Annex A: RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response if you are responding by post.

Full name or organisation's name

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Are you responding as an individual or an organisation?

☐ Individual

☑ Organisation

Where are you resident? (Please select one of the options below)

Scotland ☑ Rest of the UK ☐ Rest of the World ☐

If you are responding as an organisation and want to tell us more about your organisation's purpose and its aims and objectives, you can do so here.

Members of the Faculty of Advocates are engaged in providing legal advice and representing litigants in relation to the issues raised in this consultation. The Children (Scotland) Act 1995 is in our experience generally clear, succinct and coherent. It sets a comprehensible structure for parental responsibilities and rights. The welfare of children is at the heart of the Act, which was framed with the UNCRC in mind. It is part of a wider legislative framework. Some caution is required before embarking on change. A number of the proposals in this review do not require change in legal structure. "Good law" (as defined by the Office of Parliamentary Counsel) is "necessary, clear, coherent, effective and accessible". The 1995 Act largely satisfies this requirement. It is desirable that it should continue to do so.

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- ☑ Publish response with name
- ☐ Publish response only (without name)
- ☐ Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- ☑ Yes
- ☐ No

Annex B: Consultation questions

Question 1):

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

a) Yes – remove the presumption and do not replace it with a different presumption. ☐
b) Yes – remove the presumption and replace with a new presumption based on a different age. ☐
c) No – leave the presumption in. ☑

Why did you select your answer above?

The Faculty agrees that all children should, where practicable, be given the opportunity to express their views and that many children under 12 have views that should rightly be taken into account, both in order to serve their welfare and to recognise their rights. Failure to give children the opportunity to express a view may make Scottish orders unenforceable internationally, for example under article 23 of the 1996 Hague Parental Responsibility Convention and article 23 of the current EU Council Regulation 2201/2003. It is therefore vital that courts do give children under 12 the opportunity to be heard. The solution is however to reinforce good practice, not to take away the presumption. The presumption of capacity at 12 is coherent with Scots law in a number of respects, including making a will, instructing a solicitor, participating in legal proceedings, challenging school exclusion, consenting to adoption or permanence and in relation to additional support needs.

Question 2):

How can we best ensure children's views are heard in court cases?
Please select as many answers as you want.

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). ☑

Why did you select your answer(s) above?

The method of taking a child's views should be tailored to the needs of the individual child and as such is case dependent. The most appropriate method should be employed and a wide range of options should be available, including, for example, securing views via a teacher or other trusted adult. We are concerned by cases where the child appears to have been manipulated in advance of proceedings by being taken to see a solicitor or other professional to provide views that are then presented as a "golden key" to the outcome sought by the person bringing proceedings. We would like to see this practice halted. We propose as a solution that the court rules no longer require warrant to intimate to the child but that the issue of giving the child the opportunity to be heard is a necessary feature of an early case management hearing, and that the sheriff or judge determines how this is to be done.

Question 3):

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

a) Child support worker. ☐
b) Child welfare reporter. ☐
c) Another option (please specify). ☑

Why did you select your answer above?

The question is too simplistic. There may be a series of decisions taken in the course of a litigation. It should be a matter for the sheriff or judge as part of case management to decide whether any particular decision should be conveyed to the child concerned and by whom the decision should be conveyed.

Question 4):

What are the best arrangements for child welfare reporters and curators *ad litem*?
Please select only one answer.

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

Why did you select your answer above?

Advocates are appointed as child welfare reporters and curators ad litem in the Court of Session. The system works well as all those involved are known to the Court and selected on the basis of their competence to carry out the work.

The Faculty is less familiar with practice in the sheriff court and so restricts comment to arrangements in the Court of Session.

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Question 5):

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

Yes ☐
No ☑
Why did you select your answer above?

