



Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy

Barnardo's Scotland response

September 2018

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1. Introduction

The Review of Part 1 of the Children (Scotland) Act 1995 and the creation of a Family Justice Modernisation Strategy is a vital consultation covering many issues which have a significant impact on the wellbeing of the children and families that we work with. Family law is extraordinarily powerful; we believe it deserves no less scrutiny and attention than our criminal law. Our current experience is that children and families are too often being put at risk or being harmed by current systems, and it is crucial not only that there is reform, but that we get that reform right.

Barnardo's Support Worker: "the systems fail the family"

Much of our response to this consultation has been shaped by our experience of providing domestic abuse services, and we have included anonymous, sometimes composite, examples from our services to illuminate the real consequences of the current family law shortcomings on children and families. Our services have long been reporting concerns around child contact decisions that are not being made in the best interests of the child, around problems in the child's views being understood by courts (and how this lack may contribute to problems in child contact decisions and a court experience that is itself detrimental to the child's welfare) and around families affected by domestic abuse having those experiences reproduced by our court procedures. We would also direct Scottish Government to the forthcoming launch of Everyday Heroes – this participation work with children and young people provides a vital perspective from young people themselves on their experiences of gender based violence.

Barnardo's Scotland is committed to further improving our own practice in relation to domestic abuse by implementing the Safe and Together model. This model recognises that the behaviours of the perpetrator of domestic abuse impact negatively on the child(ren), and that where a person chooses to coercively control a parent they are thereby choosing to abuse a child. We seek to see this negative impact on children by the actions of perpetrators of domestic abuse recognised throughout our systems – we strongly support the ways in which the Domestic Abuse (Scotland) Act 2018 sought to recognise the impact of domestic abuse on children through the criminal law, and seek a similar approach in family law.

We have concerns about the overarching approach of this consultation as well as the practicalities. We believe it is crucial in order that family law processes act in the best interests of the child that they are child centred and based on children's rights. This consultation however often seems to prioritise the rights of various adults. We note also that this consultation does not link how family law processes fit with Getting It Right For Every Child (GIRFEC). We would want to see individual considerations about

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legislative change positioned in an overarching, child centred vision of family law (which would require not only legislative change but accompanying strategy and resources). We would also note that many of the legislative proposals in this consultation require further development and discussion, and we would caution against rushing into legislation where this is the case.

This consultation is extraordinarily complex, dealing with a vast range of interlocking issues. We have not felt able to respond to the narrow questions, with insufficient answer options, presented in the consultation document. Instead we have responded on some key themes in the consultation, noting issues missed out of the consultation document as well as identifying under those themes the key relevant specific questions from the consultation document. This should not be taken as a view that any of the questions in the consultation are unimportant. Rather it should be taken as an indication of how important they are to children's wellbeing, and the inability of brief yes/no answers to reflect the complexity of the systems in play or the lived experience of the children and families that we work with. Given the complexity of the issues, it is vital that Scottish Government considers the responses to this consultation in depth; simply counting numbers of yes or no answers to these questions which can rarely be answered yes or no will not provide an accurate picture of the responses received nor make best use of the contributions of organisations or families to understanding these issues and how policy responses can be improved.

**Key points:**

- Children's views are vital to courts making decisions in the best interests of the child - a duty on the court to record how the child's views were heard, and the impact this had on decision-making, is necessary;
- Children of all ages communicate (not necessarily verbally) their experiences; the courts must provide a range of ways for children to be understood, as best suits the individual child;
- Effective, child-friendly two-way communication with the child is necessary throughout the court process – adults tasked with this role must have specialist skills around working with children;
- Child contact must be determined on the basis of what is safe and in the best interests of the child;
- The first response to situations where a contact order is not functioning should be exploration of why this is the case, not enforcement;
- The courts must actively seek out information about domestic abuse as this is vital to being able to make decisions in the best interests of the child;
- The civil courts must, as a minimum, provide equivalent protections to the non-abusive parent and children as are available in criminal processes.



2. The Views of the Child

In this section we consider issues around how the courts can effectively hear the views of the child, including reference to the consultation questions 1, 2, 3, 4, 28, 44.

Key points:

- 2.1 Children's views are vital to courts being able to make decisions in the best interests of the child;
- 2.2 Children of all ages, including babies, are able to communicate (including verbally, through their behaviour) – the courts are responsible for ensuring that they have access to and understand what children of all ages are communicating;
- 2.3 A variety of ways, adequately resourced, must be provided, and understood, by the courts, so that all children can be supported to provide their views through whatever mechanism(s) best enable them to express themselves;
- 2.4 Effective mechanisms for two-way communication with the child must be provided throughout the court process;
- 2.5 Trusted and skilled adults have vital roles to play in civil court processes relating to children.

2.1 Children's views are vital to courts being able to make decisions in the best interests of the child

In our experience the child's views are vital to enabling the court to make the best decision – decisions that are in the best interests of the child. There may also be benefits to the system to effectively hearing children, e.g. saving court time. We have known cases where the child's comments on practicalities of contact have resulted in contact being sustained in accordance with the (revised) court order – where previously contact had been problematic and resulted in the case being returned to court. We have known cases where the child's wishes around contact, once heard, led to an option not previously identified by the court – resulting in sustained, satisfactory contact and no further court hearings. Conversely, we know of cases where the child's views have not been heard effectively by the courts, where there have been ongoing court hearings as well as considerable distress caused to the children. We would welcome the Scottish Government championing the importance of the courts effectively listening to the views of the child, not only because it is a crucial right that children's voices be heard in the decisions that fundamentally affect their lives, but also in recognition that their views enable the best decisions to be made.

We would welcome discussion therefore of a requirement on the court to record how the child's views were heard by the court, and the impact this had on the decision made, and to provide reasons in any cases where the child's views were not considered. Analysis of such records over time would provide important information on any key issues affecting the

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courts from being able to hear children's views effectively, e.g. if there are gaps in availability of child advocacy workers in particular areas of the country. This would also provide an important formal recognition of the value of the child's views to decision making in relation to family matters. This would also be crucial information for the court itself, for example if there were problems with a contact order such as enforcement being sought (see section 3.5).

