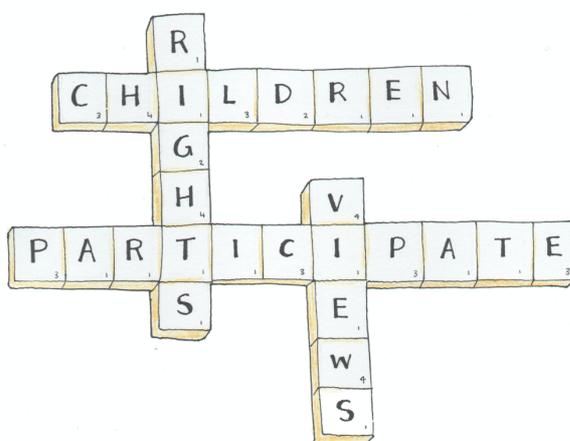


Children's Participation in Family Actions – Probing Compliance with Children's Rights

Research Report



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The structure of this report

The report is structured in the following way:

Chapter 1 An overview of the research

In Chapter 1, we set out the research aims and objectives and describe the research methodology.

Chapter 2 Children's Participation Rights in Family Actions – the Scottish Legal Context and Compliance with the UNCRC

In Chapter 2, we review the Scottish legal context. We set out some of the key issues for achieving compliance with the UNCRC.

Chapter 3 Children's Expert Group

In Chapter 3, we set out the priorities for the research that were established by the Children's Expert Group.

Chapter 4 Review of Case Law

In Chapter 4, we review reported case law relevant to children's participation in family actions.

Chapter 5 Perspectives of Legal Professionals in Scotland

In Chapter 5, we report on our interviews with Scottish legal professionals. We examine their perspectives on the challenges and barriers to implementing children's participation rights in family actions.

Chapter 6 International Perspectives on Children's Participation in Family Actions

In Chapter 6, we present our review of evidence about children's participation in family actions. We also examine the perspectives of international experts.

Chapter 7 Moving Forward – Steps to Achieving Compliance with the UNCRC for Children’s Participation in Family Actions in Scotland

In Chapter 7, we bring together the research findings to examine how law, policy and practice in Scotland could develop to achieve compliance with the UNCRC in relation to children’s participation rights.

Chapter 8 Conclusion

In Chapter 8, we bring together the overall findings of the research.

1 An overview of the research

1.1 Introduction

Children's involvement in family law proceedings is currently subject to policy and legislative scrutiny. Despite the strong provisions in the Children (Scotland) Act 1995 regarding children's views being given due weight in decisions about parental responsibilities, children's rights to participate have been inconsistently and inadequately realised. Empirical evidence and case law points to notions of children's competency, their manipulation and their distress (caused by participation) as potential 'blocks' to children's participation rights (Mackay, 2013a and b; Morrison et al, 2013; Morrison, 2014; Tisdall and Morrison, 2012; Tisdall, 2016). This has been recognised by the Family Law Committee of the Scottish Civil Justice Council and as part of the Scottish Government's Children (Scotland) Bill. This research wrestles with issues connected to the implementation of, and barriers to, children's participation rights. It examines how legislation and practice in this context might be developed to ensure its compliance with children's human rights

In this chapter we provide an overview of the research project in its entirety. We state the research aims and the linked objectives. We elaborate on the different phases of the research and the methods used for each. We provide an overview of the key ethical issues for the project and describe how we approached them.

1.2 Research Aims and Objectives

The research had two overarching aims:

- To interrogate the current challenges for and barriers to realising and implementing children's participation rights in family actions and the implications these have for compliance with children's human rights.
- To identify empirical evidence on potential solutions to these issues from Scotland and from other jurisdictions (England and Wales, Australia, Canada and New Zealand – who

have positively evidenced developments, from judicial interviewing to children's advocacy).

The objectives for the research are:

1. To provide opportunities for children with experience of family actions to shape and influence research and policy making in this area.
2. To ascertain from the perspective of legal and advocacy professionals, what the current challenges for, and barriers to, children's participation are in family actions in Scotland and the implications for children's human rights.
3. To investigate how notions of 'competence', 'manipulation' and 'distress' are understood and addressed in practice.
4. To identify promising practices in Scotland that aim to address these barriers to and challenges for children's participation and evidence of their effectiveness.
5. To identify how other jurisdictions address these issues, what evidence exists about the effectiveness of these approaches, and explore how they might translate to a Scottish context.

1.3 Research Methods

Children's Expert Group

The research was guided by children with experience of participating in family actions. Children with an existing relationship with support services were invited to form a Children's Expert Group for the research. This group helped to ensure that the research was grounded in the lived experiences of children who have participated in family actions in Scotland. The group provided a rare opportunity, for those whose lives are most affected by these issues, to influence research and policy making in an arena that they are often excluded from. (Research objective 1)

The research had four further phases:

Phase 1 reviewed reported case law on children's participation in family actions in Scotland. The analysis examines the tensions and dilemmas that exist for children's participation in

family actions and what bearing these have on children's human rights. It provides a context for the overall research and helped shape the focus of the subsequent research activities. (Research objectives 2 & 3)

Phase 2 focused on the perspectives of legal and advocacy professionals. We undertook semi-structured qualitative interviews with professionals who have 'on the ground' experience of children's participation in family actions. Interviews were carried out from the following groups: judiciary (n=6), solicitors (n=8), advocacy specialists (n=3). Purposive sampling identified participants with expertise in this area. Care was given during sampling to ensure there was spread of representation, such as including specialist and non-specialist judges. Interviews were recorded and transcribed. These interviews focussed on the perceived challenges for and barriers to children's participation and any solutions there may be to these. Interview schedules were informed by priorities identified by the Children's Expert Group and by findings from the case law review. Particular attention was given to how the notions of 'competence', 'manipulation' and 'distress' are understood and addressed in practice. The interviews explored what impact current legal processes have on children's human rights. Data were analysed thematically. (Research objectives 2, 3 & 4)

Phase 3 investigated other jurisdictions' approaches to children's participation in family law and other parts of the justice system. A rapid international review of literature was undertaken of children's participation in family actions. The searches focussed on the jurisdictions of England and Wales, Australia, Canada and New Zealand. These jurisdictions were selected because of their recent and on-going attempts to improve children's participation in family actions. Searches were restricted to publications written in English that have been published during the period 1997-2017. Searches were carried out using legal databases Bailii, Westlaw UK & International and Lexis Library, as well as social science databases including Web of Science. We also carried out searches on Open Grey, a European search engine that focuses exclusively on 'grey literature'.

Follow up qualitative interviews (n=15) were undertaken with authors of the literature from the evidence review. This enabled an interrogation of how different jurisdictions addressed challenges for and barriers to children's participation that have emerged from other phases

of the research. Interviews allowed us to ascertain whether and in what ways the legal terrain may have shifted since the publication of the reviewed evidence. (Research objective 4)

Phase 4 aimed to contribute to policy and practice debates with two intensive events. The first event, *'Realising children's human rights to participate in family actions?'* was held in November 2018. Here, we presented interim findings from the review of case law, using these to stimulate dialogue amongst key government stakeholders on the barriers around the *implementation* of children's rights in family law. The second event, *'Reforming the Children (Scotland) Act 1995'* was held 1st October 2019, involving key stakeholders from across civil society and academia in Scotland. This event focused on the research in its entirety. It was opened by Ash Denham, Minister for Community Safety, and chaired by Bruce Adamson, the Children and Young People's Commissioner for Scotland. The event was used to share and develop our findings.

1.4 Research Ethics

Ethical approval was gained from both the University of Stirling's General University Ethics Panel and by the University of Edinburgh's School of Social & Political Science's Ethics Committee.

A range of ethical considerations were considered such as participants' informed consent for interviews and data management, with particular concern for issues involving the child experts. Attention was given to ensuring that the children were appropriately supported before, during, and after their contributions, by ensuring a support service was in place. This service was the contact should any concerns have been raised about a child or someone else being at risk of significant harm, which would have been reported.

Access and permissions to research with the judiciary were facilitated by the Scottish Government's Justice Analytical Services. All participants' data has been anonymised in the report. All interviewees were offered the opportunity to review the report for accuracy before it was finalised.

2 Children’s Participation Rights in Family Actions – the Scottish Legal Context and Compliance with the UNCRC

2.1 Introduction

In this section we establish the legal context for the research. We begin by defining family actions and providing a brief overview of the Scottish policy context for children’s participation in family actions. We then set out the relevant provisions from the Children (Scotland) Act 1995¹, the European Convention on Human Rights and the United Nations Convention on the Rights of the Child. We highlight the authoritative interpretations of children’s participation rights, from the UN Committee on the Rights of the Child through their General Comments.

2.2 Defining family actions and children’s participation

Family actions are legal proceedings where a court may make an order that regulates adults’ parental responsibilities and rights. This research is concerned with how children’s participation rights are implemented in such private law proceedings and decisions. In particular, this research is primarily considering court proceedings under Section 11 of the Children (Scotland) Act 1995.

2.3 Policy Context

Children’s participation in family actions is high on the Scottish policy agenda. A lodged Parliamentary Petition raised serious concerns about the current legislation and practice in this area.² There has been ongoing work by the Family Law Committee of the Scottish Civil Justice Council around how children’s views are heard in family actions: this led to a revised F9 form (the form used by courts to elicit children’s views) in 2019.³ As part of its Programme for Government 2018-19, the Scottish Government committed to consult on and introduce new legislation that would: ensure that the child’s best interests are at the centre of any

¹ We refer to the new provisions proposed in the Children (Scotland) Bill in Chapter 7 of this report.

² <http://www.parliament.scot/GettingInvolved/Petitions/PE01635>

³ <https://www.scottishciviljusticecouncil.gov.uk/news/2019/04/02/views-of-the-child-in-family-and-civil-partnership-actions>

contact or residence case or Children’s Hearing; and ensure that the voice of the child is heard. In September 2019, the Scottish Government introduced the Children (Scotland) Bill to the Scottish Parliament and published its Family Modernisation Strategy (Scottish Government, 2019). At the time of writing this report, the Children (Scotland) Bill was subject to the first stage of parliamentary scrutiny in the Parliament’s Justice Committee.

In this chapter we review the existing domestic and international legislation that addresses children’s participation rights in family actions. In Chapter 7 of this report, we review relevant provisions made in the new developing legislation, the Children (Scotland) Bill.

2.4 The Children (Scotland) Act 1995

Part 1 of the Children (Scotland) Act 1995 is the primary legislation for the relevant family law provisions. Section 1 sets out the responsibilities parents have to their children and Section 2 sets out parents’ rights consequential to those responsibilities.⁴ These include a parent’s right and responsibility to maintain personal relations and direct contact with the child on a regular basis (s. 1(1)(c) and s. 2(1)(c)). This right and the corresponding responsibility relate to children under the age of 16. Section 1(1) is qualified, with the responsibilities only applying so far as is practicable and in the interests of the child.

When making any major decision in relation to a parental responsibility or right, parents must have regard to their child’s views as far as is practicable, taking account of the child’s age and maturity and views of any other people with parental responsibilities or rights in regards to the child (s. 6). As a matter of practice, decisions such as children’s contact and residence during and following parental separation are considered such a major decision. Thus children’s views should be considered whether or not parents take their dispute to court.