The Faculty of Advocates gave a full response to this question in May 2016. We explained that a court considering an application for production of confidential information relating to children must act in accordance with the European Convention on Human Rights. That means there must be a balancing exercise having regard to the child's expectation of confidentiality, the need to respect the right to family life and therefore the requirement for family members to have the documents they reasonably require to be involved in decision making (under article 8) and the requirement of a fair trial (under article 6). We referred to the analysis of these issues by the Supreme Court in Re A (A Child) [2012] UKSC 60. The Scottish Parliament cannot pass legislation that conflicts with these fundamental rights.

Question 6):

Should child contact centres be regulated?

Yes ☐
No ☐
Why did you select your answer above?

Child contact centres serve an extremely useful purpose within the framework of contentious private law disputes in relation to children. They were set up and are managed by Relationships Scotland. The Faculty of Advocates is not in a position to give informed comment on the regulation of contact centres. However, there is a concern that in introducing regulation, this may very well lead to a reduction in the number of contact centres providing a service to non-resident parents. This would affect the ability of some children in high conflict disputes to continue to see their non-resident parent, which would be a most concerning consequence of introducing regulation.

Question 7):

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

Our view is that the present terms of the 1995 Act make proper provision to allow the court to make orders providing for the continuance of children's relationships with family members other than their parents. No further legislative steps are necessary.
We refer to the range of orders that may be made by the court under section 11(2) of the 1995 Act. It is open to any person to make an application for such an order. The court may therefore make an order regulating the relationship between a child and a family member, other than a parent, who claims an interest. The same test will apply to a family member as applies to a parent. The court requires to have regard to the welfare of the children as the paramount consideration, no order should be made unless it would be better for the children that the order be made than that no order made, and that the children must be given the opportunity to express their views and account be taken of those views.

Question 8):

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

Yes ☐
No ☑
Why did you select your answer above?

It is not our view that there should be a presumption in law that children benefit from contact with their grandparents. While children will usually experience such a benefit, there will be circumstances where that is not the case. The present provisions of the 1995 Act, as outlined above, and the statutory test discussed, allow a court to consider whether an order should be made for contact between a child and their grandparents, on the same considerations as apply to a parent.

Question 9):

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

Yes ☑
No ☐
Why did you select the answer above?

Our view is that a sibling, including a sibling under 16, should be able to seek contact with a child. At present, the terms of section 11(2)(b)(i), as set out above, could be construed to provide a barrier to a sibling under 16 seeking contact, if contact is viewed as a parental responsibility or parental right. That is not however a necessary approach to an order relating to "arrangements" under section 11(2)(d) and further the terms of section 11(3)(a)(i) which allows anyone who does not have PRRs to seek an order suggest that is not the correct interpretation.
Further, children live in different family relationships which are important to them, but where there may be no biological link, or the link is not with a person who could be categorised as a sibling. We consider that the terms of the 1995 Act should be clarified to make it clear that a person under 16 (rather than specifically a sibling) may seek an order for contact without being awarded PRRs.

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?

This consultation is in regard to Part 1 of the Act, which deals with private law matters, and does not concern looked after children.
However, we do support the existing guidance that contact between siblings, and between looked after children and those children with whom they have shared family life, should be encouraged and steps taken, possibly via inspection of children's services, to ensure that guidance to this effect is complied with.

Question 11):

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

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

Why did you select your answer above?

There should be a range of measures with an emphasis on the constructive, rather than the punitive. Punitive measures remain necessary in cases where a party refuses to engage in constructive measures and refuses to allow contact ordered by a court. Where there are difficulties, parents would benefit from attending an awareness course centering on the impact on children of their actions. Parenting Scotland runs a three hour course which parents can attend separately or together. Attendance is beneficial at an early stage of proceedings, before the issue of enforcement arises, when it may operate as a supportive and preventative measure. Such a course could also operate as a measure to induce compliance, and form part of a last resort punitive measure, such as a community payback order. Judges should have more flexibility in orders which may be made to enforce contact orders. Where punitive measures become necessary, penalties should remain civil rather than criminal measures.