In our experience contact decisions are particularly likely to conflict with the child's wishes where the child's wishes are not to have contact; this matches research evidence (e.g. Mackay, 2013). We see this including in contexts of domestic abuse, where the child may have expressly stated a wish not to have contact with the perpetrator of abuse and/or exhibits severe distress observed by professionals, and yet the court makes an order requiring contact (see also section 3). It is vital that the courts seek out information about any context of domestic abuse in order to make decisions in the best interests of the child (see also section 4). We are particularly concerned that this consultation refers to the idea of 'parental alienation', which in our experience can be alleged by perpetrators of domestic abuse as a tactic of their abuse. It is vital that the courts have an effective understanding of domestic abuse and its impact on children, including to ensure they are able to effectively hear what children are communicating.

Service example 1: The child's view illuminates contact arrangements satisfactory to all parties.

Court proceedings around contact had been ongoing for a significant amount of time, and court time. The child's views had not as yet been listened to. This was noted, and support was provided for the child to express their views and for these to be heard by the court. The child expressed a view that they did not currently want to have face-to-face contact with their father; this was not something that they could handle given what had previously happened in terms of the father's behaviours. However, the child did not want to lose contact with their father, as their father was valuable to them. The child asked if there were options for contact to be maintained through some other means, and expressed a particular preference for writing letters. This option was satisfactory to the father, who was pleased that the child wanted to maintain contact. This option was satisfactory to the mother, who was pleased that contact would be taken forward in a way that was safe for the child. This option was satisfactory to the child who was able to maintain contact in a positive way which they felt able to cope with. The court made an order in these terms.



2.2 Children of all ages, including babies, are able to communicate (including verbally, through their behaviour) – the courts are responsible for ensuring that they have access to and understand what children of all ages are communicating;

Children of all ages, including babies, have views about the things that are happening to them. These can be seen for example in the baby that stops crying because they have learned that they will not be soothed, the toddler that acts out in school each day where contact is scheduled for that evening, the child that screams and clings onto furniture each time someone tries to take them to the contact centre. These children may or may not be able to formulate these experiences in ways that the courts are used to hearing, e.g. as an explicit, verbalised statement on whether they want to have contact, but this information is always important to the court in taking decisions (and can be heard by the courts through for example adults providing observations about a child's behaviour – see example 3). It must become the norm that we acknowledge and validate the things that children, of all ages, are telling us through their behaviours; the responsibility to find ways to access and understand those views lies with the adults.

In our experience children under 12 are particularly likely to be unheard in the court process. It may be that this relates to current legal provisions, where the presumption that a child above age 12 is able to form a view is being misconstrued in practice as meaning that children below this age are unable to provide a view. Removing the current presumption and replacing it with a presumption that all children can provide a view may therefore be an important step in ensuring that all children can be heard in the court process, and therefore that decisions are better made through being better informed. We note however that it is not currently the case that children above the age of 12 are regularly and reliably heard in court processes. Furthermore, replacing the existing presumption with one that all children can provide a view is unlikely by itself to achieve the necessary outcomes of children being enabled to effectively participate in the court process (we also have concerns that in practice removing the current presumption could mean even fewer children being heard by the courts). Changing the presumption to one that all children can provide a view must therefore be accompanied by provision of effective mechanisms for children to provide their views – and for those in the court process to understand and value those mechanisms. It is also crucial that effective monitoring of children's participation in court processes, as suggested above, is put in place and scrutinised in particular for consideration as to whether children of all ages are being effectively heard.

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Service example 2: Where children are harmed because their views are not heard in child contact proceedings.

Child contact proceedings were initiated. The school provided information to the court that the children (of primary school age) had expressed clear views that they did not wish to have contact. A worker for the children asked if the children could speak to the Sheriff but was told that the children were not considered old enough to have a view. The court stated that the school was not independent and therefore not able to provide information on the children's views. The court ordered contact.

The children exhibited extreme distress at the time of contact visits, crying and screaming and clinging on to furniture so as not to go. The court refused to consider any evidence around a context of domestic abuse as there were no criminal proceedings.

The Sheriff repeatedly warned the non-resident parent for their behaviour at contact visits – particularly that they were turning up at the contact venue with a large amount of family members and this was deemed intimidating. No formal action was taken against the non-resident parent's actions despite this continuing after the Sheriff gave instructions that it had to stop.

Contact continued for about 18 months. Criminal proceedings had now started against the non-resident parent in relation to domestic abuse. The court stopped contact as it was not considered in the best interests of the children. The children are currently receiving support for their experiences, including the distress caused by court ordered contact.

2.3 A variety of ways, adequately resourced, must be provided, and understood by the courts, so that all children can be supported to provide their views through whatever mechanism(s) best enable them to express themselves

The practice of enabling a child's views to be heard by the court should be child-led. When our advocacy workers start work with a child their first step would often be to explore with the child the different possibilities available to them and what might work – and to make a plan for how to enable the child to communicate. Different children may be able to best express their views through different mechanisms – in order to ensure that the court receives the best information a variety of options therefore need to be available, adequately resourced, and the court supported to hear this information in whatever format it comes to them. In our experience it can be most effective where this information comes to the court in several different formats.



We have experience working with children to provide their views through a range of mechanisms.

- Form 9. We have occasionally supported children to complete Form 9 and provide this to the courts. We are aware of many cases where Form 9 has not been known to the child. We are not aware of situations where children have felt able to complete Form 9 without the support of a worker. We also note that children may be working through other forms, e.g. local authorities may offer a particular form for children to provide their views in relation to other processes, and it should be possible for the courts to hear the child's views, where appropriate, through other forms. Our experiences have however more tended to supporting children to express their views in ways led by the children. While Form 9 may be part of the package of options that should be available to a child, we do not believe that it is enough on its own.
- Artwork, visual representations, written story work. We have supported children and the court to hear the child's views through provision of their views in formats that they felt comfortable to produce. A child may draw pictures of their family for example, which can be a way for them to communicate their views about different members of that family. In one example a child had drawn a picture of their family in which the child, a sibling and one parent stood together in sunshine, under blue skies while far on the other side of the page the other parent stood under thunder clouds and lightning. The child is thus able to provide their perspective on their family life – and the court systems must support this to be provided, heard and understood by the court.
- Speaking directly to Sheriffs. We have supported children to speak to Sheriffs, but have also known cases where Sheriffs have refused to speak with children. We note that children may find it intimidating to speak directly to Sheriffs or to attend court – this is not a reason why a Sheriff speaking directly to a child should not happen, but it may require support (for the child and/or the Sheriff) and safe spaces. In the Children's Hearings System we have worked with children to provide their views through the use of avatars (ie a computer model that can speak their words, see section 5.1) and would welcome further discussion of how technology can be used to support children to engage in the court process.
- Trusted adults. Children have told us that they would like us to listen more to the adults that they trust, rather than requiring them to tell their story repeatedly. This may be a variety of individuals – in some areas independent child advocates are available and may be able to provide the child's views to the court. There may also be other individuals in the child's life who they trust and would like the court to listen to – such as teachers, support workers, or family members.