Should court proceedings be initiated, courts are charged with giving due regard to children’s views. When making a decision about parental responsibilities and rights under s. 11, a court:

⁴ While s. 2’s header is ‘parental rights’, they are consequential to enabling the parent to discharge parental responsibilities (see *H v H* (2016 SAC (Civ) 12) and commentary in *Fotheringham* (2017)).

- ... taking account of the child's age and maturity, shall so far as practicable --
- i) give him the opportunity to indicate whether he wishes to express his views;
 - ii) if he does so wish, give him an opportunity to express them; and
 - iii) have regard to such views as he may express. (s. 11(7)(b)).

A child aged 12 or above shall be presumed to be of sufficient age and maturity to form a view (s. 11(10) as well as s. 6(1)). A number of mechanisms follow on from the primary legislation:

- If children are served with papers once the case enters the court process (called 'intimation'), they receive a Form F9 requesting their views. The form goes back to the sheriff.⁵
- The court may appoint a child welfare reporter or curator ad litem to report on the child's views.
- The sheriff may express the wish to hear directly from the child and ask for the child to be brought to the court.
- The child may give evidence as a witness, at a proof. The child can use 'special measures' to help the child give evidence, as a 'vulnerable witness' under s. 11 of the Vulnerable Witnesses (Scotland) Act 2004.
- A child may take independent legal advice. If this were done, the child's views can be expressed in several ways. The lawyer may help the child to fill in Form F9; the lawyer may write to the court on the child's behalf; or the lawyer may seek to have the child involved as a party to the action.
- Alternatively, if the case were in the Sheriff Court, the lawyer may appear on the child's behalf at the Child Welfare Hearing to represent the child and assist in having the child's views communicated to the court views. The Child Welfare Hearing provides an early hearing to resolve any disputed issues in family actions, particularly in relation to children.⁶

⁵ A sheriff would hear most family law cases at first instance but some cases are heard in the Court of Session at first instance.

⁶ This summary is largely taken from Tisdall (2018).

When considering whether or not to make an order, and what order to make, the courts' paramount consideration is the child's welfare (s. 11(7)(a)). There is no presumption in favour of contact between parent and child. There is, however, a general principle that maintaining contact with a parent is conducive to the child's welfare - see Lord President Rodger in *White v White* (2001 SC 689).⁷ The court must have regard to protecting the child from any 'abuse', the risk and/or effect of any abuse on the child (s. 11 (7A-7C)), which were amendments seeking to ensure courts considered the effects on children of domestic abuse. The court must also consider whether relevant persons (those with parental responsibilities or a parent of the child without parental responsibilities or rights) will co-operate with each other in regards to matters affecting the child (s. 11 (7D-7E)). These amendments sought to address children's welfare in highly contested child contact cases, because of allegations or concerns of domestic abuse and/or difficulties with parents co-operating with each other.

Thus, children have rights to participate in contested child contact cases that come to court, with a range of potential mechanisms. Neither competency nor capacity are terms directly used in the relevant sections of the 1995 Act, in regards to children's participation rights, but rather 'age and maturity'. 'Maturity' is not further defined in the 1995 Act. Particular provisions have been added to the 1995 Act, seeking to address high conflict cases between parents and domestic abuse.

2.5 European Convention on Human Rights (ECHR)

The ECHR provides a set of rights that are as applicable to children as they are to adults. As the legislation is not child-specific, the ECHR has often been used in conjunction with the UNCRC when dealing with matters that affect children. The provisions of the ECHR are largely incorporated into domestic law. This is through the Human Rights Act 1998, which requires all Scottish law to be compatible with 'Convention Rights'.⁸ Further, public authorities (like courts) must not act incompatibly with such rights.

⁷ Lord Rodgers stated: "It is conducive to the welfare of children if their absent parents maintain personal relations and direct contact with them on a regular basis" (para 17).

⁸ Rights contained within the European Convention for the Protection of Human Rights and Fundamental Freedoms, as detailed in Schedule 1 of the 1998 Act.

For this study, two ECHR Rights are particularly relevant:

Article 6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 8(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.6 The United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC is the most significant legal instrument for advancing children's rights. It has been ratified by all but one of UN member states. The United Kingdom is bound by the UNCRC by virtue of being a party to the treaty. The UNCRC has not yet been incorporated into United Kingdom or Scots law. This means it is not enforceable in support of individual children's rights and interests. It may, however, be used to interpret domestic legislation. It is presumed that Parliament does not intend to legislate in a manner incompatible with treaties to which the United Kingdom is a party and the Scottish Government has committed to incorporate the UNCRC in this parliament (Scottish Government, 2018a, p2283).

Two of the UNCRC's general principles are of particular importance for contested child contact cases. Article 3 sets out the 'best interests' principle:

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 3 therefore has a wide remit – in all actions concerning children – but a lower threshold than 'paramountcy' – a child's best interests are 'a primary consideration'. No sharp legal distinction has been made between the concept of a child's 'best interests' (used in the UNCRC) and a child's 'welfare' (used in Scots law).

Article 12 of the UNCRC sets out a child's right to have their views considered:

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

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

While Article 12 tends to be the most cited of the participation rights, the UNCRC contains a number of other participation rights, such as Article 13 (freedom of expression), Article 14 (freedom of thought, conscience and religion), Article 15 (freedom of association and peaceful assembly) and Article 17 (access to information).

In addition, several other Articles within the UNCRC are relevant to disputed contact decisions:

Article 7(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 9 (1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

(2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

(3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 18(1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

A child therefore generally has a right to live with both parents and both parents are responsible for the child's upbringing and development. These rights are qualified by consideration of the child's best interests. A child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents, unless that is contrary to the child's best interests.

2.7 Compliance with the UNCRC

The UN Committee on the Rights of the Child provides guidance through its General Comments on the interpretation and the implementation of the UNCRC. As authoritative interpretations, the General Comments provide a detailed framework by which to consider compliance in law, policy and practice.

The Committee's General Comment on Article 12 was published in 2009, with a number of key points for this research:

- A child should be presumed to have the capacity to form his or her own view: "... it is not up to the child to first prove his or her capacity" (para 20).
- There is no age limit on the right of the child to express his or her views (para 21).
- A child need not have comprehensive knowledge to be considered capable (para 21).
- Children experiencing difficulties must have opportunities to express their views (para 21).
- States Parties must be aware of the "potential negative consequences of an inconsiderate practice of this right" and ensure the "full protection of the child" (para 21).
- 'Freely' means a child must have the right to express their own views and not the views of others (para 22) and the child must not be manipulated nor subjected to undue influence or pressure (para 22). A child should not be "interviewed more often than necessary, in particular when harmful events are explored" (para 24).
- Information is a precondition to a child's "clarified decisions", both in terms of: the matters, options and possible decision to be taken and their consequences; and the conditions under which the child will be asked to express their views (para 25).

- “All matters affecting the child” must be understood broadly (para 26-27).
- “Being given due weight in accordance with the age and maturity of the child” requires views to be considered seriously (para 28).
- Maturity as well as biological age should be considered in determining the significance of a child’s views (para 29).
- Maturity is defined as “the capacity of a child to express his or her views on issues in a reasonable and independent manner” (para 30).
- Should a child decide to be heard, “... wherever possible, the child must be given the opportunity to be directly heard in any proceedings” (para 35).

The UN Committee thus provides an expansive interpretation of Article 12, to maximise the potential for children to have their views duly considered. A child’s age and maturity can be relevant, particularly in terms of the weight given to a child’s view. But children should be presumed to be capable of having a view, so the question is how to facilitate this.

The General Comment 12 further provides specific steps for implementing children’s participation rights. These include:

- Preparation for the child;
- An enabling and encouraging environment for the hearing;
- Assessing the capacity of the child, so as to guide the weight to be given to these views in the decision;
- Feedback to the child on the outcome and how the child’s views were considered;

- The child should have access to complaints, remedies and redress should their right be disregarded or violated (para 40-47).⁹

Article 12 therefore requires that children’s participation rights are considered *throughout* the legal process.

2.8 Summary

In this chapter we have set out the current legal context of the research. We highlighted the relevant provisions from the Children (Scotland) Act 1995¹⁰, the European Convention on Human Rights and the United Nations Convention on the Rights of the Child and the key interpretations of children’s participation rights that are established through the General Comments made by the UN Committee on the Rights of the Child. We return to these in Chapter 8 where we analyse how these are reconciled with the provisions made in the developing Children (Scotland) Bill. In the next chapter, we turn to the Children’s Expert Group and examine their priorities for the study.

⁹ General Comment 5 published in 2003 states that children must have access to effective remedy for their rights to be meaningful (para 24). This means that if a child believes their right (including rights to participate) have been breached, then they should have an accessible way to complain and seek redress. This extends to breaches of children’s participation rights.

¹⁰ We refer to the new provisions proposed in the Children Scotland Bill in Chapter 7 of this report.

3 The Children's Expert Group

3.1 Introduction

This part of the research answers the first research aim and the first research objective of the study:

Research aim 1: To interrogate the current challenges for and barriers to realising and implementing children's participation rights in family actions and the implications these have for compliance with children's human rights.

Research objective 1: To provide opportunities for children with experience of family actions to shape and influence research and policy making in this area.

The Children's Expert Group was formed so that the research could be guided by children who had experience of participating in family actions. A group of children met with the research team at the beginning of the research to help identify priority areas for the project. In-depth research on children's own experiences of participating in family actions was outwith the scope of this project. Therefore, the purpose of the Children's Expert Group was not to provide a representative account from children about participating in family actions but rather was to ensure that the research was grounded in children's lived experiences (Lundy and McEvoy, 2009; Collins et al, 2020). This chapter elaborates on the methodology for this part of the research. It also reports on the areas that the Children's Expert Group identified as priorities for the research.

3.2 Recruitment of the Children's Expert Group

At the beginning of the research, we made contact with a range of third sector support services and youth advocacy and participation projects. For ethical reasons, recruitment included children who were not involved with on-going legal disputes and had on-going relationships with support services. Despite many great efforts from various support services and advocacy projects, recruitment was challenging. This in part may be explained by the absence of on-going specialist support for this group of children. There are few specialist support services for this group of children and even fewer that provide support children once

legal disputes have ended. However, Edinburgh Domestic Abuse Advocacy Court Support (EDAACS) were able to support recruitment of the expert groups for this part of the research. Appendix A contains the recruitment materials used for the Children's Expert Group.

3.3 The Children's Expert Group

Four children were recruited to form the expert group. Children were aged between seven and ten years old. Three of the children identified as boys and one as a girl. All of the children had their views facilitated as part of legal proceedings about disputed child contact. All of the children's views had been taken by a court reporter (now called a child welfare reporter) as part of preparing a child welfare report.

3.4 Identifying priorities for the research

With a Child Support Worker from EDAACS, the research team facilitated a workshop with the Children's Expert Group. The aim of this was to identify children's priorities for the research. During the workshop, children were invited to reflect on their own experiences of participating in family actions and from these to identify areas for the research to explore. Children were invited to identify issues and practices surrounding participation that they thought needed to change. Children were also invited to identify areas of family law or practice that they wanted the research to examine. An outline of the workshop is provided in Appendix A.