Question 12):

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

Yes ☐
No ☑

Why did you select your answer above?

At present, orders made elsewhere in the United Kingdom may be enforced in Scotland after registration in the Court of Session. The jurisdiction of the sheriff court is generally limited to the sheriffdom in which it is situated. A litigant could therefore defeat the jurisdiction of the sheriff court by moving outwith the sheriffdom. The jurisdiction of the Court of Session is Scotland wide. The present cross border enforcement provisions echo international measures such as those set out in Brussels II bis and the Hague Convention on the Civil Aspects of Child Abduction, where the Court of Session has exclusive jurisdiction in relation to enforcement measures. The present arrangement where cross border orders are registered in the Court of Session operates efficiently and is in line with other international enforcement measures. Our view is that the present provisions should continue.

Question 13):

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

Yes ☐
No ☑
Why did you select your answer above?

The provisions of the Family Law Act 1986 on jurisdiction in family cases presently work well. We understand that a judicial protocol is about to be introduced which will enable judicial liaison between Scottish judges and those in England and Wales, which we see as a very positive development.
We would mention that in terms of Article 15 of Brussels II bis, there is provision for transfer of a case to a court in a Member State if the child has a closer connection to that Member State and it is better placed to hear the case. There is an attraction to replicating these provisions in cross UK border family cases. Under existing provisions, a cross-border judgment requires to be registered and then enforced. There would be benefits to a court having the power to simply transfer the case to another intra-UK jurisdiction.

Question 14):

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

Yes ☑
No ☐
Why did you select your answer above?

A substantial number of children are born to married parents. The presumption that the mother's husband is the father is generally helpful. We are not aware of any major problems arising as a result of the presumption and would favour retaining it.

Question 15):

Should DNA testing be compulsory in parentage disputes?

Yes ☐
No ☑
Why did you select your answer above?

We have responded in the negative to the question as framed because it suggests automatic compulsory testing. We do favour giving the court the power to order DNA testing as the procedure can now be carried out in a non-invasive manner and brings clarity. The European Court of Human Rights has held that the right to identity, including the right to know parentage is an integral part of respect for private life under article 8 of the European Convention on Human Rights (Jaggi v Switzerland (2008) 47 EHRR 30, applied by the English courts in Anderson v Spencer [2016] EWHC 851 (Fam), upheld on appeal [2018] EWCA Civ 100). DNA testing should be subject to consideration by a court which may refuse an order were there exceptional circumstances where testing could be medically or psychologically harmful.

Question 16):

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

Yes ☑
No ☐
Why did you select your answer?

Step-parent agreements are available in England and Wales where all persons who hold parental responsibility agree. They are capable of serving the welfare of children by allowing a step-parent who is integral to care of the child to have a formal role in exercising parental responsibilities and parental rights. They avoid the detriment and potential embarrassment to a child of explaining (for example) why a step-parent fulfilling a parental role cannot give formal consent as a legal representative. Many step-families would not wish to make applications to a court, but would take advantage of an agreement registered in the Books of Council and Session, similar to current agreements under section 4 and 4A of the Children (Scotland) Act 1995. The form of agreement could contain a section for a child of 12 or over to consent and for a trusted adult such as a teacher or GP to take and record the views of a younger child.

Question 17):

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

Yes ☐
No ☑
Why did you select your answer above?

The current legislation has the correct balance by imposing responsibilities on parents and then conferring rights in order to allow responsibilities to be fulfilled. "Rights" are an important aspect of the legal framework. They are consistent with the article 8 of ECHR right to respect for family life and with international Conventions such as the Hague Convention on the Civil Aspects of International Child Abduction which turns on "rights" of custody and access. Sections 1 and 2 of the 1995 Act were endorsed and formed the basis of permanence orders in the Adoption and Children (Scotland) Act 2007, which would require to be re-framed were "parental rights" no longer to have formal existence. The existing law works satisfactorily. It is not necessary to amend it.