Service example 3: The court listens to the children's views through a range of mechanisms

Contact arrangements were in place for three children with a non-resident parent. The school started to raise concerns about the two younger children. The teacher had noticed that their behaviour changed when contact was scheduled. They had talked to the children who they described as very anxious, and refusing to eat. Our service was asked to start nurture work with the children, including work to support them to find their voice and describe their fears. The two children expressed views that they did not want to have contact.

On the day of one scheduled visit the resident parent contacted the service. The two younger children were extremely distressed, screaming and crying, and refusing to get into the car for the visit. The resident parent felt like she had to physically force the children to go to the visit because a court order was in place, but was worried about their distress and about hurting them. The service was particularly concerned that one child was trying to remove their seat belt, and could potentially open the car door while it was moving. The service advised the resident parent that it would not be safe to transport the children in this condition. The service maintained records of what it had witnessed and the advice given.

The service collated information from the school, from after school club and from their own nurture work with the children. This included pictures that the children had drawn, reports from our workers and from teachers of what the children had said about their views, and observations and logs from the workers and teachers about the children's behaviour. This information was supplied to the court. On receipt of this information, the Sheriff asked to speak to the children directly. This was supported. The Sheriff decided that whatever the children wanted should be accommodated – if they wanted to go to contact, this must be provided for, and if they did not want to go to contact this must equally be provided for.

The two younger children continued to say that they did not want contact; this was accommodated. The older child stated that they did want contact; this was maintained for a short time, until the non-resident parent disengaged.

There should be options available to the child to communicate in the way that they are best able to express their views – but this may require support for people involved in the court process who are not used to receiving or understanding information in this way. For example, in our experience solicitors do not always understand the role of support

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services and are not aware of the variety of ways in which a child's views may be sought – they may not know therefore who to turn to or what to ask for in terms of seeking the child's views, nor how to present this to the court. It is vital therefore not only that a range of mechanisms are possible for the child, but that these are effectively resourced and supported, and understood by all participants in the court system.

2.4 Effective mechanisms for two-way communication with the child must be provided throughout the court process

We strongly agree that an appropriate mechanism is needed not only to feedback to the child about the court's final decision, but also throughout the court process. This is important so that the child understands what is happening (e.g. when court processes are ongoing, when a decision is likely to happen, what will be expected of them if they go to court) and has enough time to absorb and ask questions about the final decision. This is a crucial component in ensuring that the child's experience of the court process itself is of a system which provides for their welfare.

A particular concern is where children are not given information about their own situation during processes, often on the basis that this is to protect them, and then on the grounds that they have not had information are deemed unable to provide a view or for that view to be unreliable. It should also be noted that not giving children information does not necessarily protect them – we have worked with children who have been distressed at the age of 12 when they suddenly start receiving information that they had not previously known about. In our experience a skilled worker can work with children around their understanding of difficult information from a young age; this support should also be available to older children. As with systems and structures to enable the child to express their views, systems and structures to provide information to the child should be about the child and how the child can best understand and process that information.

The child must be provided with information about the court process as well as about its decisions. In our work around children's hearings we often work with a child to support their understanding of the different people in their hearing and their roles. This can help a child to feel less intimidated by the process (and therefore to participate more effectively), as well as to understand what is happening and its impact. Similar work might be valuable in the civil courts, particularly perhaps where a child is asked or is asking to speak to a Sheriff directly. One way we work with children around these issues is using interactive technologies; in addition to providing guidance, Scottish Government may wish to consider how to provide information to children about the courts system in ways that they can actively engage with.

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It is crucial that whoever is responsible for communication with the child, and specifically for ensuring that the child understands the final decision that has been made, has the necessary skills, time and relationship with the child. We note the recent call from the Faculty of Advocates for people with specialist skills to work with children who are participating in court processes, as “It has long been accepted by experts in the field that neither lawyers nor the court are best placed to consider the communication abilities and needs of child and vulnerable witnesses” (Faculty of Advocates, 2018). In our experience, problems can occur when decisions are fed back without having the reasons explained in a way that the child can understand, and without providing enough time for the child to take in information, to fully process that information and to ask all their questions about what has happened. We would draw attention to the Super Listener developed by Children and Young People in the Power Up/Power Down project as an example of what young people say they want from the adults working with them. Communicating with children is a specialist skill which must be valued and respected by the courts.

It is also vital that the person responsible for communicating with the child has access to the necessary information from the court. This should include information about how the court has listened to the child’s views, and what considerations have been made as a result of the child’s views. This is important because there are situations where a child has believed they have expressed their views (e.g. to school, to a support worker) and these views do not appear to reach the court. Ensuring that this information must be fed back to the child provides the court with another opportunity to identify and rectify any issues where the child’s views have not been effectively heard.

2.5 Trusted and skilled adults have vital roles to play in civil court processes relating to children

Trusted and skilled adults play a crucial part in civil courts being able to make decisions in the best interests of the child and in ensuring that the court process itself is a positive experience for the child. Trusted and skilled adults may be required to support the children to understand the processes of the courts and their options to provide their views; they may be the individuals who provide the court with the views of the child; they may be the individuals who communicate with the child about the final decision made about the child’s life and what it means.

An independent child advocate can play a crucial role in supporting the child to find their voice and to express their views in formal systems in whatever means the child finds most appropriate. Provision for advocates is not currently available in all areas of Scotland, and can be limited to particular types of young people or particular types of processes (e.g.

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looked after children). We would welcome more extensive provision of advocacy services for children.

