we do not support this amendment.

Amendments 81-82, lodged by Alex Cole-Hamilton: WE DO NOT SUPPORT

81. *In section 12, page 17, line 32, at end insert— <( ) the involvement of the child's lineal ancestors in the child's life as an important familial relationship including in situations where the child is not able to maintain contact with the child's lineal ancestors,>*

82. *In section 12, page 17, line 33, at end insert— <( ) the child's right to maintain personal relations with the child's lineal ancestors.".>*

As outlined in our response to amendments 45 & 46, promoting or including presumptions of a child's contact with specific adults undermines a child rights-based approach. For this reason, we do not support this amendment.

Amendment 83, lodged by Liam McArthur: WE DO NOT SUPPORT

83. *In section 12, page 17, line 33, at end insert— <( ) in the absence of an agreement on the pattern of residence of a child and at the request of at least one of the child's parents, the possibility of ordering that the child should reside on an approximately equal basis with each of the child's parents.".>*

We strongly oppose this amendment. We believe that a presumption of shared residency is one in favour of adults, not children, and that it undermines the rights of the child, prioritising the wishes of a parent over the views of the child.

This amendment undermines and detracts from children's best interests. Any assessment about children's care arrangements must be done on a case-by-case basis. For some children it is safe and appropriate for their residency to be shared equally between their parents. For others this is wholly unsafe and inappropriate.

We remind the Committee of Paragraph 67 of the UN Committee on the Rights of the Child's General Comment 14 which states "…shared parental responsibilities are generally in the child's best interests. However, in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents."[8]

Answers to questions on what is in a child's best interests are found through careful consideration of a child's particular circumstances, including by listening to their views and experiences. Decisions must not be driven by a desire to reach an outcome based on time. Presumptions based on what might be beneficial in some cases is unhelpful and not applicable to the specific context of the minority of cases which result in litigation. Research shows court ordered shared parenting can have detrimental outcomes for children when there

[8] https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

are high levels of conflict between parents – and that these are often the families whose cases require to be resolved in court.[9]

It is important to be clear that the majority of cases which make it to courts include reports of domestic abuse[10], and extensive research shows that child contact is used by perpetrators as a means of furthering and intensifying abuse.[11] This amendment could effectively place the burden of proof on survivors of abuse to evidence why contact is unsafe, which is directly contradictory to the Bill's policy objective of further protecting survivors of domestic abuse. In cases of domestic abuse, a presumption of shared residency is likely to be actively detrimental to the welfare of the child; the paramount consideration of the Children (Scotland) Act 1995.

Disclosure of information: We urge MSPs to support **Amendment 64**

Amendment 64, lodged by Liam McArthur and supported by John Finnie – WE SUPPORT

64. After section 1 insert— <Disclosure of information (1) The Children (Scotland) Act 1995 is modified as follows. (2) After section 11ZB (which is inserted by section 1(4) of this Act) insert— "11ZC Disclosure of information: consideration of the child's welfare and best interests (1) This section applies in proceedings for an order under section 11(1) where a request has been received by the court for the disclosure of any information relating to the child, including the disclosure of a child welfare report. (2) In deciding whether to allow a disclosure of information under subsection (1)— (a) the court must, as its paramount consideration have regard to the welfare of the child concerned, (b) the information must be disclosed only where the court considers that — (i) the likely benefit to the welfare of the child arising in consequence of disclosing the information outweighs any likely adverse effect on any other person arising from disclosure, and (ii) disclosure is in the child's best interests, and (c) the court, taking account of the child's age and maturity and proportionate to the child's best interests, shall as far as practicable— (i) give the child an opportunity to indicate whether the child wishes to express views about disclosure of the information in a manner suitable to the child, (ii) where the child wishes to express views, ensure that the child is given an opportunity to express those views in a manner suitable to the child, and (iii) have regard to any views expressed by the child."

Under Article 8 of the European Convention on Human Rights (ECHR) children and young people have rights to privacy. We believe children who access support and recovery services and share their views should be able to share information about their experiences safe in the knowledge that this personal information will not be shared with the court without them being informed or when it is proportionate, relevant or in their best interests. This is particularly important to ensure that children's personal information is not shared with a person who may have perpetrated abuse against them without it being in their best interests or without it being discussed with the child.

For these reasons, we welcome the recognition that children's rights to privacy are being breached in family courts and the intention of both this amendment and amendment 33 (lodged by Ash Denham) to address this. We urge members to support this amendment for the following reasons:

[9] Newis, P (2011) 'Shared Care in Separated Families: Building on what Works.' London: Gingerbread; Fehlberg B., Smyth B. et al (2011). 'Family Policy Briefing 7: Caring for children after parental separation: would legislation for shared parenting time help children?' University of Oxford, Department of Social Policy & Intervention; Trinder, L. 'Shared residence: A review of recent research evidence', Child & Family Quarterly, Vol 22, No. 4, pp. 475-498.
[10] 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 https://bit.ly/3e4kthK
[11] Scottish Women's Aid (2018) Briefing: Domestic abuse and child contact https://bit.ly/2YNdmE6

- It offers further protection for children and young people by taking account of the child's 'best interests' as part of considerations about their information being disclosed. This goes further than amendment 33's consideration of the child's 'welfare'. Our view is that clear reference to a child's 'best interests' better reflects the protections laid out under the UNCRC, ensuring the Bill meets its key objective of compliancy with the UNCRC (in advance of the upcoming incorporation of the UNCRC into Scots Law).
- It also upholds the welfare of the child as *the paramount* interest, reflecting language elsewhere in the Bill and upholds children's participation rights by introducing a duty for the courts to seek, and have regard to, the child's views on the information being disclosed.