Question 18):

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

Yes ☐
No ☑
Why did you select your answer above?

Section 11 of the Children (Scotland) Act 1995 allows the court to make "such order... as it thinks fit". The list which follows includes orders regulating the arrangements as to with whom a child is to live and arrangements for maintaining personal relations and direct contact with a person with whom the child is not living. These particular orders are given the "shorthand" name of residence orders and contact orders. Properly understood naming these orders (and "specific issue orders") does not detract from the focus on arrangements which may be appropriate in the best interests of a child. While the specific names could be revoked without changing the scheme, this is not in our view necessary.

If you answered yes what terms should be used?

Question 19):

Should all fathers be granted PRRs?

Yes ☑
No ☐
Why did you select your answer above?

It should be the norm for children to have the benefit of two parents to exercise responsibility. While there are exceptional cases where to involve a father would be adverse, there are also in our experience cases where a father whose involvement might benefit the child are excluded, as for example Fife Council v M [2015] CSIH 74 where a father acted promptly to try and secure parental responsibilities and parental rights, only finally to find when he had them that he was unable to resist a permanence order because the child had by then settled with a foster carer who wished to adopt. If he had had PRRs he could not have been discounted by the local authority at a time when he could have offered a home to the child.

Question 20):

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

Yes ☐
No ☑
Why did you select your answer above?

Back-dating the effect of registering a birth would mean that parents would be faced with consequences to their action (registration) that they did not intend at the time. People should be able to act in the knowledge of the consequences of what they do. Backdated changes risk being categorised as arbitrary and unfair.

Question 21):

Should joint birth registration be compulsory?

Yes ☑
No ☐
Why did you select your answer above?

This is consistent with article 7 of UNCRC and therefore requires to be considered, not least given the commitment of the Scottish Ministers to secure better effect of UNCRC under the Children and Young People (Scotland) Act 2014, section 1. We do however accept that there would require to be exemptions, similar to those which apply in England and Wales.

Question 22):

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

Yes ☑
No ☐
Why did you select your answer above?

Subject to any such change being necessary, given our response to question 19, if a father has PRRs in the place of birth of the child, he should be recognised to have PRRs in Scotland. In our opinion this should not necessarily be contingent on registration of birth. We recognise the difficulties of finding equivalents to joint birth registration. We are aware of work by the Hague Conference in this area which is indicative of the complexity.

Question 23):

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

Yes ☑
No ☐
Why did you select your answer above?

We see no need to legislate for this. The "presumption" as such is already built into the Children (Scotland) Act 1995 in the structure of sections 1 and 2 which assume continued involvement of both parents in exercise of parental responsibilities and parental rights. Any public authority dealing with a child is bound by section 6 of the Human Rights Act 1998 to respect the article 8 right to family life of child and parents. ECHR rights are generally interpreted having regard to UNCRC rights of the child, which endorse the involvement of both parents. Most problems arise because unmarried fathers can be excluded from having PRRs by the failure of the mother to allow them to register the birth. This is the issue that requires to be addressed.

Question 24):

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

Yes ☐
No ☑
Why did you select your answer above?

To enact such a presumption would cut across ECHR and UNCRC principles. It would also represent a significant departure for Scots law. There is currently an understanding that there is no "onus" on a parent in a case about PRRs under section 11 of the 1995 Act. The court will simply examine the evidence and make such order as will serve the welfare of the child as the paramount consideration. Domestic abuse is a relevant consideration in this exercise, but the exercise is multi-faceted and should not be driven by one aspect of the problems currently facing the courts. Enacting presumptions (or lack of them) risks causing confusion. The existing law works satisfactorily in the interests of children.

Question 25):

Should the Scottish Government do more to encourage schools to involve non-resident parents in education decisions?
Please select only one answer.

a) Yes – put the pupil enrolment form and annual update form on a statutory basis. ☑
b) Yes- issue guidance on the enrolment form and annual update form. ☐
c) Yes – other (please specify). ☐

d) No – no further action by Scottish Government is required. ☐

Why did you select your answer above?