Providing the child's views to the courts requires skilled advocacy work, founded on a strong relationship with a child built up over time. This relationship is crucial to enable the child to have confidence in the worker and for the worker to understand the complexity of the child's views to therefore be able to present them effectively to the court. We have often provided information to the courts where this has covered several month's work. In contrast, we know of cases where a Child Welfare Reporter has provided a report on the basis of a 20 minute visit during a school breaktime (which was also problematic for the child's experience of their school day). We are not clear that Child Welfare Reporters always have the necessary specialist skills and background around communicating with children (noted above as crucial). While new arrangements for Child Welfare Reporters, including training and monitoring, are clearly required, there is also a need for a clear understanding of what this role is expected to provide (for example the difference between advocating for a child's views and providing a worker's perspective on those views) and the skills, such as specialist communication skills with children and a good understanding of the impact of domestic abuse on children, needed to fulfil that role.

A key challenge for the individual responsible for supporting the child and the court to hear the child's views is whether all players in the court have a clear understanding of and respect for each other's different roles. We have had situations for example where our independent child advocates have been perceived to be providing a view of one or other parent. We have also had situations where we have been requested to provide information to the court and then been criticised for not providing this through the appropriate system. Such instances suggest a lack of understanding of our service's role, and also an expectation that our services will be experts in court processes where our expertise lies elsewhere. We would be interested in further discussions about what information we could provide to individuals in the court system and legal profession to help them to understand our role effectively, and what information could be provided to us to ensure that we are able to represent the child's views most effectively.



3. Child Contact

We warmly welcome Scottish Government's consideration of issues around contact. In our experience this is an extremely problematic area of current practice, particularly where there is a context of domestic abuse. We see contact arrangements in place which are not in the best interests of children. These issues however require broader consideration than is covered by the questions in this consultation.

Key points:

- 3.1 Child contact arrangements must in practice be in the best interests of the child;
- 3.2 The law should not introduce presumptions as to who has a beneficial role in the child's life, or widen automatic granting of parental responsibilities and rights, as this may conflict with the best interests of the child in the individual case (with particular relevance to questions 8, 16, 19, 20, 21, 23, 24);
- 3.3 Child contact can be used to continue abuse – the state, not the non-abusive parent, should be responsible for managing this risk;
- 3.4 Contact centres should be regulated to ensure high standards (with particular relevance to question 6);
- 3.5 Exploration of the reasons why a contact order is not working should be the first response, before enforcement (with particular relevance to question 11);
- 3.6 Sibling contact is an important component of young people's experience and requires support (with particular relevance to question 10).

3.1 Child contact arrangements must in practice be in the best interests of the child

As noted in the consultation, the court is required to regard the welfare of the child as its paramount consideration. Looking at decisions, however, it is not always apparent how a decision is understood to be safe and meaningful for the child – and therefore how the child's welfare was at the centre of that decision. In particular we are concerned that in practice (despite this not being present in law) adults' rights to have contact are taken to supersede children's rights to have contact where this is safe and in their best interests.

There may be benefit in a broader shared understanding of the purposes of contact, led by Scottish Government, perhaps in the form of national guidance. We believe that our collective understanding of contact should be child centred, based on children's rights, based on what is safe, meaningful and in the best interests of the child. This would include for example contact that is developmentally appropriate for the child. It would include contact which is practicable for the child; we are aware of situations where contact orders have been put in place which conflict with the child's school schedule. There also needs to be clear recognition of the

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harm that perpetrators of domestic abuse do to children, and therefore of how contact in situations of domestic abuse may be unsafe and harmful for the child. Such shared understanding would be valuable for the courts in considering what, if any, contact order to make in the best interests of the child, as well as supporting professionals' understanding where they are part of contact arrangements.

Service example 4: A contact order is put in place which does not reflect facts of child development

A court order was put in place for weekly contact, for a defined length of time, by telephone with a two year old child. The two year old child was not able to stay on the telephone interacting for the required period of time. This is not surprising given expected development of a two year old child. The non-resident parent brought the matter back to court seeking for the resident parent to be held in contempt of court for not complying with the court order.

Of particular importance is a shared understanding of what 'supervised' contact is and therefore what the responsibilities of the person providing supervision are. This is important, for example, so that courts know when ordering supervised contact what that provides, and what it does not provide, in terms of the child's safety and wellbeing. This is also important so that relevant professionals, e.g. staff in contact centres, can be provided with appropriate training and held to appropriate standards. In many cases supervision may be provided by extended family members, e.g. grandparents. This may put such individuals in a difficult position, as they may have loyalties to the non-resident parent as well as to the children, and may fear that their own contact with grandchildren will be stopped if they provide information about problematic behaviour (resulting in, for example, grandparents covering up alcohol use during supervised visits). Family members may also not be in a position to recognise signs of coercion or abuse and take action to protect the child. It is crucial that, where courts order supervised contact because of concerns about a child's safety, there is a clear understanding of what that will entail, and the extent to which it will or not keep a child safe during contact.



Service example 5: Court ordered contact functions after the child's views on the practicalities of their schedule incorporated

The non-resident parent had recently left prison following a period of custody for domestic abuse offences against the resident parent. The court decision was for the relationship to first be re-established between the child and the non-resident parent by telephone before considering face-to-face contact. Telephone contact was agreed, to the child's phone, at a particular time of day. The child regularly did not have the phone switched on at the agreed time. The matter was returned to court, which considered moving to face-to-face contact, despite the concerns at the time of the initial decision, as telephone contact was not deemed successful. Our service had recently begun working with the child. The child made a comment to the service that the time agreed for telephone contact was a problem for them – they never had their phone switched on because they were just out of school. The child did not understand why the telephone contact could not take place at weekends when they would always have their phone on. This information was provided to the court, which ordered telephone contact at a time suitable for the child. Contact proceeded satisfactorily.

3.2 The law should not introduce presumptions as to who has a beneficial role in the child's life, or widen automatic granting of parental responsibilities and rights, as this may conflict with the best interests of the child in the individual case

In this section we comment briefly on key principles around parental responsibilities and rights and birth registration, as these have a bearing on child contact issues.