This amendment will not prevent information from being shared where it is proportionate and relevant to the court. Indeed, our organisations strongly believe that proportionate and relevant information-sharing is in a child's best interests to keep them safe and ensure the courts are equipped with all the details at their disposal to make informed decisions. **The amendment does not remove the court's discretion on whether to disclose information to a parent or carer but rather stipulates what must be considered when deciding whether to allow disclosure.**

Children 1st has written in detail about the need for further protections in this area in written evidence submitted to the Committee (Pg 8).[12] Children and young people have been clear: to feel safe enough to give their views, they need to know that their privacy is being respected.[13] This is particularly important when children have experienced domestic abuse. This amendment offers protection to children: those who are most vulnerable in family courts and who often feel marginalised, insignificant and ignored when decisions are made about them. We strongly urge members to support it.

Amendment 33, lodged by Ash Denham, & amendment 33A, lodged by Rona Mackay

33. After section 13, insert— <Duty to consider child welfare when allowing access to information (1) The Children (Scotland) Act 1995 is modified as follows. (2) After section 11D (which is inserted by section 13(2) of this Act) insert— "11DA Duty to consider child welfare when allowing access to information Where the court— (a) is considering making an order under section 11(1), and (b) has to decide whether a person should have access to anything in which information relating to a child is recorded, in making that decision, it must regard the welfare of that child as a primary consideration.".>

33A. As an amendment to amendment 33, line 11, after <consideration> insert <and must, where the court considers it appropriate, seeks the consent of the child to the person having access to the information>

As outlined above in our comments with respect to amendment 64 and in our oral and written evidence we welcome the Scottish Government and the Scottish Parliament's consideration of the importance of protecting the rights of children when their information is being shared with the courts.

We are grateful to the Scottish Government for acknowledging the issues we, and young people with lived experience of domestic abuse and court-ordered contact, have raised in regards to confidentiality of children's information. We also recognise the helpful additional amendment regarding the consent of children and young people in disclosing confidential

[12] https://www.children1st.org.uk/media/7564/children-1st-response-to-children-scotland-bill-141119.pdf
[13] YELLO! (Young Expert Group) Written Evidence to the Justice Committee for consideration at Stage One of the Children (Scotland) Bill https://womensaid.scot/wp-content/uploads/2019/12/Yello-Response-to-Children-Scotland-Bill-call-for-views.pdf

information lodged by Rona Mackay, which we believe would strengthen this amendment further. However, as outlined above, we believe that amendment 64 offers additional protections to children and is therefore stronger than amendment 33. This is specifically because amendment 64:

- Includes specific reference to the 'best interests' of the child, in line with the UNCRC, the Scottish Government's initial consultation paper on this issue and section 11E of the Bill (regarding Explanation of Court decisions to the child), which uses the phrase "best interests of the child" at subsection 3(b).
- Ensures that children's views are taken into account when decisions are made about sharing their information.

We therefore strongly urge members to support amendment 64.

Vulnerable witnesses: relevant offences and special measures

Amendments 11-14, lodged by Ash Denham – WE SUPPORT

11. *In section 4, page 6, line 6, at end insert— <( ) an offence under section 1(1) of the Prohibition of Female Genital Mutilation (Scotland) Act 2005, ( ) an offence under section 3(1) of that Act,>*
12. *In section 4, page 6, line 6, at end insert— <( ) an offence under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010,>*
13. *In section 4, page 6, line 6, at end insert— <( ) an offence under section 122(1) of the Anti-social Behaviour, Crime and Policing Act 2014, ( ) an offence under section 122(3) of that Act,>*
14. *In section 4, page 6, line 25, at end insert— <( ) In section 12 (orders authorising the use of special measures for vulnerable witnesses), after subsection (3), insert— "(3A) The court may not make an order under subsection (1)(b) above in relevant proceedings if it is required by section 22C or 22D to consider the special measure described by section 22B to be the most appropriate for the purpose of taking the child witness's evidence (or one of them if the court considers other special measures to be appropriate too).".>*

We support amendments 11, 12, 13 and 14 as they strengthen protections laid out under Section 4. However, we urge further consideration by members of issues listed below, which must be addressed in order to ensure that the Bill meets its policy objective of further protection for survivors of domestic abuse.

Under section 4, unlike in criminal cases, a deemed vulnerable witness in either s.11 court proceedings or Children's Hearings Court Cases (CHCCs) will have no automatic right to use the existing standard special measures under the 2004 Act, such as the use of a screen or supporter. These measures will have to be applied for in the usual way or can be granted by the court if no application is made. This does not provide certainty or reassurance to adult survivors of domestic abuse, and it is inequitable that survivors who had automatic access to standard special measures in criminal cases to support them to give evidence will not have the same protection against the same perpetrator in civil cases. Indeed, it is in civil cases where the procedure can be more likely to facilitate continuation of the abuse and further traumatise survivors through the experience of having to directly engage with, and give evidence in the presence of, a perpetrator.