Education authorities and schools must recognise all those who count as "parents" in terms of the Education (Scotland) Act 1980. The definition in section 135(1) is broad. It includes all fathers and current carers. The definition itself would bear some reconsideration.

In the meantime it is important that schools recognise all those having parental responsibility. Prescribing a form in regulations would be a straightforward step to address a current difficulty.

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? Please select only one answer

a) Yes – legislation. ☐
b) Yes – guidance. ☑
c) Yes – other (please specify). ☐

d) No – no further action is required. ☐

Why did you select your answer above?

We agree that all parents who have PRRs should in principle be entitled to information as they will require this in order to exercise PRRs. However health practitioners have their own professional codes and are now having to come to grips with GDPR. Legislation risks cutting across other professional and GDPR requirements and making the task of health professionals increasingly complex. Guidance is the appropriate step.

Question 27):

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

Yes ☐
No ☑

Why did you select your answer above?

Section 11 is well-drafted and clear. It distinguishes between orders depriving a person of some or all PRRs (s 11(2)(a)) or imposing or giving PRRs (s 11(2)(b)) and orders regulating practical arrangements (s 11(2)(c), (d), (e) and (f)). It expressly provides that a residence order carries certain PRRs (s 11(12)). There is no need to specify this further.

Question 28):

Should the Scottish Government take action to try and stop children being put under pressure by one parent to reject the other parent?

Yes ☐
No ☑
Why did you select your answer above?

This is one of many problems that are currently presented to courts. The problem itself is complex and incapable of simple definition, characterisation or resolution. A legislative response would not be helpful or appropriate.

The most constructive response the Scottish Government can make is to make resources available for counselling and therapy for families affected. The courts would welcome practical assistance in resolving these issues.

If you selected yes what should be done?

Question 29):

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

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

Why did you select your answer above?

It is not the role of a criminal court to consider PRRs. The focus of the criminal court following conviction is on sentence, rather than the welfare of children. The effect the conviction should have is a matter for the civil courts, having regard to the welfare of the child as the paramount consideration. There may be cases where it is important for children to retain contact, for example, even where a parent is serving a custodial sentence. This is not an issue where all the relevant factors can be balanced by the criminal court. There may also be ECHR issues. In Dickson v UK (2008) 46 EHRR 41 the ECtHR held that the UK had violated the art. 8 rights of a prisoner serving a life sentence for murder by refusing facilities for his wife to conceive by artificial insemination. He, she and presumably any resulting child had a right to respect for their family life.

Question 30):

Should the reference in section 2 of the 1995 Act to "exercising" parental rights be changed to reflect that a person may not be exercising these rights because the child is now outwith the UK?

Yes ☐
No ☑
Why did you select your answer above?

The Faculty of Advocates considers that section 2 as currently enacted works well and does not need to be reformed.

Question 31):

Should section 6 of the Child Abduction Act 1984 be amended so that it is a criminal offence for a parent or guardian of a child to remove that child from the UK without appropriate consent?

Yes ☑
No ☐

Why did you select your answer above?

The Faculty of Advocates considers that section 6 of the 1984 Act should be amended to ensure consistency across the UK, ie removal by a connected person without appropriate consent should be an offence. The offence should not be restricted to cases where there is an order for "custody" or an order prohibiting removal.

This section requires to be updated in any event, as it continues to use the term "custody".

Question 32):

Should personal cross examination of domestic abuse victims be banned in court cases concerning contact and residence?

Yes ☐
No ☑

Why did you select your answer above?