3.5 Priorities for the Children's Expert Group

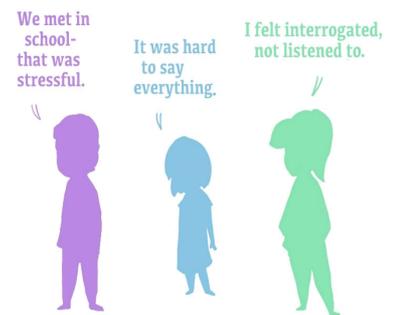
The Children's Expert Group identified three broad areas for the research to focus on: the need for skilled and individualised support; valuing children's views in decision-making; and children's place in contested proceedings.

The need for skilled and individualised support

All children reflected on how difficult the process was for giving their views in disputed child contact. In part, this was due to the topic – contact with one or more of their parents – but also how their views had been sought. They thought improvements could be made.

Children were keen for the research to focus on the different ways in which children might be able to participate in legal disputes. They felt

it was important that mechanisms for children’s participation were sensitive to children’s own particular circumstances and to any difficulties they may experience in giving their views. For instance, children discussed that it may take time or several meetings for children to feel able to express their views. They reflected that current mechanisms risked feeling disempowering rather than empowering.



Valuing children’s views in decision making



Despite all of the children having their views sought during the legal dispute about contact, children felt that their views had not been listened to or heard. These feelings related to both the mechanisms that aim to facilitate participation as well as the decisions

that were then made. Children wanted the research to focus on how law and practice might change so that there was greater emphasis on listening to their views. They also wanted the research to examine how children’s views were taken into account and weighed in decisions made by courts.

Children’s place in contested proceedings

Children described feeling ‘kept out’ of the legal process in parental disputes about child contact. They were frustrated that their views had been mediated by another adult (e.g. child welfare reporter) to the court. Some children felt strongly that this had led to their views being misrepresented or that the substance of them had been changed. Children wanted the research to consider how views might be directly represented



to the court. They also wanted the research to examine how children might be informed about the decisions made at court and the reasons for those particular decisions.

3.6 Summary

Through the Children's Expert Group, we aimed to ground the research in children's lived experiences (Lundy and McEvoy, 2009; Collins et al, 2020). The Children's Expert Group identified three key priorities for the study: the need for skilled and individualised support; valuing children's views in decision-making; and children's place in contested proceedings. These are key issues that we grappled with and return to throughout the research. In the next chapter we report on our review of case law.

4 Review of Case Law

4.1 Introduction

This review of case law contributes answers to the first research aim and the third research objective:

Research aim 1: To interrogate the current challenges for and barriers to realising and implementing children's participation rights in family actions and the implications these have for compliance with children's human rights.

Research objective 3: To investigate how notions of 'competence', 'manipulation' and 'distress' are understood and addressed in practice.

The review concentrates on s. 11 of the Children (Scotland) Act 1995, when contested contact cases are decided by the court. As further detailed below, all cases that refer to the participation provisions of the Act (i.e. s. 11(7)(b)) were considered as well as a 12 month sample of recent s. 11 reported cases.

4.2 Methodology

For this review, two searches of reported case law were undertaken through the Westlaw database. These form the core of the cases analysed. First, reported case law was identified by searching for references to s. 11(7)(b) of the Children (Scotland) Act 1995: in other words, case law that is annotated as addressing children's participation rights in s. 11 orders. The database search identified 31 cases up until 1st May 2019. The results give insight into courts' interpretations of this provision but only when children's participation is identified as a legal issue. Thus, second, another search and analysis was undertaken of reported case law, for over 12 months, of s. 11 cases more generally. Specifically, this was from 1st June 2017 to the 1st June 2018 and resulted in 9 cases. This second method provides the opportunity to analyse more generally how children's views are presented and used in written decisions.

A review of reported case law has its disadvantages because of how cases are selected for reporting. Cases are selected because they are perceived as making a significant legal point.

They are not necessarily typical of all cases. Reported case law is more likely to be appeal cases, whereas children's participation in family law proceedings is more likely to occur in sheriff courts at first instance. Most Section 11 cases in the Sheriff Court are unreported. Thus appeal cases may be commenting on how lower courts recognise children's participation rights but the appeal courts themselves rarely interact with children directly. The reported case law from sheriff courts, when identified, was given a separate analysis, as well as considering all the identified reported case law together.

This review draws upon previous ones done by Tisdall and colleagues, published elsewhere (Marshall et al, 2002; Tisdall et al, 2002, 2004; Morrison et al, 2013; Tisdall and Morrison, 2012; Tisdall, 2016, 2018).

4.3 Findings

The findings are grouped together below into four themes: the court's attention to children's right to participation and what is 'practicable'; problems with the mechanisms for children to participate; court's concerns for a child's welfare, which can limit the child's opportunity to participate; and the weight given to a child's views by the court.

4.3.1 Attention to children's views in reported case law

Children's views used to be largely absent from reported family case law in Scotland (Marshall et al., 2002). Children's views were rarely mentioned in decisions and even less likely to be described as influential on the decision. Now, children's views are more likely to be mentioned, since the implementation of the 1995 Act and particularly after the case of *Shields v Shields* (2002 SC 246). The case is notable both because the appeal to the Inner House of Court of Session was solely on the basis of s. 11(7)(b) and because of the court's guidance on interpreting these provisions.

Shields v Shields was a relocation case, with the mother requesting a residence and specific issue order, in regards to her son who was seven and a half years old. The case was appealed to the Sheriff Principal, who noted negatively that attention had been lacking in ensuring the child had an opportunity to state his views. Papers had not been served on the child and hence the child had not received the Form F9; no justification for this had been recorded,

beyond the child's age. The Sheriff Principal still refused the appeal, as he would "... have to be satisfied that no sheriff acting reasonably in the circumstances ... could have refrained from seeking the views of an 8-year old child ..." (quoted in para 4). The Inner House of Court of Session disagreed. The sheriff was obliged to exercise a discretion as to whether, and if so how, an opportunity should be given to the child to express his views. The child had an absolute right to an exercise of that discretion. It was insufficient to say that some sheriff or sheriffs might, hypothetically, have exercised that discretion in a manner unhelpful to the child. Further, courts could not necessarily rest on an early decision but had to consider whether a material change in circumstances had happened, up until the order was made. The lapse of time between intimation being dispensed with, and the decision being taken, was such a material change.¹¹ The subsequent observations by the Inner House help to clarify the participation provisions of the 1995 Act. The first test is 'practicability', which is a low threshold: "But, if, by one method or another, it is 'practicable' to give a child the opportunity of expressing his views, then, in our view, the only safe course is to employ that method" (para 11). In *S v S* (2012 Fam LR 32), the Inner House added that s. 11(7)(b) is:

... also clearly concerned with what is appropriate having regard to the age and maturity of a given child. It would, we suggest, be most unsatisfactory if considerations of physical practicability obliged this court to follow a course which risked causing further distress, and perhaps lasting harm, to a young child. (para 36)

Thus, the issue becomes largely *how* rather than *whether* a child's views should be ascertained (while ensuring a child is protected from further distress or potential lasting harm). Only after a child's views have been sought does the court decide on the weight to be given to the child's views, in making its decision. *Shields v Shields*, as modified by *S v S*, thus supports children's rights to have their views considered in disputed court proceedings, with the responsibility on adults to have the skills to do so.

¹¹ The boy was noted as 7.5 years at the start of the case and was aged 9 years at appeal. In *Woods v Pryce* ([2019] SAC CIV 18), the appeal was upheld because the boy's views had not been asked for in a contested contact case. The boy had last expressed his views to the court when aged 7, and he was now aged 9. These two years were considered a 'material change of circumstances' (para 11).

Now, cases more regularly mention whether or not a child's views are sought. If a child's views were not sought, then a simple statement is typically made, such as in *A v B* (2016 SLT (Sh Ct) 389):¹² "In this case, the children are too young to be able to express a view (Mother's submissions, para 41) and, then, with more elaboration, "Given their ages both agents agreed, correctly in my view, that the children are too young to express a view" (sheriff's decision, para 49).¹³ This is the extent of the discussion, with the agents' assertions accepted by the court, without an apparent independent assessment. While in *A v B* no individualised attention was given to each child's potential participation, a number of cases consider siblings individually: for example, in *MRG v MD* (2018 Fam LR 2), the sheriff records that all witnesses accepted that MJ was too young (at age three) to have a real understanding of the particular issue (para 7) but MA who was aged five had his view noted in the discussion (para 8). Later, though, the sheriff writes in his decision that "It is accepted that the children are too young to express a view" (para 19). This suggests that neither MA nor MJ reached the initial threshold to have their views considered, so that no further action was taken by the court to decide on the means to do so. The simple statements excluding children appear somewhat bald without further evidence; age is apparently easily accepted as a reason not to give children an opportunity to express their views.¹⁴ As reviewed above, the General Comment on Article 12 (UN Committee on the Rights of the Child, 2009) would suggest that less reliance be placed on a child's age, in the initial practicability test under s. 11(7)(b), and more attention to supporting the child to express their own view.

4.3.2 Mechanisms for children's participation

The Form F9 has come in for substantial criticism, through research (Mackay, 2013a and b), practice (Family Law Committee, 2015) and also now through case law. In *X v Y* (2018 SLT (Sh Ct) 215), the appellant was opposed to intimation (particularly for the younger child, who was

¹² The reported case is not explicit on the children's birth dates, although it does state (for other reasons) that the children's births were registered in Algeria in 2010 and 2014 respectively; if done close to the time of childbirth, then the children would have been six and two respectively at the time of the court's decision.

¹³ See also *M v F* (2016 Fam LR 70) – "... parties in the present case were agreed – correctly – that given IM's very young age [4.5 years] and level of maturity it would be inappropriate to seek to ascertain her views on the proposed relocation or to have regard to any views which she might express" (para 3).

¹⁴ Such a finding matches that found by Mackay in her research in sheriff courts. Age – and sometimes for quite old children, above the age of 12 – was used by most solicitors acting for parents, to ask the court to dispense with sending the Form F9 to children (Mackay, 2013b).

aged four) while the respondent thought it appropriate. The sheriff had ordered intimation, with this decision explained in the appeal judgement:

On the basis of the submissions made by the respondent's solicitor, the sheriff was of the view that the older of the two children was capable of forming and expressing a view and that form F9 would be a suitable means of obtaining that view. In relation to the younger of the two children the sheriff acknowledged that she may be too young, however, he accepted the assurance by the solicitor for the respondent that she is articulate and capable of forming a view. (para 24)

The sheriff appeal court disagreed, stating that the sheriff attached "inappropriate weight to the submissions made to him by the respondent's solicitor" (para 27). The Form F9 had been given undue significance by the parties, given the (in)effectiveness of the Form (para 26), such as: dissatisfied parties frequently complain that a child's views may be adversely influenced by one party and the Form may upset the child. Further, timing is important. The Form F9 is issued early on in the process, so taking views then may not be appropriate when the sheriff may know nothing or little about the child's personal circumstances. The court has an obligation to take the views of the child when the order is *made* (para 25), which will be some time after intimation. Citing *Shields v Shields*, the judgement emphasises that practicability is the proper and appropriate test and that Form F9 is not necessarily the only way to comply with the legislative requirements. On the facts of this case, both parties were now accepting that the children's views should be taken and the sheriff was directed to appoint a reporter (now called a child welfare reporter) to seek the children's views (para 27). The judgement is thus notable in several ways: judicial questioning of Form F9's usefulness; that courts should consider the range of available methods for children to express their views; that the particularities of each child should be considered when exercising this judicial discretion; and the court should consider the timing for ascertaining children's views.¹⁵ Such individualised and particularised attention meets several of the requirements for realising children's participation rights, as laid out in the UN Committee on the Rights of the Child's General Comment on Article 12 (2009).