Vulnerable witnesses in s.11 cases who do not have a relevant protective order, have not reported the abuse to the police (an issue referred to in para 58 of the Policy Memo), or where

the COPFS is not prosecuting, will not be deemed vulnerable witnesses. This is deeply concerning given how few women and children report domestic abuse to police and other services. The choice not to disclose abuse is usually a complex weighing of risk and benefit, including fear of retaliation, victim blaming, and other common repercussions. Protecting survivors will improve evidence and thereby improve the court's ability to partner with non-offending parents to protect children.

Tied into sections 4-6 is section 7, covering non-evidential hearings such as Child Welfare Hearings (CWH). Vulnerable parties under this section have not been afforded "deemed vulnerable witness" status. This is inequitable since vulnerable witnesses are vulnerable from the beginning of the proceedings, particularly during the lengthy and more informal CWH process. Given that CWH often precede formal proofs, it is unacceptable that a survivor of domestic abuse would be protected in a proof but not in a CWH Hearing where they are obliged to be in closer proximity to the abuser.

We urge consideration of the above points at Stage 3.

Child welfare reporters: qualifications and experience

Amendment 65, lodged by Liam McArthur

65. *In section 8, page 15, line 9, at end insert— <( ) Only a social worker registered with the Scottish Social Services Council may be appointed as a child welfare reporter.>*

We think that this amendment could be more appropriately considered when guidance and regulations are being developed relating to Child Welfare Reporters. We understand that there will be extensive consideration of training requirements and national standards for Child Welfare Reporters and warmly welcome a focus on training relating to children's rights, child development, domestic abuse and ways to help children express their views in a way that makes them feel safe and comfortable.

Children 1st and Scottish Women's Aid have written extensively about the need to carefully consider and fully resource training of Child Welfare Reporters in our joint response to the Financial Memorandum.[14]

Amendment 66, lodged by Neil Findlay: WE DO NOT SUPPORT

66. *In section 8, page 15, line 21, at end insert— <( ) For the purposes of subsection (3)(a), persons may be included in the register where they have obtained the necessary professional qualifications if they know the child to which the child welfare report relates in a professional capacity.>*

While we are supportive of seeking suitable professionals for the role of Child Welfare Reporters beyond the legal profession, we do not believe this amendment is a necessary or helpful way of achieving this. We do not believe that professional qualifications are the only factor that will need to be considered when exploring who is suitable to be a Child Welfare Reporter, and we understand that the Scottish Government has committed to further work on this issue regarding regulation set out under secondary legislation.

[14] https://www.parliament.scot/S5_Finance/General%20Documents/Scottish_women_Aid_Children_.pdf

Amendment 67, lodged by Neil Findlay: WE URGE FURTHER CONSIDERATION OF THE NEED FOR A SYSTEM OF REDRESS

67. *In section 8, page 15, line 21, at end insert— <( ) Before making, revising or revoking regulations under subsection (3), the Scottish Ministers must consult persons with lived experience of— (a) domestic abuse, (b) court-ordered contact.>*

Our organisations are supportive of meaningful, rights- based engagement and participation with those with lived experience of domestic abuse and court-ordered contact in designing and delivering policy, legislation and practice. It has been clear throughout the passage of this Bill the impact that those with lived experience have had on shaping new provisions to improve the civil justice system for others. We strongly support the continued involvement of survivors of domestic abuse and those with experience of contact centres and the civil justice system in the ongoing development, implementation and reviewing of provisions made in this Bill.

We welcome the intention of this amendment, and Amendment 73 regarding consulting on regulations relating to Child Welfare Reporters and contact centres. We also acknowledge that full public consultation is planned for relevant secondary legislation in both of these areas.

Family justice must be accountable to children and their families, and we urge members to look beyond specific opportunities for consultation to the wider framework which upholds accountability. We believe an immediate way to ensure this is to introduce a system of complaints and redress for children. This is set out in General Comment 5[15] and is missing from the Bill's current drafting. This must be addressed at Stage 3 if the Bill is to be compliant with the UNCRC.[16]

Regulation of contact centres

Amendment 52, lodged by James Kelly: WE SUPPORT

52. *In section 9, page 15, line 31, at end insert— <"(14A) Where any person, in connection with proceedings to which this section relates, makes a referral to a contact centre or otherwise requires contact to take place at a contact centre in Scotland, that contact must take place at a contact centre operated by a regulated contact service provider.>*

We are in support of this amendment, in line with our comments above about ensuring that contact arrangements are safe.

Amendment 70, lodged by Neil Findlay

70. *In section 9, page 16, line 4, at end insert— <(aa)make provision for staff referred to in paragraph (a) to be trained and to hold recognised professional qualifications in relation to issues concerning children,>*

We are in support of this in principle but acknowledge that this will be addressed in the regulation of contact centres to be set out in secondary legislation.