This is a difficult area, calling for a much more nuanced approach than a straightforward ban on self-representation. The requirement for protection of victims of domestic abuse must be balanced with the need for a fair hearing, in the course of which evidence can be tested in the interests of justice. Failure to provide for such a balance may result in a hearing that does not comply with ECHR article 6 and/or a failure to respect the right to family life in terms of article 8. In many cases the Vulnerable Witnesses (Scotland) Act 2004 will provide sufficient protection. If it is considered necessary to ban a party litigant from self-representation there will require to be a measure such as that found in the Criminal Procedure (Scotland) Act 1995 section 288D which allows the appointment of representation by the court, funded at the public expense. Decisions in this area should be taken in the course of case management.

Question 33):

Should section 11 of the 1995 Act be amended to provide that the court can, if it sees fit, give directions to protect domestic abuse victims and other vulnerable parties at any hearings heard as a result of an application under section 11?

Yes ☐
No ☑
Why did you select your answer above?

The conduct of litigation is a matter for the sheriff or judge. There are inherent powers of the Court to ensure that all parties and witnesses are treated with proper respect and their participation is facilitated. Vulnerable witnesses are already protected. If further steps are required these should be covered by rules of court, not primary legislation.

Question 34):

Should subsections (7A)-(7E) of section 11 of the 1995 Act containing a list of matters that a court shall have regard to be kept?
Please select only one answer.

a) Yes – retain as currently. ☐
b) Yes – but amend (please give details). ☐

c) No – remove these provisions. ☑

Why did you select your answer above?

The welfare of the child is the paramount consideration when taking a decision about parental responsibilities and parental rights. These subsections relate to matters that should be part of the welfare assessment, but the emphasis they introduce risks detracting from other considerations that may also be important. Sheriffs and judges should be trusted to take decisions having regard to all the factors that bear on the welfare of the child. The drawback of any "checklist" is that matters that are material to the individual case may be relegated or omitted. This particular set of subsections is unhelpful in so far as it focuses on one aspect of welfare, without drawing attention to other aspects that may be as compelling or more compelling in any particular case.

Question 35):

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

Yes ☐
No ☑

Why did you select your answer above?

We have not encountered this as a particular difficulty. The position differs from the children's hearing where a parent can request a review every three months and there is justification for an order requiring leave of the court for an appeal following a frivolous or vexatious resort to the appeal process (see Children's Hearings (Scotland) Act section 159). A court process is more formal and takes much longer. A sheriff is unlikely to entertain a repeat application without a material change in circumstances.
There is already general provision for vexatious litigation orders in the Courts Reform (Scotland) Act 2014. We see no need to duplicate this measure with particular reference to orders relating to children.

Question 36):

Should action be taken to ensure that the civil courts have information on domestic abuse when considering a case under section 11 of the 1995 Act?

Yes ☐
No ☑

If yes, what action should be taken?
Please select all answers that apply.

a) Introducing a duty in legislation on the civil courts to establish if there has been domestic abuse. ☐
b) Placing a duty in legislation on child welfare reporters that they must consider in each case whether there is evidence of domestic abuse and, if so, report on it accordingly. ☐
c) Including domestic abuse in any welfare checklist for the courts to consider in section 11 cases. ☐
d) Discussing with the Law Society of Scotland and the Family Law Association whether guidance for practitioners would be helpful. ☐
e) Other (please give details). ☐

Why did you select your answer(s) above?

The paramount consideration in a section 11 case is the welfare of the child. It is a matter for parties to raise all the issues bearing on the child's welfare and for the Court to focus on those issues. The measures proposed risk diverting primary attention to the adults and re-creating litigation in the mould of NJDB v JEG & Anor [2012] UKSC 21.

Question 37):

Should the Scottish Government do more to promote domestic abuse risk assessments?

Yes ☑
No ☐

If yes what should be done?

It would be helpful to take advantage of work that has been carried out in this area by (among others) Relationships Scotland. There is a need for a more discerning approach to the effect of domestic abuse. In some cases domestic abuse implies that the relationship with a child must be terminated, in the interests of the child. In other cases the child's welfare may require a continued relationship, but there may be issues of safety to the child or an adult closely associated with the child. Domestic abuse risk assessments offer a reasoned and responsible approach in this difficult area. They should be available in appropriate cases.