The over-arching principle around who should have parental responsibilities and rights (PRR) and who should be presumed to have a beneficial role in the child's life is that this should be in the best interests of the child. It is inappropriate for the law to introduce presumptions that have the potential to conflict with this, such as presumptions that the child would always benefit from the involvement in their life of a particular type of person (e.g. grandparents, both parents). Similarly, it would be inappropriate for the law to automatically expand the types of adults who have parental responsibilities and rights (e.g. through compulsory joint birth registration, through automatic provision of PRR to step-parents). This is not to say that, for example, maintaining a strong relationship with grandparents is not an important factor for many children, rather that each individual case, and what is in the best interests of that particular child, will vary.



We have particular concerns about questions in this consultation about extension of automatic PRR to all fathers or any assumption that children will benefit from contact with both parents. In our experience perpetrators of domestic abuse use ideas of their parental rights as opportunities to abuse – e.g. requiring to have time out of prison to attend case conferences/children’s hearings and then using this as an opportunity to abuse the non-abusive parent. Extensions to automatic PRR for all fathers or any assumption that children would benefit from contact with both parents therefore may act against the best interests of the child where there is a context of domestic abuse.

Service example 6: Birth registration and parental responsibilities and rights are complex in situations of domestic abuse and require consideration in the best interests of the child

A young woman was separated from her abusive partner at the time of giving birth to her baby and considering what she should do about birth registration. Some professionals suggested that she should put him on the birth certificate to give him a chance to be a father. The young women considered this in the light of her ex-partner’s abuse during her pregnancy. She wanted him to be a good father to his child, but was concerned that he had chosen not to do this during her pregnancy. She decided to give him as much time as possible to demonstrate that he wanted to be a good father – and did not register the birth until the last possible day. The father made no attempt to ask about his child during that time. She understood that the father could seek at a later date to be registered – and she thought that gave him appropriate opportunity if he actively wanted to be a father. She therefore chose not to register the birth with his name.

3.3 Child contact can be used to continue abuse – the state, not the non-abusive parent, should be responsible for managing this risk

Our services experience regular examples of perpetrators of domestic abuse using child contact visits or communication about child contact to continue to abuse – including, but not limited to, physical assaults, threatening the non-abusive parent that they will never see the child again, using contact visits to subject the child to a barrage of questions about what the non-abusive parent has been doing. We note that our service experience matches research evidence around separation being a high risk factor of serious harm for the non-abusive parent and around use of child contact to continue abuse (see e.g. Coy et al, 2012). This abuse can be enabled by the system, which puts protections in place for the non-abusive parent and the child(ren), e.g. special bail conditions, but makes exceptions such that the alleged abuser is allowed to contact, and abuse, the non-abusive parent in order to make arrangements for child

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contact. The negative impact of domestic abuse on children is recognised in the Domestic Abuse (Scotland) Act 2018 in the form of an aggravator to hold the perpetrator to account for harm to children through domestic abuse. Where there is ongoing risk of domestic abuse, the likely harm to the child through contact must be recognised by the courts as a core consideration for what is in the child's best interests.

Too often in our experience the burden of managing the risks of contact in a domestic abuse situation are placed on the non-abusive parent. We welcome consideration of the role of the contact centres in this consultation, but they are only relevant in some cases. Statutory services often remove themselves, perhaps because of misperceptions that there is no longer a risk to the child if the perpetrator of abuse is not in the house, or perhaps because of resource constraints. Where the non-abusive parent is raising concerns about facilitating contact they may be told to use family or friends, e.g. to drop a child off at contact visits. This may not be possible, particularly where the abuse has included tactics of isolation, leaving the non-abusive parent with few friends or family members to call on. It is also our experience that where the non-abusive parent does ask family or friends this can result in those individuals then experiencing abuse. It should not be the non-abusive parent's responsibility, or that of family or friends, to manage the risk presented by perpetrators of domestic abuse.

Service example 7: Statutory services are unable to provide support with child contact despite child protection risks

A young parent was informally managing contact arrangements with an abusive ex-partner by attending with him for contact visits taking place in a public place. A range of professionals (including health and voluntary sector) raised concerns about the risk to the child and to the non-abusive parent. The non-abusive parent reported experiencing high levels of anxiety while in the presence of the ex-partner for the contact visits and also difficulty in managing his behaviour without capitulating to his demands.

Social work stated that they were unable to provide any resource to support the young mother around contact. They reported no concerns about her care. They noted that it would not be acceptable for her to leave the child unattended with the ex-partner as that would pose a child protection risk to the child.

We are aware for example of pilot schemes such as 'Contactfamily' where a third party provider passes on messages about contact arrangements, meaning that the non-abusive parent is less likely to be subject to abusive messages while making arrangements. This also supports the child and the non-abusive parent's wellbeing, because for example both

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are less anxious whenever the phone beeps that there is an abusive message. We would welcome further exploration by Scottish Government of the availability of, and resources for, such services.

We do not underestimate the difficulties of providing services to support families affected by domestic abuse in relation to child contact. Some of our services provide spaces where contact may take place and offer support for handover arrangements (not supervised contact). Our services have experienced issues with perpetrators of domestic abuse in these settings, for example where contact is taking place shortly before the service closes the perpetrator may be repeatedly late. There have been occasions where the perpetrator has been abusive to service workers. More commonly, a perpetrator may seek to discuss changes in contact arrangements or their perception of shortcomings of the non-abusive parent with the service in front of the children, or ask the children to raise these issues with the services. In such cases the service will be clear that they will have that conversation with the non-resident parent separately – with the aim that the children get to spend their visit time enjoyably with the non-resident parent. All of these situations are difficult for the service to manage, however they are able to do so with recourse to management support, supervision arrangements, and support from other workers. It is notable that non-abusive parents who are required to handle such behaviours will have support from none of these systems – and often will not have family support in place due to the isolating tactics of many abusers. We would reiterate that it should not be the responsibility of the non-abusive parent to manage the abusive behaviours of the perpetrator.

Service example 8: The risks posed by perpetrators in child contact are not always well identified

Contact was put in place between a child and a non-resident parent through Skype. The non-abusive parent and the child had been forced to relocate due to the abuse, and their location was being kept confidential from the perpetrator. Contact by Skype was thought positive by the non-abusive parent because it meant the abuser was not attending the house and therefore felt safer. This form of contact was also deemed safe by services. However, it was later discovered that the perpetrator of abuse had been using the Skype sessions to ask the child to walk the device around the house, looking for clues as to their location, as well as spending the time asking the child questions about where they were and what the non-abusive parent had been doing. The contact had therefore continued to allow the perpetrator to track the non-abusive parent's movements as part of his pattern of abuse.