[15]UN Committee on the Rights of the Child, General Comment 5 https://bit.ly/37QlbNu
[16] See Morrison and Tisdall's written evidence
https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS519CH26_Morrison_Friskney_Tisdall.pdf

Amendment 19, lodged by Ash Denham: WE SUPPORT

19. *In section 9, page 16, line 7, at end insert— <(ba) make provision for minimum standards to be met by contact centres (including standards in respect of accommodation), (bb) make provision for the registration of contact centres that meet those minimum standards and, for those that do not, the refusal of registration or removal from the register (including appeal rights), (bc) make provision about the conditions on which a regulated contact service provider may, in accordance with the regulations, provide a contact service at a place that is not registered as a contact centre (including conditions about the minimum standards for accommodation at a place if it is to be used for that purpose),>*

As raised in our oral and written evidence, we welcome the measures to regulate and introduce minimum standards for contact centres. It is important to remind the Committee that our oral and written evidence and the evidence of young people who have experienced domestic abuse and the family courts[17] was clear that contact centres do not feel like safe or enjoyable spaces for many children and young people, particularly those who have experienced domestic abuse. We wish to again highlight that it is **contact that must be safe, rather than focusing on the contact centre.**

We acknowledge the challenges presented to contact centres operating in rural areas and acknowledge that there may be resulting situations where it may be in the child's best interests to facilitate contact outwith a contact centre. However, while not all contact is supervised, much of the contact that happens in contact centres is supervised, often due to considerations of domestic abuse or other factors which may make a child unsafe. In light of this, we urge careful consideration of which contact could be deemed safe enough to happen at a place that is not registered as a contact centre.

Amendment 71, lodged by Bob Doris

71. *In section 9, page 16, line 12, at end insert— <(2A) Minimum standards under subsection (2)(a) must make provision for the relevant adjustments necessary for a disabled child to access a contact centre and use its facilities including toilets. (2B) In subsection (2A)— "relevant adjustments" means, in relation to a disabled child, alterations or additions which are likely to avoid a substantial disadvantage to which the disabled child is put in using the contact centre in comparison with children who are not disabled, and "disabled child" means a child with a disability within the meaning of section 6 of the Equality Act 2010.>*

We are in support of this in principle, but acknowledge that this will be addressed in the regulation of contact centres to be set out in secondary legislation and guidance.

Amendment 72, lodged by Neil Findlay: WE SUPPORT

[17] Ibid.

72. *In section 9, page 16, line 15, at end insert— <( ) undertaking risk assessments of contact centres to be carried out by staff trained in undertaking such assessments,>*

We are in support of this amendment and of the Justice Committee's recommendation regarding the piloting and evaluation of the use of domestic abuse risk assessments by the courts when making decisions about contact. We agree that risk assessments must be carried out by a professional who understands the dynamics of domestic abuse, coercive control, and the experiences of children and young people. Current domestic abuse risk assessment practice in Scotland is not coercive control-competent, nor is it child-centred. We would encourage development of robust risk assessment processes in collaboration with specialist domestic abuse services and Scottish Women's Aid in order to offer further protection for non-abusing parents, children and young people experiencing domestic abuse and coercive control.

Amendment 73, lodged by Neil Findlay - WE URGE FURTHER CONSIDERATION OF THE NEED FOR A SYSTEM OF REDRESS

73. *In section 9, page 16, line 20, at end insert— <( ) The Scottish Ministers must consult persons with lived experience of— (a) domestic abuse, and (b) court-ordered contact, before making, implementing or reviewing regulations under subsection (1).> -*

As outlined in our response to amendment 67, we are always supportive of meaningful engagement and participation of those with lived experience of domestic abuse and court-ordered contact in the development, implementation and reviewing of provisions made in this Bill regarding the regulation of Child Welfare Reporters and contact centres. We also acknowledge that full public consultation is planned for relevant secondary legislation in both of these areas.

Family justice must be accountable to children and their families, and we urge members to look beyond specific opportunities for consultation to the wider framework which upholds accountability. We believe an immediate way to ensure this is to introduce a system of complaints and redress for children. This is set out in General Comment 5[18] and is missing from the Bill's current drafting. This must be addressed at Stage 3 if the Bill is to be compliant with the UNCRC[19].

Amendment 28, lodged by Ash Denham: WE SUPPORT

28. *In section 9, page 16, line 31, at end insert— <"regulated contact service" means a contact service that— (a) is provided by a regulated contact service provider, and (b) is either— (i) provided at a place that is registered as a contact centre in accordance with regulations under subsection (1), or (ii) provided in circumstances in which the provider may, in accordance with regulations under subsection (1), provide the service at a place that is not registered as a contact centre,> 29 In section 9, page 16, line 33, leave out <made>*

Please see our comments on amendment 19.

[18]UN Committee on the Rights of the Child, General Comment 5 https://bit.ly/37QlbNu
[19] See Morrison and Tisdall's written evidence
https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS519CH26_Morrison_Friskney_Tisdall.pdf

Renaming residence and contact orders

Amendment 75, lodged by Fulton MacGregor: WE DO NOT SUPPORT

75. *After section 9, insert— <Renaming residence and contact orders (1) The Children (Scotland) Act 1995 is modified as follows. (2) In section 11 (court orders relating to parental responsibilities etc.)— (a) in subsection (2)(c), the words "(any such order being known as a "residence order")" are repealed, (b) in subsection (2)(d), the words "(any such order being known as a "contact order")" are repealed, (c) in subsection (2)(e), the words "(any such order being known as a "residence order")" are repealed, (d) in subsection (3)(aa), for "contact" substitute "section 11", (e) in subsection (12), the word "residence" is repealed.>*

Our organisations have often shared concerns about language and terminology used by the courts when speaking about children and the relationships that they have with the important people in their lives. While we recognise the limitations of the existing terminology, this amendment does not appear to offer a viable alternative. We believe removal of these terms without a valid replacement could result in unnecessary confusion, and do not encourage support of it until further consultation has been undertaken on more appropriate terminology.