¹⁵ See Smith (2018) for commentary on *X v Y*.

Until recently, children's *direct* involvement in court proceedings has not been encouraged by the courts nor been generally evident in practice. Primarily, it is for the courts to decide on the mode of children's participation. A number of cases underline judicial discretion on the mode of children's participation.¹⁶ Appeal cases show a strong reluctance to interfere in the initial judge's discretion, perceiving the judge at first instance as best placed to make the case-by-case decision on whether a child's views should be heard and what weight should be given to them. This is firmly stated in *Stewart v Stewart*: "At the time of proof, the child was under three years old, and it was clearly within the sheriff's discretion to take the view that to seek the views of a child of that age would be wholly impractical" (2007 SC 451, para 12).¹⁷ Thus, appeals are more likely to be successful if *no* consideration were given to whether or not a child's views should be gathered, but less so if the sheriff made an explicit decision not to do so.¹⁸

Some recent reported cases may show a changing trend in children's direct participation, at least amongst some in the judiciary. The judge shows a proactive approach, in *G v G* (2015 SCLR 1), to interviewing the child (para 28). His judgment provides a detailed description on the interview method, its quality and what the child said. However, in developing the argument for the decision, there is no reference to the child's views being influential on the decision. In an appeal case, *S v A* (2015 GWD 13-222), the sheriff's attempt to interview child A is commended, even though the child was not "keen to engage in discussion" with the sheriff (para 8). It may be that more judicial interviewing is happening in Scotland,¹⁹ although no clear pattern is discernible through the reported case law.

¹⁶ For example, see *S v A* (2015 GWD 13-222).

¹⁷ The judgment's strong wording may have been influenced by the court's view of the appellant's submissions. The appellant had criticised the sheriff for not considering the child's views, amongst other issues. These submissions were described in the judgment as "simply misconceived" (para 11).

¹⁸ Or if a child's views were taken at some point during the proceedings. *C v M* (2005 Fam LR 36) states that, as the children's views had been considered earlier in proceedings, it was a matter for the sheriff's discretion "to decide whether that lapse in time amounted to a material change of circumstances" (p. 40) and thus whether children should have an additional opportunity to express their views. In a recent ruling, *Woods v Pryce* in 2019, however, the appeal was upheld because a child aged 9 had not recently been given a chance to state his views although the court had heard his views when he was aged 7 (para 11).

¹⁹ See also Hassan and Masson (2017), who reports on Sheriff Anwar's actions in the case of *MB v MB* (unreported 2017 (Sh Ct (Glasgow and Strathkelvin))). Sheriff Anwar spoke to the child in chambers; the child welfare hearing was then continued, with the Sheriff narrating from her notes about the child's views. The

The case of *Hall v Hall* (2014 GWD 26-521) suggests having a self-represented litigant may weigh against children's direct participation. The Sheriff Principal in *Hall v Hall* is negative about how the appellant conducted his case, generally. Further, the Sheriff Principal is critical that the appellant had brought one of his children, Z, to court even though Z was not party to the proceedings:

Indeed, on an earlier occasion a different sheriff entered the court room for a continued child welfare hearing only to find Z sitting in court. The sheriff correctly decided that Z be removed from the court and arrangements were made for him to be looked after during the hearing. This is a very clear example of the appellant's lack of judgement in considering the welfare of one of his children, rather than asserting at whatever cost his deeply held principles about the appropriate legal basis for his children's care arrangements. (para 13(2))

In *Hall v Hall*, the father was seen as overly involving his children, in the proceedings (see below). Much has been written about the potential pressures of increased self-representation in England. These include greater judicial management (whether to protect or constrain the self-represented litigant) and extended proceedings due to party litigants' lack of legal awareness and negotiation (see Bevan, 2013; Hunt, 2011). Children can also be negatively impacted by such pressures, whether or not they are themselves party to the proceedings. This has led English family law discussions to encourage greater protections of vulnerable witnesses, including proactive consideration by the court (Vulnerable Witnesses and Children Working Group, 2015).

Courts have been resistant to children's separate legal representation in s. 11 cases. For example, in *B v B* (2011 SLT (Sh Ct) 225) the court refused to allow a child to have his own legal representation, even though the child did not agree with the view presented by the curator ad litem and wished to have his own solicitor. The Sheriff Principal made this decision for three reasons. First, the proceedings would be disrupted, as five days of proof had already

views were reported as "rather equivocal", as the child was "acutely aware of the conflict between her parents and that she was trying her best to please both parents" (page 2).

occurred. Second, this could cause further delay, which would not be in the best interests of the boy or his brother. Third, permitting the boy to enter the process would only “add to the pressures to which he has already being subjected” and “In short, this is a boy who may well feel under pressure to take ‘a particular line’” (para 18). Thus, as with *Henderson and Henderson* (1997 Fam LR 120), the court expressed concern that children could be distressed and unduly pressured, when children sought legal representation. Changes in legal aid mean that children are even less likely to have a solicitor’s support for participation. Previously a child would be assessed financially in the same way as an adult, on the basis of the child’s own disposable income and capital. Since changes in 2011, a solicitor assessing a child who applies for civil legal assistance must take account of the financial circumstances of anyone who owes a duty of ailment to that child. There is an exemption – if it would be unjust or inequitable to do so, in the particular circumstances of the case. Statistics are limited, but what is known is that there has been a drop in civil advice and assistance intimations from, and in civil legal applications and grants by and to, children under the age of 16 since these legal aid changes.²⁰ Children are even less likely than before to have their own legal representation.

If children are not directly involved in courts, they face a double layer of interpretation of their views (see also Trinder et al., 2010). If children are given the opportunity to express their views, this is usually done through a report ordered by the court (as the sheriff was directed to by *X v Y* (2018 SLT (Sh Ct) 215)).²¹ A child welfare reporter will be instructed on what to report upon by the court, which can include a request to ascertain a child’s views; a curator ad litem is appointed to protect the child’s interests and may also be requested to ascertain a child’s views. Neither role has a responsibility to advocate for the child nor to support the child in stating her views, directly to the court. This raises a distinction made in English research, about whether such professionals should directly present children’s views –

²⁰ Statistics are available from a freedom of information request to the Scottish Legal Aid Board (see <https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=cb3fd83f-eaf3-48a1-bfb7-eae731c3b0b8>). This found a drop in civil advice and assistance intimations, from 1852 for children under age 16 in April 2009/March 2010 to 898 in April 2011/March 2012. Further, the consultation paper on Family Law (Scottish Government, 2018b, page 171) reports that the Scottish Legal Aid Board funded 32 applications from children, for legal aid to appear directly before the judge or sheriff, between 2015 and 2017.

²¹ In Mackay’s study, for example, only 42% (125 of 299) of children had their views taken into account by one or more of the mechanisms listed above; the most commonly used was reports (68 children by court reports and a further 15 children by a curator ad litem) (2013a).

transmission – or should they *interpret* or *translate* children’s views, in light of their overall role to protect the child’s interests (Office of Children’s Commissioner, 2011). But courts may well not be making this distinction, accepting reports as the transmitted views of the children rather than recognising them as interpretations or translations. For example, in *L v L* (2013 GWD 25-496), the sheriff observes that the judge was “entitled to treat the recorded views as the views of the child unless the judge (exceptionally) accepts evidence that contradicts them” (para 22). A high reliance can be given to such reports, which may not fully or may only partially relay children’s views. Further, even a transmission of a child’s views is a form of interpretation (unless the full audio and visual version of the child communicating is provided), as reporting involves selection and contextual framing. Reports will always be one layer of interpreting children’s views, following by the second layer when courts in turn interpret the reports.

From what research is available, a minority of children have their views considered by courts (e.g. McKay, 2013a). If their views were considered, it is more likely that their views come to the court through court-instructed reports. The usefulness of the F9 Form has now been considerably questioned, with revised forms now introduced. Timing is increasingly recognised as an issue, should a child’s views be considered: case law has clarified the court’s obligation at the time of considering whether to make a court order and what that order should be.

4.3.3 Concerns about children’s welfare in contested cases

The potential for lengthy court proceedings to be against children’s welfare has been highlighted by a 2012 Supreme Court decision. In *B v G* (2012 UKSC 21), the court was scathing about the unnecessarily lengthy contact proceedings, with accompanying costs, which were “inimical to the best interests of the child” (para 21). This has led to changes in procedural rules and encouragement of active judicial case management.²² For example, the Sheriff Principal in *Hall v Hall* refers to *B v G* and then later writes: “... it is clear from the history of the proceedings that the views of the children have been sought on many occasions, arguably

²² The Family Law Committee of the Scottish Civil Justice Council consulted on new case management in family actions. See <http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-on-the-case-management-of-family-and-civil-partnership-actions-in-the-sheriff-court>

too often” (para 13(6)) and that repeated questions by the appellant have put “each of his children under enormous pressure” (para 13(6), referring to the sheriff’s words). More generally, the Sheriff Principal observes that this case is typical of ones where “children are left to suffer the consequences, not least because their opinions on what they want are asked often and in circumstances where they could never be expected to cope” (para 8). In another case involving the same appellant (*H v H* 2016 SAC (Civ) 12), the sheriff appeal court notes that numerous reports had been made in relation to the children, “it was clear from the material before us that their views have been canvassed” (para 15) and that the views had been considered in the relevant court decisions. Thus, involvement in the proceedings themselves is seen as potentially harmful to children, by creating pressure and/or distress, and over-canvassing their views.

Primary legislation requires the court to treat the child’s welfare as the paramount consideration, when deciding whether or not to make an s. 11 order and if so what order to make; case law (e.g. *M v M* 2012 SLT 428) repeatedly underlines that the child’s welfare is the outcome that must be sought.²³ Children’s participation is instrumental to the court’s decision on children’s welfare: children’s views are given weight if they are perceived to help the court in that decision (e.g. *R v R* 2012 GWD 39-765). Courts value reports that assist them in making their welfare decision, considering the particular facts and circumstances of the case. For example, reported case law shows how courts value reports that are ‘balanced’. In *J v J* (2004 Fam LR 20), the court criticised the expert report for *not* being balanced. The expert was instructed only by the mother, he had only interviewed her and he had only met with the children in the mother’s home. Thus the expert was seen as having insufficient knowledge of the situation and not considering all the factors a court must take into account. Children’s views are more likely to be influential on the courts if contained within court-ordered reports that treat welfare as the paramount consideration, consider the range of relevant evidence, and provide expert guidance on what weight should be given to children’s views (see *Ellis v Ellis* 2003 Fam LR 77, *CAM v HM* 2012 GWD 28-576 and *H v H* [2016] SAC (Civ) 12).²⁴

²³ *X v Y* (2018 SLT (Sh Ct) 215) states that an interim order may need to be made without the views of children being known to the court, simply because the children’s welfare requires the order (para 30).