Why did you select your answer above?

Question 38):

Should the Scottish Government explore ways to improve interaction between criminal and civil courts where there has been an allegation of domestic abuse?

Yes ☐
No ☑

Why did you select your answer above?

We have serious reservations about how this would work, given the different functions and objectives of the criminal and civil courts. There is a risk of increasing complexity and delaying appropriate solutions that may be required in the interests of children.
We would support information being shared between criminal and civil courts, so that they do not work at cross-purposes (as, for example, when bail conditions would prevent contact that is considered by the civil court to be in the interests of the child). We would not support criminal courts making orders about children or civil courts imposing criminal penalties.

Question 39):

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

Yes ☑
No ☐
Why did you select your answer above?

We endorse the aim of discouraging undue delay in cases involving children and are supportive of any provision in primary legislation which would achieve that.

Primary legislation alone may not however achieve the desired purpose. Section 25A was introduced into the Adoption (Scotland) Act 1978, to require courts to draw up and give directions for keeping to timetables with a view to determining adoption proceedings without delay. As the APRG found, this had limited effect. As a result the provision was not repeated in the Adoption and Children (Scotland) Act 2007, but court rules were introduced with specific timetables. In our experience these rules are honoured more in the breach than the observance. Sheriff courts frequently maintain they do not have the resources to give effect to the prescribed timetables.

Question 40):

Should cases under section 11 of the 1995 Act be heard exclusively by the Sheriff Court?

Yes ☐
No ☑
Why did you select your answer above?

Relatively few cases solely concerning orders under section 11 are raised in the Court of Session. Such cases are either particularly complex or involve cross-border or jurisdictional issues. It is appropriate that litigants continue to have access to the Court of Session for such cases. Also, section 11 orders are sought in actions for divorce which have been raised in the Court of Session as that is the more appropriate forum. Where cases involving section 11 orders are more appropriately dealt with in the Sheriff Court, the Court of Session has the power to remit these.

Question 41):

Should a checklist of factors for courts to consider when dealing with a case be added to section 11 of the 1995 Act?

Yes ☐
No ☑

Why did you select your answer above?

Currently, the provisions of section 11 encourage a holistic approach to welfare. There is a danger that a checklist would foster a “tick box” approach.

There is also a risk that listed criteria would be the focus of decision-making to the exclusion of criteria that are most relevant to the particular case. At worst relevant factors might be overlooked because they are not in the checklist.

If you answered yes what should be in such a checklist?

If a checklist were to be inserted, as well as the factors already set out in section 11(7A) to (7E), it should include consideration of mental health and substance abuse as these matters directly impact upon the welfare of children.

Question 42): Should the Scottish Government do more to encourage Alternative Dispute Resolution in family cases?
Please select as many options as you want.

a) Yes – introduce Mediation Information and Assessment Meetings in Scotland. ☐
b) Yes – better signposting and guidance. ☐
c) Yes – other (please give details). ☑

d) No – no further action required. ☐

Why did you select your answer(s) above?

It is important that parties in family cases are aware of all forms of alternative dispute resolution, whether mediation, arbitration or collaboration. The Scottish Government could do more by providing legal aid funding for the full range of alternative dispute resolution. Arbitration, for example, could provide a speedy, effective and inexpensive solution to some issues in family cases.
There should not however be any compulsory mediation as this would potentially be counter-productive in some cases and oppressive in others.

Question 43):

Should the Scottish Government make regulations to clarify that confidentiality of mediation extends to cases involving cross border abduction of children?

Yes ☑
No ☐

Why did you select your answer above?

This may require an amendment to Civil Evidence (Family Mediation) (Scotland) Act 1995 to clarify the proceedings to which the confidentiality provisions apply. We have concerns that M v M 2015 S.L.T. 682 which held that the confidentiality provisions did not apply in cases of child abduction may have been wrongly decided. That case places an unhelpful restriction on trying to resolve these difficult and delicate cases, where confidential mediation could be helpful.