Promotion of contact between child and others

Amendment 54, lodged by Ash Denham: WE SUPPORT

54. *In section 10, page 17, line 3, leave out <, having regard to their duty to the child under paragraph (a), both practicable and appropriate> and insert <appropriate having regard to their duty to the child under paragraph (a)>*

We support the efforts of our colleagues across the sector working hard to recognise the rights of siblings to maintain meaningful relationships with each other, where safe and appropriate.[20] We encourage Committee members to consider their briefings and submissions with respect to this amendment and others relating to sibling relationships. We support strengthening section 10 of the Bill through this amendment and recognise the important oral evidence provided by Who Cares? Scotland on this issue. In order to ensure full and effective implementation we again refer to the need for adequate resources to realise children's rights.

Amendment 76, lodged by Alex Cole-Hamilton: WE DO NOT SUPPORT

76. *In section 10, page 17, line 6, at end insert— <( ) the child's lineal ancestors,>*

We do not support this amendment, for the same reasons as outlined in our response to amendments 45 & 46. This section of the Bill is very clearly addressing the important concerns highlighted by our colleagues across the sector who have shared the experiences of children and young people affected by contact arrangements that do not take into account their right to maintain relationships with their siblings if they wish to. We think it is important that this section of the Bill focuses on addressing that with urgency rather than introducing other areas.

[20] https://www.standupforsiblings.co.uk/

Amendment 77, lodged by Rona Mackay: WE SUPPORT

77. In section 10, page 17, line 8, leave out <of the half-blood or of the whole-blood> and insert <biological or non-biological>

We support this change in language, which better reflects how children and young people view their familial relationships.

Amendment 78, lodged by Liam McArthur: WE DO NOT SUPPORT

78. In section 10, page 17, line 12, at end insert <, and ( ) a former foster carer of the child.".>

As outlined in our response to amendments 45 & 46, promoting or including presumptions of a child's contact with specific adults undermines a child rights-based approach. For this reason, we do not support this amendment.

Amendment 31, lodged by Ash Denham

31. After section 10, insert— <Duty to consider contact when making etc. compulsory supervision order (1) The Children's Hearings (Scotland) Act 2011 is modified as follows. (2) In section 29A (duty to consider including contact direction), after subsection (2), insert—

"(3) In considering whether to include a measure of the type mentioned in section 83(2)(g), the children's hearing or, as the case may be, the sheriff must in particular consider the inclusion of a measure regulating contact between the child and— (a) any relevant person in relation to the child with whom the child does not reside, and (b) any sibling of the child with whom the child does not reside. (4) In subsection (3), "sibling" includes— (a) a sibling by virtue of adoption, marriage or civil partnership and whether of the half-blood or of the whole-blood, (b) any other person with whom the child has resided and with whom the child has an ongoing relationship with the character of a relationship between siblings.".>

We appreciate and acknowledge the intention behind this amendment. As stated above in our response to amendment 54 we recognise the need highlighted by our colleagues to uphold children's rights to maintain relationships with their siblings, where safe and appropriate.

However, we have significant concerns about point (3)(a) ("any relevant person in relation to the child with whom the child does not reside") in terms of potential unintended consequences of the inclusion of a measure of contact between the child and a relevant person, for the same reasons that we have highlighted concerns elsewhere in this briefing in regards to contact with specific adults. We are keen to work alongside the Scottish Government to address this so that this important amendment for siblings can be safely introduced into the Bill.

In line with our support for amendment 77, we also recommend changing the language of 'half-blood' and 'whole-blood' to 'non-biological' and 'biological' respectively.

Finally, we remind the Committee of the Scottish Government's commitment to the implementation of the Independent Care Review and the need to ensure this legislation links directly to that. Where safe and appropriate children should be cared for and supported at home and particular attention should be paid to providing support and help at an early stage.

Alternative methods of dispute resolution

Amendment 57 and 58, lodged by Margaret Mitchell: WE DO NOT SUPPORT

After section 1, insert— <Alternative methods of dispute resolution (1) The Children (Scotland) Act 1995 is modified as follows. (2) After section 11ZB (which is inserted by section 1(4) of this Act), insert—

"11ZC Alternative methods of dispute resolution

(1) The Scottish Ministers must by regulations make provision for legal aid to be available to the parties in dispute to enable the parties to participate in alternative methods of dispute resolution for the time being set out in subsection (3). (2) Regulations under subsection (1) must make provision to secure that— (a) legal aid is available for the purpose of undertaking alternative methods of dispute resolution, and (b) the applicant is enabled to secure appropriate legal advice to engage in alternative methods of dispute resolution— (i) before, or instead of, commencing court proceedings, or (ii) as directed by the court. (3) A draft of regulations under subsection (1) must be laid before the Parliament no later than 6 months after Royal Assent. (4) The alternative methods of dispute resolution under this section to which legal aid is to be available by virtue of this section are to include— (a) mediation (b) arbitration, (c) collaborative law, (d) family group conferencing. (5) The Scottish Ministers may by regulations modify the list of alternative methods of dispute resolution for the time being set out in subsection (3). (6) Regulations under this section are subject to the affirmative procedure. (7) In this section— "alternative methods of dispute resolution" means methods by which the parties involved in a family dispute may resolve that dispute without recourse to legal action through the court process, "legal aid" has the same meaning as "civil legal aid" in the Legal Aid (Scotland) Act 1986, "advice and assistance" has the same meaning as in the Legal Aid (Scotland) Act 1986."