3.4 Contact centres should be regulated to ensure high standards

Contact centres can provide a vital resource so that contact can take place between a non-resident parent and child without direct contact between the perpetrator of domestic abuse and the non-abusive parent. For example, contact centres may be able to facilitate the non-abusive parent dropping off the child shortly before the contact session so that they do not have to be present when the perpetrator arrives. We note however that there are significant limits to the amount of protection currently provided. For example, contact centres are rarely able to provide support for the non-abusive parent in relation to the wider environment around the centre (e.g. if there is only one bus route to take in getting to the centre, the perpetrator may monitor that bus route). More crucially, contact centres are not necessarily resourced and trained to disrupt the behaviours of a domestic abuse perpetrator or unsafe contact more broadly (we have had situations where contact centres did not identify parents that were under the influence of alcohol/drugs or were not able to respond effectively to anger/aggression). As visible in our service examples, the tactics used by perpetrators of abuse are wide and complex, and identifying and managing these situations requires significant investment in staff. Where contact centres are not able to provide appropriate monitoring, the contact may well be unsafe for the child. There must be a common understanding of what contact centres are and are not able to provide (particularly in relation to supervised contact) and this must be effectively resourced and regulated to ensure high standards.

It should further be noted that contact centres are not always currently resourced to provide for effective meaningful contact, e.g. through the provision of relevant, safe, trust building activities for children and parents to engage in. When we work with abusive parents one area we may work with them around is meaningful engagement with children – supporting them to develop their understanding of the value of being a father and therefore how their domestic abuse has negatively impacted on their child. If a contact centre is not able to provide or support such activities it may be difficult for a parent to engage in meaningful contact with their child.

3.5 Exploration of the reasons why a contact order is not working should be the first response, before enforcement

The reasons why an order for child contact may not be working well are complex and often not about a child's, or a resident parent's, disregard of a court order. In particular in our experience there may be problems with contact where the contact order does not reflect the child's age or stage of development, where the contact order has not adequately considered practicalities for the child or where the child experiences high levels of

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distress around contact. These factors should be explored (with particular reference to the child's views) before consideration of enforcement action. It may be suggested that in such cases it would be the responsibility of the non-abusive parent to have the matter returned to court, however we have worked with parents where this has been sought and the legal representative has advised that it is not plausible. We would welcome exploration of potential mechanisms to ensure understanding of the circumstances of why a contact order is not working as a first response.

Perpetrators of domestic abuse may continue abuse through child contact. Examples of behaviours include regularly returning children later than agreed times, changing arrangements at the last minute, arriving with a large group of family members to intimidate the non-abusive parent. It is rare in our experience that such behaviours are dealt with through enforcement of contact orders – we noted in service example 2 above a perpetrator of abuse who continued to act against the Sheriff's instructions despite repeated warnings. In many other situations these matters would not even come to the court's attention – we note in section 4 below issues around legal professionals not understanding domestic abuse and therefore not bringing information to the court. Exploration of mechanisms to understand why a contact order is not working should also include consideration of how such tactics of abuse through contact could be more effectively tackled.

There is a need for greater information to be collected about how contact orders are, or are not, contributing to a child's wellbeing. In section 2 above we noted the need for effective scrutiny of how a child's views are being taken into account in making child contact decisions and this may be a particularly important aspect to understanding where a contact order is not working. There is a need therefore for much greater information, review and scrutiny of the outcomes of child contact orders. We note also the example of problem solving courts, where such information would come back to the court itself to consider progress in the individual case. It is vital that structures for information collection and scrutiny around child contact decisions are put in place.

3.6 Sibling contact is an important component of young people's experience and requires support

Relationships between brothers and sisters, and with other children with whom a child has grown up, are incredibly important, and we are supportive of measures to make it simpler for children and young people to stay in touch with one another, where this is appropriate and desirable. It is important that this contact is really meaningful for the children and young people, allowing them to spend time and maintain or rebuild relationships; we do not believe, for example, that contact between siblings which happens as a by-product of both having parental contact at the same time, will usually be sufficient.

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There are specific issues around supporting looked after children to keep in touch with other children they have shared family life with. In many respects we believe that the existing guidance/regulations are reasonable. They clearly highlight the importance of placing siblings together and, where this is not possible, the promotion of contact between them. It also goes some way to recognise the complexity of such relationships; acknowledging the multiple forms they can take including full siblings, half siblings, step siblings and even “foster” siblings. In practice however many more siblings are separated than remain together. Perhaps the biggest barrier to enabling looked after children to keep in touch with other children they have shared family life with is not regulatory but resource. The barriers to this happening can be numerous. For example, we know from practice that there is often a difficulty placing siblings together due to lack of placements, and that when children are separated, they can be placed some distance apart. Any contact has to be organised and facilitated and, again, resource is a factor – this is a particular problem if there are long travelling distances or difficulties in the relationship which may necessitate additional supervision/support. Local authorities often struggle to staff such arrangements and, while these can usually be managed informally, many foster families face competing demands.

Without underestimating the complexity of this, we do not believe that resource constraints should supercede the importance of maintaining relationships between brothers and sisters, where this is in the best interests of the child. We are therefore supportive of the suggestions of Clan ChildLaw that Section 17(1) of the 1995 Act is amended to include a duty on the local authority to:

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

Such amendments would be subject to existing safeguards in Section 17 around ensuring that this would only be done where it was in the best interests of the child.



4. Domestic Abuse

In this section we comment on key experiences of our services around courts' understanding of the domestic abuse context of cases and the experiences of women and children of family law processes where domestic abuse is a factor. This section is particularly relevant to consultation questions 32, 33, 34, 36, 37, 38, 41.

Key issues

- 4.1 Information around any domestic abuse context is vital to courts making decisions in the best interests of children; courts must take an active approach to seeking and understanding this information;
- 4.2 Civil courts must, as a minimum, provide women and children with equivalent protections around the court process as currently exist in criminal cases.