²⁴ A case underlines the preference for court-instructed reports. Sheriff Anwar in *Q v P* (2016 Fam. L.R. 54) negatively commented on parties’ submitted expert child psychology reports: “While each case will turn on its own facts, in the absence of any factual basis for concluding or suspecting that a child is suffering from, or

4.3.4 Weighing up children's views

Courts find it difficult to deal with views that are not considered autonomous. As Barnes (2008) writes, if children's views were characterised as 'manipulated' by parents or others, the views are given little weight. Such concerns can be tracked through reported case law, with court decisions mentioning children being pressured by parents being present during interviews or giving material bribes (e.g. *Ellis v Ellis* and *C v M* 2012 GWD 9-170) or counter-assertions, where a child answers questions "without any sign of being coached and with no detectable bias in favour of either parent" (*G v G* 2015 SCLR 1, para 28) or that a child was described as 'knowing her own mind' (*H v H* 2010 SLT 395, para 31). More overt concern may be increasing in reported case law, as strongly worded phrasing can be found in *Hall v Hall* (see above), *X v Y* (2018 SC DUM 54)²⁵ and *E v W* (2014 GWD 26-514).²⁶ In *E v W* the Sheriff writes:

I do not believe a 7 year old child would talk in the manner they claim. I am of the opinion they were, so to speak, putting their own concerns into his mouth ... That seems to me to be the ways adults, not young children speak. (para 11)

Thus, children's views were undermined because the sheriff perceived the child as speaking like adults. In *E v W*, the sheriff may well be correct about parental coercion and the child's potential distress (para 42). But the particular phrasing resonates with how children's views are undermined, in other participation activities, where children are described as too 'professionalised' and too proficient in knowing the adult discourses (Faulkner, 2009). Thus as children become more informed and experienced in expressing their views, this risks their views being given less weight because they are not considered 'authentic'.

affected by, or is likely to be suffering from or affected by, an underlying psychological issue, requiring the input of a suitably qualified expert, the basis for appointing a child psychologist must be questionable" (para 35).

²⁵ This case involved allegations of domestic abuse and of abuse of the children. The sheriff describes the two girls' views (who were aged 8 and 5 at the time of the order) as "not genuine, independent and uninfluenced" (para 125).

²⁶ This case was about contempt of court because the mother had not fulfilled the requirements of contact established by a previous order.

Concerns about ‘manipulation’ are given extra salience because of the substantial proportion of cases reaching court, which are likely to involve allegations of domestic abuse (Cafcass and Women’s Aid, 2017).²⁷ This raises particular difficulties for the judiciary, as so much domestic abuse remains underreported to the police, so few allegations in family law cases have been tested by courts (Morrison et al., 2013). There is no single definition of ‘domestic abuse’ in Scottish policy generally nor across legislative provisions. While courts must now take account of ‘abuse’ when taking the child’s welfare as the paramount consideration, courts have found the definition unclear and circuitous (s. 11(7C), see *R v R* 2010 Fam LR 123). The legislative definition is criticised for potentially making disputes more contentious because of the ‘emotive connotations’ of using the term abuse (Morrison et al., 2013). Indeed, this amended section is rarely cited in reported case law, in comparison to the estimates of domestic abuse in contested cases.²⁸

In summary, the review of reported case law suggests difficulties for courts in dealing with children’s views, if children are considered to be emotional, inconsistent or unduly influenced.²⁹ Courts can have particular difficulties in dealing with disputed parental responsibilities cases, when there are allegations or suspicions of domestic abuse. Children may well be pressured and manipulated in such cases but also, as so little domestic abuse is proven legally, may have their concerns under-recognised. Because the court’s paramount consideration is the child’s welfare, a child’s views are largely helpful if they assist the courts with that decision. If the child’s views are not considered rational, consistent and the children’s own, then the court considers them less helpful in its decision-making.

4.4 Summary

Section 11 of the 1995 Act was set up with the UNCRC requirements in mind, seeking to address the requirements of Article 12 in contested parental responsibilities cases in front of the court. A number of mechanisms support this, from the Form F9 to court reports

²⁷ According to this English research of 216 child contact cases, 62% of applications to the family court featured allegations of domestic abuse. See also Mackay (2013b).

²⁸ Exceptions include *AS v AB* (2010 GWD. 32-663) and *JB v AG* (2013 GWD 3-96).

²⁹ See Tisdall (2016) for further development of this analysis.

containing children's views. Yet, research and other evidence continues to show that children's participation rights are often not met.³⁰

The UN Committee on the Rights of the Child, in its General Comment on Article 12 (2009), recommends that, wherever possible, children are given the opportunity to be heard directly in any proceedings (para 35). This has not been the general practice in Scottish courts to date, although it is possible that judicial interviewing is increasing. The Form F9 has proved highly problematic, from its (lack of) distribution, to its wording and formatting, to its mistrust by parents and the courts. While revised and more child-friendly versions are now available, some of these problems are not dissipated by the revisions. The court and financial barriers to legal representation of children have only increased since 1995, leading to few children having this legal support to participate. No other mechanism is in place that ensures children know and are supported in their participation (and other) *rights* during and after the court proceedings. Children may thus lack the knowledge and understanding of why and how decisions have been made, which could result in them being *more* vulnerable to misinformation from one parent or both. At least until recently, direct presence in courts has largely been seen as against a child's welfare, as likely to cause further harm and distress in already difficult situations. If considered at all, children's views are more likely to be considered indirectly through court-instructed reports. Children are then reliant on the double interpretation of the reporter (child welfare reporter or curator ad litem) and then the judge, on what their views are. Despite the breadth of the mechanisms available for children's views to be considered in contested parental responsibilities cases, as discussed in this chapter, the mechanisms do not seem to be ensuring children's views are regularly heard, let alone directly.

Recognition has increased in reported case law, to whether or not a child's views should be considered. Case law now regularly comments on whether or not a child's views are sought. Age is frequently used as a reason not to include a child's views; this is despite the emphasis in *Shields v Shields* that 'practicability' sets a low threshold. The courts currently do not show

³⁰ As discussed in this section, with particular reference to: Mackay, 2013a and b; Morrison et al., 2013; Morrison 2014; Morrison et al., 2020; Scottish Government, 2018b.

consistency in how they reference age across cases nor is this seemingly backed up by robust assessments of maturity or capacity, with some independence from the parties. The UN Committee on the Rights of the Child (2009) goes further, in stating that children should not have to prove their capacity; rather more attention should go to supporting children to express their views.

Reported case law suggests that courts can be concerned about children's welfare being damaged by the court proceedings themselves. Leading cases emphasise the detrimental effects of overly-long disputes, with children repeatedly asked to give their views. Certain reported cases involve self-represented litigants, where courts sought to manage how the litigants involved their children (i.e. seeking further expert reports, appeals, bringing the children to court). The reported case law does not tend to use the term 'manipulated' but the court comments negatively on children being overly pressured or influenced.

Thus, the reported case law demonstrates the now familiar challenges for and barriers to children's participation, that mean their participation rights are not fully realised. The reported case law shows decisions being made by courts to include or exclude children's views being considered in the first place, but without an underlying independent evidential basis on what 'counts' as maturity. Concerns about children's welfare and potential distress can lead to excluding their participation rights in court proceedings, particularly when the proceedings are highly contentious and lengthy. The emphasis then seems not to improve the courts for children but to minimise children's distress by further distancing children from the courts.³¹ The English and Welsh 'Voice of the Child' Dispute Resolution Advisory Group provides a different perspective:

Arguments that it might be distressing to the child do not normally constitute good reason to disenfranchise the child ... Furthermore, high conflict disputes can be particularly stressful for children and being able to express their concerns and worries can be reassuring and supportive. (2015, para 133)

³¹ This point is further developed in Tisdall (2016).

Thus, both children's best interests and participation rights can be met when children are well supported to express their views.

If children's views were considered, the reported case law does not always state what weight they were given. Views are commended if the children were considered consistent, rational and autonomous, but less so if the children were perceived as emotional, anxious and inconsistent. Yet this misses that – particularly in the context of parental separation – children and others are likely to be distressed and emotional, changing their ideas, and embedded in relationships (Morrison et al., 2020). A recent case, *Woods v Pryce*, may now lead the way in acknowledging this: in terms of providing a child the opportunity to express his views, the Appeal Sheriff writes, “It is not enough that approaching the child might be distressing, or that nothing seems to have changed. The only test is one of practicability” (para 12).

5 Perspectives of Legal and Advocacy Professionals

5.1 Introduction

In this chapter we return to specific the challenges and barriers to implementing children's participation rights in Scotland. We report on legal and advocacy professionals' views and perspectives of children's participation in family actions.

This answers the first research aim and the second, third and fourth research objectives:

Research aim 1: To interrogate the current challenges for and barriers to realising and implementing children's participation rights in family actions and the implications these have for compliance with children's human rights.

Research objective 2: To ascertain from the perspective of legal and advocacy professionals, what the current challenges for and barriers to children's participation are in family actions in Scotland and the implications for children's human rights.

Research objective 3: To investigate how notions of 'competence', 'manipulation' and 'distress' are understood and addressed in practice.

Research objective 4: To identify promising practices in Scotland that aim to address these barriers to and challenges for children's participation and evidence of their effectiveness.

5.2 Method

This phase of the research used qualitative interviews to explore the views and perspectives of legal and advocacy professionals. Interviews focussed on current challenges for and barriers to children's participation and any solutions there may be to these. Interview schedules were informed by priorities identified by the Children's Expert Group and findings from the case law review. Particular attention was given to how the notions of 'competence', 'manipulation' and 'distress' are understood and addressed in practice. The interviews explored what impact current legal processes have on children's human rights. Three distinct groups of professionals were interviewed: solicitors (8); sheriffs (6); and children's advocacy specialists (3). Participants were recruited using a purposive sampling strategy. Drawing from

professional networks, solicitors who practiced child and family law were recruited from across Scotland. The sample includes participants from both urban and rural areas. The sheriff sample was drawn from four sheriffdoms; four of the sheriffs presided over courts in principally urban areas and two over courts in rural areas. The advocacy specialists were non-legal advocates, working in voluntary (2) and statutory services (1). Their remits involved supporting and facilitating children's views for legal proceedings about contested child contact. Interviews were audio-recorded and transcribed and data was analysed thematically (see Braun and Clarke, 2006). Research materials for this phase of the research are contained in Appendix B.

A note about anonymity

The names and descriptions of the services in which advocacy specialists practice are used in this report, where we explore the services that are available to children in some locations in Scotland. This is so we can describe what promising practices in this area look like. We have not used the names of advocacy specialists in the overall discussion of this chapter's findings. This approach was part of the consent procedures with the advocacy professionals interviewed. We have not used the names of other legal participants, as agreed as part of their consent procedures.

5.3 Views about children's participation rights

The majority of participants spoke with a degree of ambivalence about children's participation. Several were negative about any attempt to expand the *depth* of children's participation in contested contact. The phrase '*voices not choices*' was repeated in interviews, underscoring that children's participation is limited in disputes about contact. This reflects the status of children's views in family law where their views are sought and then weighed as part of determining their best interests. Amongst some participants, there was a view that children's participation is and should be limited. This point was made forcefully by a participant in the following extract:

‘... there are broader issues than just [the child’s] view that the court has to take into account that [children] can’t really contribute to in a constructive way.’