58. After section 11, insert— <Mandatory mediation information meeting (1) The Children (Scotland) Act 1995 is modified as follows. (2) After section 11ZC (which is inserted by section (Alternative methods of dispute resolution) of this Act), insert— "11ZD Mandatory Mediation information meeting (1) The Scottish Ministers must, by regulations, make provision for a pilot scheme for the purpose set out in subsection (2).

(2) The purpose is to enable the court, before an order is made under section 11, to require the parties in dispute to attend a mediation information meeting on the options available to resolve the dispute, except where the dispute involves domestic abuse. (3) For the avoidance of doubt, subsection (2) does not apply where a dispute involves domestic abuse. (4) The regulations under subsection (1) may provide for judicial discretion to allow the parties in dispute not attend a mediation information meeting under subsection (2) where reasonable mitigating factors have been given. (5) A draft of regulations under subsection (1) must be laid before the Parliament no later than 6 months after Royal Assent. (6) Regulations under subsection (1) are subject to the affirmative procedure.".>

Our organisations are clear that courts are a last resort for resolving family disputes. We do not believe it is often in children's best interests to discuss the relationships that are important to them through lengthy and complex court processes. In the longer term, research demonstrates that more radical reform to family law is needed that shifts the legal conceptualisation of contested child contact from an adult dispute to one where concerns about contact are about and inclusive of children, realising all their human rights—including their participation rights. [21]

[21] Morrison, F, Tisdall, E. K. M., Warburton, J., Reid, A, Jones, F (2020) Children's Participation in Family Actions – Probing Compliance with Children's Rights Research Report https://bit.ly/2WMWqhl;

As a result of the different services the organisations offer, Children 1st and Scottish Women's Aid have particular points they wish to express in response to these amendments.

Children 1st, in line with their written and oral evidence and the recommendations of the Independent Care Review believe that families should be given early help and support before these issues reach the courts. In particular they highlight the value of Family Group Decision Making (FGDM) (also known as family group conferencing) which the organisation pioneered in Scotland and offers, in partnership with families, as an important option to help resolve conflict and help families find solutions to their own problems, where it is safe, appropriate and possible to do so.[22] They therefore appreciate the intention behind this amendment and would be keen to explore further options at stage three.

Scottish Women's Aid are clear that alternative methods of dispute resolution (ADR) are not appropriate for cases involving domestic abuse. Their view is that ADR approaches assume equality in power between its participants, an equality that does not exist in cases of domestic abuse. In this context, therefore, Scottish Women's Aid believe that in recognition of the power dynamic imbalance and risk to children, neither pre- nor post- separation mediation in family matters where domestic abuse is an issue is appropriate. Scottish Women's Aid have gone into further detail on this matter elsewhere.[23] For cases not involving domestic abuse, they welcome consideration of alternative methods of dispute resolution (ADR) in the context of this Bill with the reminder that most families living with domestic abuse do not disclose to police, courts, or social work.

While **both organisations** are strongly supportive of increasing access to alternative methods of high- quality, evidence-informed dispute resolution (ADR) in cases where it is safe and appropriate to do so, including access to Family Group Decision Making, we are concerned about the practical implementation of these amendments in the way that they are currently drafted. Specifically:

- We are concerned that this amendment distracts from children's best interests and we note that there is no mention of children's participation rights or involvement in the process this amendment or subsequent ones set out. In its current drafting we believe these amendments would not protect or safeguard children's rights.
- We do not believe that it would be helpful to have a mandatory requirement for ADR as it could be detrimental to the aim it seeks to achieve. This is because ADR (such as FGDM) often works because families feel in the driving seat of making their own changes. FGDM is a process that builds on family strengths and encourages families to find solutions to their own problems, drawing on their extended family network where it is safe and appropriate to do so. Making this mandatory would remove the essential component of consent, control and choice from families, starting off from a position where an 'intervention' is being 'imposed' upon families by the court rather than families realising their right to access strengths- based services that help to readdress fundamental power imbalances and ensure children's views and best interests are taken into account.
- There are also further practical considerations about how even a voluntary system of ADR would work in terms of resourcing, access to legal aid and ensuring there are adequate high- quality services to meet demand. As we have commented extensively throughout the duration of this Bill, full and effective implementation means adequately resourcing provisions so that children and young people and families are able to access their rights set out in legislation.