4.1 Information around any domestic abuse context is vital to courts making decisions in the best interests of children; courts must take an active approach to seeking and understanding this information

Domestic abuse is known to be relevant to a large proportion of family law cases (Mackay, 2013, found domestic abuse described by a parent or a child in half of her sample of cases reaching court). Domestic abuse is a core consideration for the wellbeing of a child. The Domestic Abuse (Scotland) Act 2018 recognises, by creating an aggravator to the offence in relation to a child, that a person's choice to abuse a partner/ex-partner is also a choice to harm a child. We have previously described (e.g. joint briefing with NSPCC and Children 1st, 2016) our services' experiences of the harm that a perpetrator of domestic abuse does to children, including isolating them from friends and/or wider family; inhibiting their ability to engage in school, sports and activities; attacking the relationship between the non-abusive parent and child; and forcing the child to live in a climate of fear.

Courts must therefore take an active approach to seeking out and understanding information about domestic abuse. This requires a range of mechanisms and understanding of all participants in the court process around the harm done to children through domestic abuse. It is clear at the present time that information about domestic abuse is not always getting through to the courts – resulting in decisions that are harmful to children. Subsections (7A)-(7E) of section 11 of the 1995 Act are useful but underused. These must be promoted and complemented with further mechanisms to ensure that the courts and the services and professions engaged in court processes understand domestic abuse and its impact on children.

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It is not currently viable for the courts to expect the non-abusive parent to bring issues of domestic abuse to their attention. In our experience, women affected by domestic abuse do not usually have confidence that family law processes will support their own or their children's safety or wellbeing. Often women and children experience the court processes as reproducing the dynamics of domestic abuse. Our service users describe their experience of civil courts in terms of feeling powerless, of having no choice, of having to say to a child who does not want to go to contact that the child has no choice. We would welcome exploration of ways in which confidence in the civil court for families affected by domestic abuse could be improved.

Service example 9: The negative impact of court ordered contact on the non-abusive parent, the children and their relationship

A court had ordered contact between an abusive ex-partner and the youngest of three children. Bail conditions were in place prohibiting contact between the ex-partner and the non-abusive parent, but exceptions were made for facilitating contact.

The non-abusive parent was isolated from friends and family, and no formal structures had been provided to support her to manage contact. She was therefore required to communicate with the ex-partner about contact arrangements herself and to drop the child off for visits. She experienced ongoing verbal abuse and was physically assaulted at drop off.

The older children were very upset that the non-abusive parent had been assaulted. They did not believe that a court could have ordered this when it put her at risk. They blamed her for doing the drop off and putting herself in harm's way. This caused difficulties in the relationship between the non-abusive parent and the older children.

The youngest child had autism spectrum disorder. Professionals around the child noted a pattern whereby the child's behaviours become particularly problematic (and harmful to self) after contact visits had taken place.

There may be particular barriers to the courts receiving effective information about domestic abuse due to issues around the legal profession's understanding of domestic abuse. We have had a number of situations for example where solicitors have told women who have fled that they have to provide their new address to the perpetrator of domestic abuse (putting themselves and their children at risk) or the court will find them in contempt. We have also known solicitors advise women not to raise any issues about domestic abuse in the court process as the solicitor's view is that the court will hold this against the woman. We also have experience of solicitors not providing information on a long



history of domestic abuse as they did not see the relevance of this to the child's wellbeing. These examples raise concerns about the legal profession's understanding of domestic abuse and its impact on children and also their view of how the courts see domestic abuse. It would be appropriate therefore that work is taken forward with the courts and the legal profession together to improve understanding of domestic abuse and how it harms children.

Service example 10: Where solicitors do not understand domestic abuse this may prevent important information reaching the court

A contact order was in place. The non-resident parent had previously threatened to abduct the children. The children became very distressed at contact visits, screaming and hanging on to the non-abusive parent. She therefore felt that she had no choice but to stay with the children during contact; she was subjected to ongoing abuse. The non-abusive parent raised concerns with her solicitor. The solicitor stated that he did not understand why she felt the need to attend contact and refused to supply any information to the court about the ongoing abuse or the children's distress at contact.

We note the proposal that domestic abuse risk assessments could be provided to the court. As described above, it is vital that the courts have access to and understanding of information about any domestic abuse context of cases, however we are unclear exactly what this proposal would entail. It may be useful for the court to have accurate, structured information about the non-abusive parent's experience of domestic abuse, which may be provided by an evidence based risk assessment tool. However, it should be noted that these risk assessments are dynamic tools, designed for a particular purpose, and that they must be carried out and interpreted by professionals who are trained to use them – it would not be possible for example for courts simply to take a numerical value from a risk assessment without understanding the contextual information. We are also not clear whether these would provide the information most relevant to a court considering questions of child contact – whereas for example effective mechanisms to facilitate the court understanding the child's views would always be crucial. It should specifically be noted that information in a domestic abuse risk assessment, if disclosed to the perpetrator of abuse through a court process, may increase the risk to the non-abusive parent or the children. This proposal requires more scrutiny and consideration.

We would welcome further work around the interaction between the civil and criminal courts. Several of the service examples contained in this response display issues of concern, such as bail conditions that do not cover child contact or civil courts failing to consider domestic abuse unless there is a criminal process. There may be further complexities with the

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provisions in the Domestic Abuse (Scotland) Act 2018 enabling Non-harassment Orders to protect children in cases of domestic abuse interacting with child contact processes. As noted previously, there is a need for greater information collection and monitoring around the outcomes of child contact decisions. This may be something that could also be further developed through models of integrated or problem solving courts.

4.2 Civil courts must, as a minimum, provide women and children with equivalent protections around the court process as exist in criminal proceedings

Our criminal justice system recognises that court processes can be used by perpetrators of domestic abuse to carry out abuse, and therefore a range of protections are available in criminal proceedings. These protections are not currently available in civil proceedings (or children's hearings – see section 5.2). This causes significant distress for our service users. A woman may find herself one week in a criminal process, with for example a screen to provide some protection from the perpetrator of abuse, and the next week sitting at the same table as the perpetrator of abuse in a civil process, often only a few chairs away. This can be the case even where the criminal court has deemed the woman and children in need of ongoing protection, through special bail conditions for example. The civil courts must be able to provide at least the same minimum protections that are available in the criminal courts, including prohibition of direct cross-examination, screens or other physical barriers from the perpetrator of abuse, consideration around the security of accessing the court (e.g. separate entrances and places to wait, awareness of the potential for the perpetrator or wider family members waiting around the court) to ensure that children and the non-abusive parent are protected from ongoing abuse throughout their experience of all court processes.