Question 44):

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

Yes ☐
No ☑
Why did you select your answer above?

Every situation is different. Guidance risks being so general that it does not address the issues, or misleading because it does not apply in the circumstances of the case. There is no substitute for proper advice relating to the individual case.

Question 45):

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

Yes ☐
No ☑
Why did you select your answer above?

In Scotland a person may use whatever name they choose. There is no need to change the birth record. If a young person wishes to change the birth register then this can be addressed when he or she attains 16.

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 ☑
No ☐
Why did you select your answer above?

This is already the law. A person with parental responsibilities who is proposing to change a child's name must consult with the child before doing so. This is the effect of the Children (Scotland) Act 1995, section 6.

Question 47):

Should SI 1965/1838 be amended so that a father who has a declarator of parentage and has PRRs can re-register the birth showing him on the birth certificate?

Yes ☑
No ☐
Why did you select your answer above?

The difference in treatment between a mother, and a person who has been established to be the father, in relation to registration of the child's birth is discriminatory and potentially gives rise to a violation of article 14 of ECHR read with article 8. It is difficult to see how the present position can be justified.

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 ☑
No ☐

Why did you select your answer above?

While this is not an issue arising under Part I of the Children (Scotland) Act 1995, the Faculty of Advocates can see no reason in principle why the Principal Reporter should be excluded from appealing in relation to decisions re deemed relevant person status.

Question 49):

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

Yes ☑
No ☐

Why did you select your answer above?

Wherever possible modernisation of the Children's Hearings System through appropriate enhanced use of available technology should be encouraged with a view to improving inclusion and efficiency. This should not however be at the expense of families who do not have access to such technology or are unfamiliar with its use.

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 ☑
No ☐
Why did you select your answer above?

The local authority that is the "implementation authority" (sections 144 and 201 of the Children's Hearings (Scotland) Act 2011) should be provided with safeguarder and other reports in advance of Children's Hearings in order that it can consider in furtherance of its duties to the relevant child how in advance of Hearings it might implement any recommendations that might be made and contribute to discussions about such recommendations from a position of knowledge.

Question 51):

Should personal cross examination of vulnerable witnesses, including children, be banned in certain Childrens (Hearings) Scotland Act 2011 proceedings?

Yes ☐
No ☐
Why did you select your answer above?

We can neither agree nor disagree. We made detailed representations on this issue last year, agreeing to introduction of rules to regulate the personal examination of a child or other vulnerable witness where the subject matter of the proceedings related to the conduct of that party towards the child or witness concerned, provided there were sufficient safeguards to ensure that evidence could be adequately tested in the interests of justice. We referred to JS and CS v Children's Reporter [2016] CSIH 74 which drew attention to the need for the counterbalancing factors to compensate if evidence could not be tested in cross-examination. We broadly supported the proposition that a distinction should be drawn between cases where there should be a mandatory prohibition of personal examination and cases where this should be discretionary. We also drew attention to the need for a court-appointed state-funded representative if a person was not permitted to cross-examine in person.

Question 52):

Should section 22 of the Family Law (Scotland) Act 2006 which prescribes where a child is deemed to be domiciled be amended?

Yes ☐
No ☑
Why did you select your answer above?

There are no reported cases indicating difficulty on this point and in the absence of evidence the case cannot be made for change.

Question 53):

Do you have any comments about, or evidence relevant to:
a) The partial Business and Regulatory Impact Assessment;
b) The partial Child Rights and Wellbeing Impact Assessment;
c) The partial Data Protection Impact Assessment; or
d) The partial Equality Impact Assessment?

Yes ☐
No ☑
If yes please provide your comments below.

Question 54):

Do you have any further comments?

Yes ☐
No ☑
If you have answered yes please provide your comments below.