[22] https://www.children1st.org.uk/help-for-families/ways-we-work/family-group-decision-making/
[23] https://womensaid.scot/wp-content/uploads/2018/02/SWA-Evidence-on-ADR.pdf

- Although we note that amendment 58 includes an exclusion specifically relating to domestic abuse, we lack confidence that our existing system, in some places, has adequate resources and infrastructure to identify where domestic abuse is taking place. In particular, as we have set out in our response to amendments relating to vulnerable witnesses there are particular challenges where no formal charges have been brought but where domestic abuse has still taken place, for example. Legal representatives involved must required to have an appropriate level of understanding of domestic abuse to enable them to positively "gate-keep" and keep survivors safe. At present we believe there are significant training needs in order to protect and safeguard the rights of survivors of domestic abuse.

Our organisations are of the view that wholesale "system change" is needed, in line with the recommendations of the Independent Care Review, to consider how children's rights can be realised through early help and support including FGDM where safe and appropriate. We agree with the Justice Committee that much more could be done to ensure that ADR forms a fundamental part of our civil justice system but think this requires further careful thinking.

While the concept of facilitating an improved process for resolving disputes where it is safe and appropriate is sound, there are many practical issues that must be resolved before this can be put in practice and therefore we do not support amendment 57 or amendments 58 and 80.

Amendment 80, lodged by Liam McArthur: WE DO NOT SUPPORT

80. After section 11, insert— <Legal aid for alternative methods of dispute resolution (1) The Children (Scotland) Act 1995 is modified as follows. (2) After section 11ZB (which is inserted by section 1(4) of this Act), insert— "11ZC Legal aid for alternative methods of dispute resolution (1) The Scottish Ministers must, by regulations, make provision for legal aid to be made available for alternative methods of dispute resolution in respect of orders made under section 11(1) within 12 months of Royal Assent (2) A draft of regulations under subsection (1) must be laid before the Scottish Parliament before the end of the period of 12 months beginning with the day of Royal Assent. (3) Before making the regulations referred to in subsection (1), the Scottish Ministers must consult the Scottish Legal Aid Board. (4) In this section, alternative methods of dispute resolution may include— (a) arbitration, (b) collaborative law, (c) family group conferencing. (5) The Scottish Ministers may by regulations modify the list of alternative methods of dispute resolution for the time being set out in subsection (4). (6) Regulations under this section are subject to the affirmative procedure.".>

We refer to our comments above in relation to amendment 57 and 58. Although we recognise that this amendment does not refer to mandatory ADR we believe that there are similar practical and safety considerations that must be resolved in advance of this being progressed. Our organisations would be happy to discuss this in further detail given our broad support for ADR where it is safe and appropriate, particularly FGDM as a positive alternative to court processes.

Child advocacy services

Amendment 84, lodged by Liam McArthur: WE SUPPORT

84. After section 15, insert— <Duty to ensure availability of child advocacy services (1) The Children (Scotland) Act 1995 is modified as follows. (2) After section 11E (which is inserted by section 15(2) of this Act), insert— "11EA Duty to ensure availability of child

advocacy services (1) The Scottish Ministers must make such provision as they consider necessary and sufficient to ensure that all children concerned in proceedings for an order under section 11(1) have access to appropriate child advocacy services.

(2) In this section, "child advocacy services" means services of support and representation provided for the purposes of assisting a child in relation to the child's involvement in proceedings under section 11(1).".>

We strongly support this amendment. Our organisations have consistently highlighted the need for skilled and individualised support to facilitate children's participation in the civil courts and their support and recovery needs. The UN Committee on the Rights of the Child's General Comment 12 states that where possible, children must be given the opportunity to have their views heard directly.[24] General Comment 12 sets out the steps states parties should take to ensure that children's rights become a reality. The requirements are wide-ranging and emphasise how children should be supported to participate throughout the legal process.[25] Research shows that addressing children's advocacy is critical if we are serious about improving children's participation rights.[26] Without investment in such an infrastructure, the Bill risks making very little difference to children's experience of participating in family actions. This is one of the strongest messages we have learnt from our research – and one that children and young people repeatedly tell us.

We recognise that Scottish Government's commitment in their response to the Justice Committee's Stage One report (Para 36) and in the Family Justice Modernisation Strategy that they will undertake further work in relation to child support workers. We recognise the complexity in ensuring that children are adequately supported throughout the civil court process while balancing the fact that there may be a variety of services and professionals involved in their lives and the concerns they have raised about repeatedly sharing their story.

We therefore recognise that this amendment offers a framework for a child advocacy service rather than specific detail about practical application. We welcome the introduction of this framework into primary legislation and urge careful consideration of how this will be adequately resourced and competently commissioned going forward. In particular it will be important to link this to the ongoing work on advocacy and support in the Children's Hearings, the implementation of the recommendations of the Independent Care Review and improvements in the criminal courts including the development of a Scottish Barnahus.

Without addressing advocacy for children the Bill will not make as much of a difference to children who are subject to family disputes.

Failure to obey section 11 order

Amendment 39, lodged by Ash Denham – WE SUPPORT

39. In section 16, page 20, line 10, at end insert— <(5) The Scottish Ministers may by regulations modify subsection (3) to— (a) add a description of person, (b) vary a description of person, (c) remove a description of person. (6) Regulations under subsection (5) are subject to the affirmative procedure.".>

We support this amendment. We acknowledge and welcome the fact that roles of professionals in the family court will develop and change in the coming years, and that

[24] Morrison, F, Tisdall, E. K. M., Warburton, J., Reid, A, Jones, F (2020) Children's Participation in Family Actions – Probing Compliance with Children's Rights Research Report https://bit.ly/2WMWqhl; UN Committee on the Rights of the Child, General Comment on Article 12 (2009) par 34

[25] ibid

[26] Morrison, F, Tisdall, E. K. M., Warburton, J., Reid, A, Jones, F (2020) Children's Participation in Family Actions – Probing Compliance with Children's Rights Research Report https://bit.ly/2WMWqhl

professionals other than child welfare reporters (for instance, support and advocacy workers) may be deemed best placed to investigate and report on non-compliance with orders.