(Sheriff, C)

The limits to children’s participation further encompassed *how* children participate in contested contact. As outlined in Chapter 2, children’s mode of participation is at the discretion of the court. The legal framework constructs disputes about contact as adversarial adult disputes that children are invited by the court to participate in (see Morrison et al., 2020). These points are elucidated in the following extract from an interview with a sheriff:

‘I don’t think children are supported [to participate] at all. [...] I don’t think they are given any option [about how to participate]. The options are mine; I chose one and I do that on the basis of what I’m told by the parents.’

(Sheriff, D)

Participants held different views on how suitable this legal framework was in implementing children’s participation rights. For those less positive about expanding children’s participation it was considered adequate. However, for others the existing framework was seen to marginalise children and their participation rights.

5.4 Implementing children’s participation rights in practice

As we set out in Chapter 2, the UN Committee on the Rights of the Child directs that children’s participation rights should be considered *throughout* any legal process. This extends from preparation to access to redress. Interviews revealed that children’s participation rights are frequently not implemented in ways that fulfil these requirements. Participants reported that there was no infrastructure or resources readily available to prepare or support children to participate in family actions. The following interview extract comments on the absence of support for children participating in family actions:

‘My concern is that children who are going through family courts actually need a lot of support and where is that? You’ve given your views and that must be quite worrying for a child because their parents are going to find out what they have said. I don’t know that there is any particular support for children.’

(Solicitor, A)

The solicitor depicts this lack of support negatively, in potentially leaving a child worried if they have expressed their views.

According to those interviewed, typically a child’s view would be sought by the court through a third party. Once the child’s view was obtained, the child’s involvement with the court ends. Participants reported there were no mechanisms to provide children with information about legal processes, decisions reached by courts or to explain the influence that children’s views had on decisions. While most participants perceived this as problematic, they were not clear how within the current system this might be addressed. Sheriff participants were concerned about the legal status of feedback should they be tasked with this and *when* feedback should take place given the length of some proceedings as well as the possibility of appeals. There was no consensus on who might or should fulfil this role and issues of capacity, resourcing and skills were cited as barriers to resolving this issue. These points are illustrated in the following extracts from interviews:

‘Because a child welfare reporter doesn’t have the time [...] They would never go back to the child after the report is done and explain the report and the decision. I think it’s important for a child to know what decision is being made and why it’s been made. And if their views haven’t been followed, why have they not been followed?’

(Solicitor, F)

‘It’s something I feel intrinsically uncomfortable about [...] I don’t think it’s part of a sheriff’s role – maybe it should be but it isn’t at the moment. And partly, I think, the younger the child the more specialised it would be.’

(Sheriff, B)

As there are no established or routine mechanisms for communication between the court and the child, the child is often left unaware how their views have been considered and whether their participation rights have been implemented or disregarded. Furthermore, there is no accessible or direct way for children to complain or seek remedies and redress in such cases.

5.4.1 Children's competence and capacity

As we discuss earlier, the General Comment provides an expansive understanding of capacity. Rather than a child having to prove their capacity, the child should be presumed to have capacity to form a view (para 20). There is no age limit on a child's right to express a view (para 21). The General Comment also states that capacity should be assessed to guide the weight given to children's views. While some participants referred to children's age being used as a proxy for capacity, it was not entirely clear from interviews how children's capacity is assessed by courts. This is exemplified in the following extract:

'So in taking the child's views I would say the court never enquires into the child's competence. But if you get a report then that's something that the reporter or curator would generally comment on. They usually describe the child as being intelligent and thoughtful for example, of mature for his or her years.'

(Sheriff, B)

Unlike other jurisdictions, in Scotland sheriffs largely do not meet with children (see chapter 4); this means that any information about their capacity is reported by third parties. For instance, comments about a child's capacity may be included in the reporting of their views as part of a court report on the child's best interests. During interviews, some participants acknowledged that such assessments of capacity were subjective:

'Ultimately it's a judgement call by whoever is [taking the child's views].'

(Solicitor, C)

Participants reported that, in a minority of cases, assessments on children's capacity are undertaken by psychologists. However, such assessments appear to take place only when there were particular concerns about a child's capacity, for instance if a child had a particular learning disability. While it may be inappropriate and impractical for the capacity of every child involved in family actions to be subject to a rigorous and independent assessment of their capacity, there are risks that courts' or legal personnel's' determinations of children's capacity are subjective. Concern about how then such assessments of children's capacity are used in the weighing of their views is heightened by the fact children do not have access to assessments of their capacity nor are they routinely independently represented in proceedings. Therefore, children are left without knowledge of how their views are presented nor weighed by the courts, making challenge difficult. Interviews with advocacy specialists further revealed mixed practice about the role of capacity in implementing children's participation rights. For instance, a service only provided support to children over the age of 10 years. This was rooted in concern about whether younger children were able to understand concepts like confidentiality as illustrated in the following quotation.

Together, this opaqueness on how capacity is assessed, and then operationalised in court processes, and inconsistencies in practice raise particular concerns about the vulnerability of younger children's participation rights in family actions. The concepts of capacity and competence have a discernible influence on children's participation rights yet neither are subject to concerted attention, assessment nor challenge (see Tisdall, 2018 for fuller review).

5.4.2 Distress and manipulation

The General Comment has a number of protective elements for children's participation. It emphasises that a child must have the choice not to give a view (para 134), that 'freely' means that a child has the rights to express their own views and not others' views (para 22) and the child must not be manipulated or subjected to undue influence or pressure (para 22). Procedurally, the child should be protected so that States Parties consider 'the potential negative consequences of any inconsiderate practice of this rights' and ensure the 'full protection of the child' (para 21). A child should not be 'interviewed more often than necessary, in particular when harmful events are explored' (para 24).

Legal participants raised significant concerns about children’s vulnerability and the risk that through participation children are subject to undue influence. The majority of legal participants expressed concern that children’s participation in legal processes may be detrimental to children’s welfare. They cautioned that through participation children were exposed to adult disputes and that this had negative short and long term consequences for the child and their wider familial relationships. These were widespread concerns, from solicitors as well as sheriffs. For example, one sheriff described the pressure on children:

Children can be put under immense pressure, so it’s a fine balancing act to be able to inform the child and let them know that decisions are being made in their lives that will affect them, but also not to put so much pressure on them that they feel stressed by that [and that] they feel a responsibility for the decision making.

(Sheriff, D)

Concerns about children’s vulnerability can mean that children’s rights participation rights are constrained (see Morrison et al., 2020). From the interviews, it was apparent that the current system struggles to implement children’s participation rights and ensure that these protective elements are complied with. In practice this risks children’s participation rights not been upheld, in order to protect them from the consequences of participation. As we now go on to explore, some of these concerns are rooted in the mechanisms in which children are able to participate.

5.5 Mechanisms for facilitating children’s views

In this section, we discuss participants’ views of different mechanisms that courts may use to facilitate children’s views as part of contested child contact. Here, we use participants’ views to tease out the utility of these mechanisms for implementing children’s participation rights.

5.5.1 F9 Form

While the majority of participants welcomed revisions made to the F9 form, many remained unconvinced about its practicality in facilitating children's views. A few participants commented that the new version of the form had not been used for a sufficiently long period to draw any firm conclusions about its improved or otherwise utility. However, most participants were unconvinced the F9 form was an appropriate way to facilitate children's views. Participants' reasons for this may broadly be categorised in three ways:

Implementing the F9 form

Participants identified that the distribution of F9 forms leave children without any practical or emotional support to complete them. Literacy may be a particular barrier for this mechanism. There are risks that children may not receive the F9 form. There are also risks that the views recorded in the F9 form may not be those of the child.

'., a lot of children aren't mature enough or literate enough to complete an F9 and the other risk is that it is done with the parent opposing contact.'

(Sheriff, E)

In practice, participants described addressing this through engaging a 'neutral service' to support the child to complete the form: for example, a professional working at a child's nursery or school. However, it was recognised that this may not always be appropriate. For instance, professionals in these services are not necessarily expert in legal processes and therefore any information or support they may provide to children may be limited. Furthermore, engaging other professionals may not necessarily be welcomed by all children and may pose risks to their confidentiality. A solicitor discusses this in detail, in the following extract:

'I think the problem is that we are assuming that the child has someone outwith their family who they can confide in or trust to help them and that's not always the case. Having someone assigned to the case to give children a bit more information would be helpful. Because it's all very well asking a teacher to help fill it in but what training

have they had? Maybe they don't have time. It's putting quite a lot of reliance on other people not involved in the court process.'

(Solicitor, G)

This method of facilitating children's views is concerning when we consider the requirements of the General Comment on Article 12, for the information that children need and are entitled to. It states that a child should be supported in their views and that information is a precondition to a child's 'clarified decisions', both in terms of: the matters, options and possible decision to be taken and their consequences; and the conditions under which the child will be asked to express his or her views (para 25).

The limits of using a form to elicit children's views

Several participants questioned the suitability of using *any* form to gather children's views about their living arrangements and relationships with parents. These concerns were largely framed around the sensitivity and indeed the profoundness of decisions for which children's views were being elicited. Participants advocated that it was better for a child's views to be sought in person and through dialogue. This would allow for any clarification on the substance of a child's views and indeed how such views are then treated in the legal process. This is illustrated well in the following extract from an advocacy specialist:

'I mean, the whole concept is a ridiculous approach to take, you know, for such an important part of somebody's life [and to use] emojis, not helping children independently to work through what they genuinely would like to see. I don't think there's enough backup information for children to understand what might happen to this information, and so on, and so forth. I just think it's just not good enough.'

(Advocacy specialist, C)

While reflecting on the limitations of the F9 form, a few sheriff participants described the F9 form as the 'starting point' for facilitating children's views not necessarily the 'end point', meaning that the F9 form was used in-conjunction with other mechanisms for eliciting children's views.

Views on revisions made to the F9 form

As noted earlier participants were mostly welcoming about recent revisions made to the F9 form. However, several participants were disappointed that revisions had not been transformative enough. Criticisms that were levelled included: the clarity of language used in the form; its (in)appropriateness for older children; and a general sense that the use of a paper form did not keep pace with children's use of digital technology.

Thus, while revisions were welcome by most, more radical changes were required to ensure children's views were duly heard by the court.

5.5.2 Child Welfare Reporters

Child welfare reporters were described as the mechanism most routinely used to give effect to children's participation rights in contested child contact by participants. Amongst participants, mixed views were held about the efficacy of the mechanism for eliciting children's views. Overall, sheriffs were positive about child welfare reporters, expressing confidence in the skills and expertise of those discharged with responsibility for reporting on children's views. One sheriff in particular provided a favourable description of a child welfare reporter's use of walking interviews with children and taking children for something to eat, in order to develop rapport and assist in facilitating their views. However, from across the interviews this sort of practice amongst child welfare reporters appeared to be the *exception* rather than the *norm*. Interviews with sheriffs and solicitors revealed that a degree of discretion was exercised by sheriffs about which child welfare reporter was appointed to a particular case. Some members of the judiciary asserted that this allowed particular cases to be 'matched' with child welfare reporters with the requisite skills and expertise for providing a welfare report that included a child's views.