Our services describe a range of ways in which non-abusive parents and children experience the perpetrator of abuse continuing to abuse them during the court process. We have known non-abusive parents spend entire court hearings staring at the floor because the experience of being in the same room as their abuser, with no protections in place, is so oppressive. We have known abusers control the non-abusive parent from participating in the court process, for example through lightly tapping the table or making a particular sound whenever she speaks (these signs may be tactics he has used throughout his abuse to control her). The courts require an effective understanding of the dynamics of domestic abuse to be able to recognise, and stop, the ongoing perpetration of abuse within the court process –for the best interests and wellbeing of the child and of the non-abusive parent, and to ensure that all participants are able to take part in the process and therefore that the court is enabled to make the best decisions. As noted above, it is not viable for the court to expect the non-abusive parent to bring the potential for ongoing abuse to the

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court's attention – there may be barriers due to a lack of understanding around domestic abuse in the legal profession which would hinder them bringing forward this information. The court must therefore take an active role and responsibility in identifying and stopping domestic abuse from being carried out in court rooms and processes.

5. Children's Hearings

In this section we comment briefly on the use of technology in the Children's Hearings System and other procedural aspects, with reference to questions 49, 50 and 51.

5.1 Technology has the potential to improve children's experience of the hearings – when used in the best interests of the child

Barnardo's Scotland has for some time been at the forefront of using technology within the Children's Hearings System, both to help children and young people to prepare for a hearing and to ensure that children and young people's voices are heard.

We would be fully supportive of the hearing system making use of a wide range of technology across a number of areas, as noted below:

Children and young people's views can be represented using a variety of different methods and technologies. For example, we have developed avatars to 'speak' the young person's words for them where they do not feel comfortable to do so. We believe that there is considerable potential to use short clips/films and interactive apps, for example an app could be developed as an extension to the 'having your say' form.

Using technology is also a useful way to help children and young people feel better prepared to attend hearings, by understanding the process, people involved and getting to know their surroundings. Again we have used avatars to help with this along with the use of virtual walkthroughs of hearing centres.

There is great potential for the use of technology to enable children and young people to 'attend' hearings remotely, for example using Skype. This would be beneficial in rural areas (where travel to hearings can be a significant issue) but could also be used effectively across Scotland, especially where children and young people are only required to attend part(s) of the hearing. Technology should be used especially in cases where the child does not want to attend in person and/or does not want to see a particular person (this can be particularly difficult to arrange in certain children's hearing centre where there is a lack of available separate waiting areas) or where there are specific issues involved such as abuse (see comments below and in section 4.2 about the need for

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current protections available in criminal courts to be, as a minimum, equivalently available in civil courts and children's hearings).

Technology should also be used to capture feedback from children, young people and other stakeholders on their experiences of attending hearings.

While we are extremely positive about the possibilities for using technology within the hearings system, our experience has taught us that there can also be some hurdles to cross before this can run smoothly. We can foresee the following challenges:

It will be vital to ensure that there is access to the appropriate equipment within the hearing, and that approaches keep up to date with what can be a fast moving world. We note that the consultation question relates to 'available' technology, and this must be interpreted as technology which is generally available within society, and not imply a restriction on what can be used as the necessary equipment is not available within a hearing room. Hearing rooms would currently need to have the right equipment to facilitate online inputs, including tv/projectors for avatars/clips to be played; at present, not all areas have these facilities, and there are still occasions when our advocates will play an avatar using a tablet and everyone has to sit around it to watch.

With any introduction of new technology or approaches, there will be a need to support and train panel members and others involved in the hearing to build their confidence and understanding.

Management information systems will need to be digitally compatible to ensure that digital means of capturing children and young people's views are able to be saved for future reference, especially if the case progresses to the sheriff court.

5.2 Children's hearings process

We agree that safeguarder reports and other independent reports should be provided to local authorities in advance of children's hearings in line with other participants.

In line with our comments in section 4.2 above, we believe that, as a minimum, equivalent protections should be available to those affected by domestic abuse in children's hearings as they are in criminal courts. Our services have experiences where the perpetrator of abuse uses the hearing as an opportunity to abuse. In one particular instance the non-abusive parent was subject to a tirade of verbal abuse in a hearing. After the perpetrator had left, the panel chair apologised to the non-abusive parent for their experience, stating that they had not felt able to stop the abuse happening in front of them. Broader system protections for



vulnerable persons might have enabled that chair to feel confident to effectively intervene to stop the abuse.

6. Commission and Diligence

Barnardo's Scotland warmly welcomes the Scottish Government proposal to amend the law such 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 (question 5).

We responded to the consultation on this topic in 2016 noting that in our experience decisions about disclosure of confidential documents were being made which were detrimental to the child's wellbeing. We have had situations where the court has requested disclosure of our therapeutic work with children (e.g. notes, artwork), including where the person seeking disclosure is alleged to have abused the child. A particular concern of ours is the potential impact of such decisions on the child's ability to engage with support services. When our services start working with a child we discuss confidentiality with them, for example that if they told us something which indicated someone was at risk of harm that we would share that information in the best interests of that child or another child. The child understands therefore that while we cannot promise them absolute confidentiality, we can promise them a safe space – a space that is predicated on their best interests, including in terms of confidentiality. This is compromised if a court process may mean that their confidential and sensitive material is disclosed, potentially to their abuser, without the court seeking their view or understanding the impact on the child. It is vital that court processes do not inhibit the provision of safe spaces for children to access support.

The law needs to be strengthened to ensure that decisions about disclosing confidential documents are only made in the best interests of the child and after taking the views of the child into account. The court must already consider the rights of the child in these decisions and yet we see decisions being made which are problematic. Whilst strengthening the law is vital, it is also crucial that courts are provided with effective support and resources to understand the impact of these decisions on the child and to seek and understand the child's views. As noted in section 2 above, supporting a child to provide their views to the court is a complex task – there must be a variety of mechanisms available such that the most appropriate means for the particular child can be facilitated. There must also be a two way flow of information. The court should provide child-friendly information about what and why a particular decision was made, such that the child understands, and has confidence in, the decisions being made about their life. The support and resources necessary may include training for relevant people in the court process and provision of resources such as specialist child support or advocacy workers.

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