Specialist judiciary

Amendment 59, lodged by Jeremy Balfour – WE DO NOT SUPPORT

59. After section 16, insert— <Specialist judiciary: cases, designation and allocation (1) The Lord President of the Court of Session may, by direction, determine that cases brought under section 11 of the Children (Scotland) Act 1995 are suited to being dealt with by judicial officers that specialise in that category of case. (2) The Lord President may vary or revoke any direction made under subsection (1). (3) The sheriff principal of a sheriffdom may designate one or more judicial officers of the sheriffdom as specialists in the category of cases determined under subsection (1). (4) The Lord President may, by direction, determine in consultation with the relevant sheriff principal, that a case determined under subsection (1) may be allocated to a judicial officer outwith the sheriffdom within which the case would otherwise be heard. (5) In this section "judicial officer" means— (a) a sheriff, (b) a summary sheriff, (c) a part-time sheriff, (d) a part-time summary sheriff.>

We have concerns as to how this would operate in relation to family law cases where domestic abuse is an issue, particularly given the current experiences of women, children and young people in relation to contact and residence decisions made by the courts. We would support training for judiciary around all aspects of their engagement with children, including child development, asking children their views and the impact of domestic abuse on children and non-abusive parents in line with the principles of the Safe and Together™ model, as well a further training in regards to the dynamics of domestic abuse before any compartmentalisation of cases is undertaken. It is also noted that the amendment proposes that cases may be allocated outwith sheriffdoms, which brings both positive and negative considerations around access to justice.

We believe that this amendment requires further discussion and consultation with children and other court users to assess the impact, including any unintended consequences.

Delay in proceedings

Amendment 85, lodged by Fulton MacGregor: WE DO NOT SUPPORT

85. In section 21, page 24, line 17, leave out from <is> to end of line 18 and insert <must resolve disputes about contact as soon as practicable and in any event no later than 60 days after the commencement of proceedings.".>

Our organisations recognise the intention behind this amendment. We have seen firsthand and have shared in our written and oral evidence the negative impact that undue delays in court proceedings can have on children and young people.

However, we are concerned that an arbitrary timescale cuts across the paramountcy of the child's best interests. Some cases – particularly those involving domestic abuse – are complex and require adequate time to ensure decisions are made in the best interests of the child. In order to avoid undue delays, and ensure that court processes are as efficient as possible, we recommend attention and resource being diverted to provisions which will help decisions be reached faster and the likelihood of non-compliance lower. These provisions include infrastructure to facilitate children's meaningful participation (including support and advocacy workers, and sufficient resource to ensure that children and young people have a range of means to give their views) and regulation of Child Welfare Reporters which ensures they have

a robust understanding of the dynamics of domestic abuse. If children's views are listened to and contact arrangements are in children's best interests and safe they are unlikely to lead to repetitive and lengthy court proceedings.

We therefore do not support this amendment.

Review of effect of Act

Amendment 86, lodged by Liam McArthur: WE SUPPORT

86. *Before section 22, insert— <Review of effect of Act (1) The Scottish Ministers must conduct a review of the effect of this Act on a child's participation in court processes to which the Act applies. (2) The review must, in particular, consider the resources required to ensure effective participation by children in those processes. (3) The review must be completed no later than 3 years after the date of Royal Assent. (4) As soon as practicable after completing the review, the Scottish Ministers must— (a) publish, in such manner as they consider appropriate, a report of the review, and (b) lay a copy of the report before the Scottish Parliament. (5) The report of the review must include the steps, if any, the Scottish Ministers propose to take to further improve the participation of children in court processes.>*

We welcome this amendment in order to ensure that children's rights are advanced and protected in the civil courts in line with the original intentions of this Bill. We would further ask that a Review of the Act includes details on the numbers of Section 11 cases that are heard in this period. To monitor the implementation of this we need national data from courts on: how children's participation were given effect, demographic details about the children involved (e.g. age, sex, if children have any additional needs) and if children's participation rights were not implemented the courts' reasons for this.

In summary, we urge members to support amendments that will realise the Bill's key policy objectives, particularly in regards to compatibility with the UNCRC and protection for victims of domestic abuse. These include amendments relating to the facilitation of children's participation,[27] protection for children and young people's confidentiality,[28] a system of support and advocacy for children and young people,[29] a review of how children's rights have been realised within family court processes,[30] extension of vulnerable witness protection,[31] and the reinstating of the duty of the court to consider the impact of 'parental cooperation' in the context of domestic abuse when making an order.[32]

If you would like to discuss anything in this paper, please contact:

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[27] Amendments 1-5, 7, 9, 10, 38 and 47-50
[28] Amendment 64
[29] Amendment 84
[30] Amendment 86
[31] Amendments 11-14
[32] Amendments 60-63

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