However, the positivity shared amongst sheriffs about child welfare reporters was not shared by other participants. During interviews with solicitors and advocacy specialists, concerns were raised about the variability of practice. Some participants questioned the skills and training that child welfare reporters had in facilitating children's views. Significant concerns were raised that legal training (which is what most child welfare reporters have) does not equip a child welfare reporter with skills or expertise to communicate with children, especially

children who, for many reasons, may be vulnerable. Further, legal training may not necessarily equip child welfare reporters to understand the complexities of children's familial circumstances or how these may affect the ways in which children articulate their views. These issues are illustrated in the following extract from an interview with an advocacy specialist:

'A child [said] the reason they didn't want to go to Dad's was because he had scary eyes and that was put in the report but it wasn't explored further. If it had been explored further with the child and maybe ask the child to explain it a bit more they would've found out is that Dad just needs to give this child one look and it puts the fear of death into the child [...]. And the only way the child could express it at that time was saying that Dad had scary eyes and then that was dismissed.'

(Advocacy Specialist, A)

Some participants highlighted that trust and having on-going relationships were key to children being able to give their views in contested child contact. These issues were especially apparent amongst interviews with advocacy specialists. The importance of a trusted, informed and independent supporter ('the Super Listener') has been emphasised by children and young people involved in Power up/ Power down, a project supported by the Commissioner for Children and Young People Scotland and Scottish Women's Aid.³²

³² <https://blogs.ed.ac.uk/cysrg/2020/02/11/are-you-a-super-listener/>
and <https://womensaid.scot/project/power-up-power-down/>

5.5.3 Judicial interviewing

As with other modes of participation, whether to engage children in judicial interviewing is at the discretion of the individual sheriff hearing a case. There was variation both in terms of the frequency and views about judicial interviewing amongst sheriff participants. A minority (2) of sheriff participants routinely engaged in judicial interviewing in order to facilitate children's views. These sheriffs reported it positively. However, the majority (4) described having limited experience of it, were cautious about it and held somewhat negative views towards it.

A key issue raised through the interviews was the purpose of judicial interviewing. Some sheriffs conceptualised it as a means to *assess a child's views* rather than to *enact participation rights*. They described using judicial interviewing to assess whether a child's views were their own or not. Such an assessment then influenced the weight attached to the child's views. This is illustrated in the following extract from an interview with a sheriff:

'Other methods had been tried, the fact was that it was intractable, and it was evident we had to make or break contact. In a way it was to try and ascertain whether someone was inappropriately shaping the child's views, and to see whether if questions were asked differently.'

(Sheriff, F)

Participants held different views about the extent to which judicial interviewing was an appropriate way to facilitate a child's views. There were concerns whether sheriffs had the time, skills or expertise to undertake this role. The extracts below illustrate skepticism whether judicial interviewing might be the best able to access a child's views on contested contact. A sheriff reflects on the difficulties:

'I don't feel that it is appropriate for me to do it, that is a personal choice. I have my own child and I know how difficult it might be for someone who he didn't know to speak with him and get anything meaningful and especially someone who is in a decision making capacity like a sheriff. And it doesn't matter, even if you take your wig

and gown off [...] you're a figure of authority. So my personal preference would not to speak with children because I am not sure how useful that would be.'

(Sheriff, C)

The sheriff reflects on the difficulties he anticipates in meaningfully facilitating a child to express their views. This is in part due to lack of familiarity with the child as well as the inevitable authoritative figure they would present. Such concerns are echoed by a solicitor:

'There will be some children who would feel frightened about going to court to speak to a sheriff. Some sheriffs might not be the best for it. In certain courts there are sheriffs assigned to family courts but in smaller courts it can be any sheriff. I think you have to have certain skills to be speaking to children and taking their views. It's not a criticism, you can't be expected to have all of the skills if you're having to deal with many different types of law and cases every day.'

(Solicitor, G)

The solicitor brings out the potential variability across sheriffs and across courts, particularly when neither were specialists in family actions.

Ideas about the effectiveness of judicial interviewing continued throughout interviews. Some participants pointed to the pressure that judicial interviewing might inadvertently bring to bear on a child. Concerns that judicial interviewing might make children particularly vulnerable to parental influence were repeated in interviews with some solicitors. This was in part because children were brought to these meetings by parents, but also because this interview became the focus and a key event for the legal dispute. Some sheriff participants also commented that judicial interviewing raised particular problems around the confidentiality of children's views. This was seen as a barrier to facilitating children's views in this way.

However, concerns around the effectiveness of judicial interviewing and the potential for influence may also apply to other mechanisms. For instance, meeting a child welfare reporter also involves a child meeting with a stranger to give their views about the intimate details of

family life. A major difference is that judicial interviewing provides children the opportunity to be heard directly by the court, for their views to be represented directly to the decision-maker and not be mediated or subject to interpretation by another adult. As has been much discussed in England and Wales, the purpose of the judicial interview merits attention, both for the child and the court system (see Daly, 2017).

5.5.4 Children's own legal representation

Despite the requirement set out in the General Comment that, wherever possible, children should be heard directly in proceedings (para 35) and the existing provisions for children's legal representation through the Age of Legal Capacity (Scotland) Act 1991, participants reported this mode of participation as rare, if not unheard of. Some legal professionals were concerned that participating in this way made children vulnerable to parental influence. They raised questions about a child's capacity to instruct a solicitor and whether a child would be able to do so without the support from a parent. These factors crystallised concern that attempts for children to become legally represented were driven by a parent rather than by a child, therefore increasing the opportunity for parental influence:

'I think if you're acting for children, my first thought is who brought this child here?
You know who is driving this?'

(Solicitor, F)

Becoming party to a dispute was further perceived to expose children to further parental conflict and information about their families that might be detrimental to children's welfare.

'I really don't think it's appropriate for a child to have legal representation and being involved in ongoing family actions involving them, because I think it puts far too much pressure on them. It puts them in a very difficult position.[...] My concern would be, if a child is instructing a solicitor, what implications does that have for the child long-term?

(Solicitor, H)

As in other research (e.g. Morrison, 2014, Cashmore and Parkinson, 2009), children in our expert group stressed that ‘being kept out’ of court was upsetting and difficult. It is of note that this approach in family law varies markedly from the Children’s Hearings System, where children are encouraged to participate actively in welfare decisions that may contain complex and upsetting details about their lives.³³ This point is illustrated well by a solicitor:

‘I certainly feel that children are far better represented in proceedings such as the children’s hearings system than they are in the family court. Because normally they will have an advocacy worker. They can instruct a solicitor and they can come along to the hearing. So the panel gets to see the interactions between parents and things like that. [...] There are still problems with that system but they are given much more of a voice in that system.’

(Solicitor, C)

This point reveals an inconsistent approach to children’s participation rights and the status of their views in private and public law. Variation is also apparent when we consider the status of children’s views in other aspects of law. A notable example is adoption where s. 32 of the Adoption and Children (Scotland) Act 2017 requires that children over 12 years must consent to adoption before a court will make an adoption order.

5.5.5 Neutrality and specialist services

The extent to which specialist services should play a role in facilitating children’s views in legal disputes was discussed in interviews with participants. Courts may discharge responsibility for gathering and reporting on a child’s views to advocacy services. These services exist quite separately to the court. However, not all advocacy services have the same relationship with courts as others and some services may struggle to be ‘allowed into’ court processes. In this study, underpinning the different relationships between courts and advocacy services was the extent to which the service was perceived as *neutral* by those working in courts.

³³ The Children’s Hearing System is Scotland’s care and justice system for children. Further information can be found at <http://www.chscotland.gov.uk/the-childrens-hearings-system/>

The idea of neutrality was especially problematic for domestic abuse services who may provide on-going support to both a child and a mother. An on-going relationship with a child who has especially difficult familial circumstances may position such services to facilitate a child's views. However, having relationships with both a child and a mother raised doubts amongst legal personnel on the neutrality of these services. While services may feel able to maintain boundaries between a child and mother through the structure of their organisation, this judgement was not always shared by courts and other legal professionals. Regardless of the accuracy of such judgements, disagreement about the neutrality of the services had negative consequences for how courts considered views that had been facilitated by such organisations and ultimately for upholding children's participation rights.

5.6 Examples of promising practice

During the research we interviewed three advocacy specialists from different services that support children's participation in family action. There were no evaluations available for these services. Below, we give an overview of the services and support that they offer to children. Two of these services are somewhat linked and enjoy a close relationship with courts and the third exists outwith these auspices and as a result focuses on providing emotional support to children who are subject to contested child contact.

Consulting Children, Avenue

Located in the North East of Scotland, Consulting Children is part of a range of post-separation services including mediation, parenting apart and child contact centres. Consulting Children is a specific service that gathers and reports on the views of children. It began as a means to ensure that children's views were addressed in mediation and has evolved to facilitate children's views for courts in cases of contested child contact. In contested child contact, the same process is used to support the child to complete a F9 form or to produce a report on the views of the child for the court. The process begins with separate individual meetings with both parents to explain the process and to undertake an assessment to see whether the service is appropriate for the child. Contra-indicators for the service are domestic abuse and

if the child has learning difficulties. The service is for children who are over 10 years old, although younger siblings may also access the service.

The child has three meetings with a mediator. The first meeting aims to build rapport with the child, the second to explore their views and the third to ensure that the mediator has understood the child's views. The mediator then prepares a report and submits this to the court. This report will contain the child views as well as other information provided by the counsellor: for instance, evaluative comments about the child's views and the service's interactions with parents. These evaluative comments are seen to help put the child's views into context for a sheriff. Neither children nor their parents receive copies of the reports submitted to the court. Following the three meetings, children's contact with Consulting Children ends. At the time of interview, whether the services should end their relationship with a child at this point was under review.

[Children's Rights Officer, West Lothian Council](#)

Funded by the Scottish Government's Equally Safe policy agenda, this service is located within West Lothian Council's Domestic Abuse and Sexual Assault Team. The service is specifically for children with experience of domestic abuse who are subject to contested child contact. It has evolved in consultation with sheriffs in the West Lothian area. The service aims to feed children's views directly into cases of contested contact. Originally, the service was only accessible to children if a sheriff made an order for the service to take the child's view. However, now the services has been developed to provide children's views without an order from a court. The service is available to children as young as 4 years old.

If an interlocutor is made for the child's views to be taken, the children's rights officer (CRO) arranges to meet with the child and their resident parent at home. In this meeting, the CRO explains their role and the boundaries of their work: for instance, confidentiality and what will happen to children's views in the legal process. Following this, the CRO meets with the child individually several times to gather their views. This meeting takes place outwith the child's home. During these meetings the CRO works with the child to facilitate their views. The child's views are recorded in writing verbatim and the written report checked with and subject to amendment by the child at subsequent meetings. Once a child is satisfied with the

record of their views they are sent directly to the Sheriff. The CRO is not involved in the legal proceedings: their role is limited to reporting the child views to the court. If a resident parent requests it the CRO may meet with the child once proceedings are concluded. However, at this point they are not acting for the court and any knowledge of legal decisions made does not come directly from the court.

[Children's Advocacy Worker, Edinburgh Domestic Abuse Advocacy Court Support \(EDAACS\)](#)

Located in Edinburgh Women's Aid, EDAACS is a specific court advocacy service for women and children who are victims and witnesses to proceedings in criminal courts. The service for children has developed to support children who are subject to contested contact in civil court.

Unlike the services described above, the service is not used by courts to gather and report on children's views. However, the service does submit reports to child welfare reporters on children's views. They also offer to support children in meetings with child welfare reporters. However, as we discuss earlier not all advocacy services have the same relationship with courts as others and services like EDAACS may at times struggle to be 'allowed into' court processes. In terms of children's participation, this service is unique in that it provides ongoing emotional support to children who are subject to contested child contact – before, during and after proceedings about contested child contact.

[5.7 Looking to the future and reforming law and practice](#)

Participants held different views as to what reforms should be made to implementing children's participation rights in family actions. Views ranged from: improving current practice; to developing new and more robust mechanisms for children's participation; to reforming how contested contact is dealt with.

For some there was a sense the current system was adequate and that any changes should be minor, concentrating on how to improve existing practices. For instance, a sheriff commented they would prefer any reforms to be akin to 'evolution rather than a revolution.' In terms of immediate ways practice might be improved, one participant pointed to the role of the curator ad litem. They suggested that clarifying and perhaps expanding this role may assist in implementing children's participation rights. Issues were also raised about the lack

of training for those working in courts and tasked with facilitating children's participation. Topics like communication with children, child development, child welfare and domestic abuse were raised as important areas for learning. Others expressed a desire to develop new and more robust mechanism for children's participation. This is illustrated well in the following extract, where the sheriff discusses the need for a dedicated role to help implement children's participation rights:

'I think we should have a dedicated child reporting officer attached to the courts. Who sheriffs could call upon to go speak with a child, ascertain their views. I think the way we do it now is outsourcing to solicitors, although a lot of solicitors are very good and experienced. [But] the funding regime to support that is poor and I think it's cumbersome, clumsy and takes such a long time that it's holding up us making quick sensible decisions at a time of stress.'

(Sheriff, C)

The sheriff highlights issues about capacity of the current system and how it is resourced. This raise pertinent questions about whether currently it is agile or nimble enough to implement children's participation rights and that potentially additional and dedicated resources are needed.

Other participants called for more radical reform. They expressed strong views that the current system was inappropriate for dealing with contested contact and not able to fully implement children's participation rights. Some pointed to the children's hearings system as being a more appropriate place for disputes about contact to be resolved. This idea that that the current structures do not meet children's needs is expressed in the following extract:

‘I would like to see soft courts where there are places that children can come and give their views to the courts with our having to necessarily go to a court.....I don’t think it’s difficult. I think the problem is that we don’t have the structures and nobody is willing to take the nuclear option which is to say that these systems don’t work and we need to start from scratch and build them again.’

(Solicitor, H)

This solicitor suggests that much more fundamental reform is needed to family law in order to ensure that law and practice is inclusive of children.

5.8 Summary

This chapter reports on the views of legal and advocacy professionals in Scotland, who participated in this phase of the research. The analysis finds that children’s participation rights are frequently not implemented in ways that fulfil the requirements made by the General Comment. This in part is because of the lack of infrastructure or resources readily available to prepare or support children to participate in family actions. The issues of ‘manipulation’ and ‘distress’ were found to especially potent in discussions about implementing children’s participation rights. The legal system currently frames contested contact cases as ‘adult disputes’, which can exclude children’s views being duly considered for fears that involvement will unduly pressure the children. In practice, concerns about children’s vulnerability risk marginalising children’s participation rights. Amongst participants there were different views about how this might be addressed. These ranged from minor amendments to existing practices to much more radical reform that would lead to courts and decision-making processes being more inclusive of children.

6 International Perspectives on Children’s Participation in Family Actions

6.1 Introduction

The chapter reports on a rapid review of evidence and follow-up interviews with international experts. It focuses on four jurisdictions: Australia, Canada (Ontario), New Zealand and England and Wales. The jurisdictions were selected because of their recent and on-going attempts to improve children’s participation in contested contact.

This addresses the second research aim and the sixth research objective:

Research aim 2: To identify empirical evidence on potential solutions to these issues from Scotland and from other jurisdictions (England and Wales, Australia, Canada and New Zealand – who have positively evidenced developments, from judicial interviewing to children’s advocacy).

Research objective 5: To identify how other jurisdictions address these issues, what evidence exists about the effectiveness of these approaches, and explore how they might translate to a Scottish context.

Through our reporting we pay particular attention to the priorities of the Children’s Expert Group: the need for skilled and individualised support; valuing children’s views in decision-making; and children’s place in contested proceedings.

6.2 Methods

Searches were restricted to publications written in English that have been published during the period 1997-2017. Searches were carried out using legal databases Bailii, Westlaw UK & International and Lexis Library, as well as social science databases including Web of Science. We also carried out searches on Open Grey, a European search engine that focuses exclusively on ‘grey literature’ on the jurisdictions of Australia, Canada (Ontario), New Zealand and England and Wales. These jurisdictions were selected because they share key characteristics:

- Ratification of the UNCRC, which through Article 12 provides children the right to express views in all matters affecting their lives including judicial proceedings like contested child contact;
- Paramount or primary consideration is given to children’s best interests or children’s welfare when resolving family actions; and
- Use of an adversarial approach to resolving disputed contact or residence in court.

The search terms used were: child* rights, views, participat*, family actions, family court. The inclusion criteria for the evidence were: empirical research, jurisdictions selected, publication dates (1997-2017) and within scope of the search. The CASP Qualitative Appraisal Tool³⁴ was applied to the publications identified through searches.

Our review of empirical evidence was supplemented by follow up interviews with key experts (n=12) from these jurisdictions. The experts interviewed are authors of the literature identified through our review of evidence and other ‘key research leaders’ from the four jurisdictions. This enables an interrogation of how different jurisdictions address the challenges and barriers to children’s participation that have emerged from our review of case law and interviews with legal professionals and advocacy specialists. This chapters reports on both of these methods of data collection.

6.2.1 Limitations of the method

A rapid evidence review does not offer an exhaustive exploration of all the literature; rather it attempts to identify and appraise what empirical evidence there is. There is a sizeable amount of published work that is conceptual and theoretical in nature or that reviews case law and legislation. However, there is a dearth of robust empirical evidence in this area.

6.3 The evidence reviewed

A total of 171 records were identified at the first stage of the search. 96 records were excluded from after reviewing abstracts. The remaining 75 records were further assessed for their suitability, using the criteria above. 24 records were subsequently included in the

³⁴ See <https://casp-uk.net/casp-tools-checklists/>

review. It is of note that most of the research originated from Australia and Canada. Appendix C summarises the evidence that is included, the methods that were used and populations the research was carried out with.

6.4 An overview of jurisdictions' approaches to children's participation

We begin by giving an overview of how each jurisdiction addresses children's participation in contested child contact. Across jurisdictions we can see children's participation is supported in variety of ways. Children's participation across jurisdictions may broadly be categorised in the following ways:

- children's views are contained within an overall report on child's best interests that is prepared by an adult appointed by the court
- children are invited to communicate directly to the court (e.g. judicial interviewing, children's views are recorded and conveyed directly to the court)
- through children's own legal representation

The *extent* of children's participation varies across these mechanisms, with some potentially offering a greater degree of participation than others. The degree to which children's views are *mediated* by adults to the court also varies across these mechanisms.

6.4.1 Australia

In Australia, Family Reports are the most common means for children's views to be represented to the court. These reports are prepared by a family consultant who is usually trained as a psychologist or a social worker. Family reports contain the views of the child as part of the family consultant's recommendations for the care arrangements for the child. These recommendations are based on what the consultant believes to be in the child's best interests. The court may also appoint an Independent Children's Lawyer (ICL). The ICL role has three overlapping functions relating to children's participation, evidence gathering and litigation management.

Criteria for appointing an ICL are set out in *Re K* (1994) 17 Fam LR 537. These are one or more of the list below:

- allegations of sexual, physical or psychological abuse;
- there is a “high level of long-standing conflict between the parents (‘intractable conflict’);
- the child is apparently alienated from one or both parents;
- “there are real issues of cultural or religious difference” affecting the child;
- the sexual preferences of either, both or another person with whom the child has contact, are likely to impinge on a child’s welfare;
- alleged antisocial conduct by one or both parents (of a kind that “seriously impinges on the child’s welfare”, including family violence);
- instances of a significant medical, psychiatric or psychological illness or personality disorder affecting a parent, a child, or another person with whom a child has significant contact;
- a child of mature years is expressing strong views that would, if given effect to, result in changes to longstanding living arrangements or the cessation of contact with one parent;
- a relocation proposal would greatly restrict or, in practice, exclude the other parent from having contact with the child;
- it is proposed to separate siblings;
- no party has legal representation; or
- an application under the court’s welfare jurisdiction for medical treatment is involved and the child’s interests adequately represented by one of the parties.

Kapsiew and colleagues (2014) undertook a comprehensive evaluation of the ICL role. They highlight concern that the appointment of ICLs in some states have been restricted to only some of these criteria due to inadequate resourcing. In practice, this means ICLs caseloads are dominated by cases characterised by family violence and child abuse. Despite the name these lawyers do not act as legal representatives for the child. Rather, ICLs represent the child’s best interests. It is of note that ICLs are not required to meet with the child whose

interests they represent. However, they are required to present the child's views. In practice, this means that ICL relies on the Family Report of the Family Consultant to report on the child's views. ICLs' practice of not meeting directly with children has prompted levels of dissatisfaction from children and parents (see Kapsiew et al., 2014.).

In Australia, judicial interviewing is rare, and judges have expressed an aversion to it (Parkinson and Cashmore, 2007). While issues of confidentiality and adhering to due process are often associated with concerns about judicial interviewing, Fernando's (2011) study found that Australian judges are not overly concerned with these issues and felt confident navigating them. Other evidence suggests judges are concerned about their skills in communicating with children, the implications of hearing evidence directly from children and whether it may make children vulnerable to greater parental influence (Parkinson and Cashmore, 2007; Fernando, 2012).

6.4.2 Canada (Ontario)

Across Canada, the most common way children's views are sought and represented is via private custody assessments or evaluation reports. These reports aim to advance children's best interests and also report on children's views. In Ontario, the Office of the Children's Lawyer (OCL) can represent children under 18 years in disputes about 'child custody' and 'access'. The court may make an order to request that OCL appoint an independent lawyer for the child. However, it is the OCL that decides what, if any, involvement it has in disputes about access. The OCL may appoint an independent lawyer for the child, a clinician (e.g. social worker) to provide a report to the court, or both a lawyer and a clinician. While there has been a growing interest in judicial interviewing, there has in general been a reluctance amongst the judiciary to embrace this. Birnbaum and Bala (2010) report on Ontario judges' concerns about: parental influence on the child; judges' lack of skills and training; and concern about due process (i.e. that they might become a witness or the confidentiality of children's views). In contrast, in the province of Quebec, children have the legal right to speak directly with the judge if the child wishes to do so (see Bala et al., 2015).

A recent innovation in Ontario has been the introduction of Voice of the Child Reports (VCRs) (see Birnbaum and Bala, 2017 for an evaluation of a pilot). VCRs have a longer history in other

parts of Canada, but the evidence review identified recent research from Ontario on the introduction of these. There is variation across Canada on how VCRs are funded and whether they are ordered by a court. In the Ontario pilot, a VCR was only prepared if: both adult parties consented and a court made an order for it; parents lacked the financial means for an independent custody assessment or obtaining a full custody assessment would cause unreasonable delay; and that an independent report of the child's views was needed. Children were also only eligible for a VCR if there were no criminal charges where the child may have to testify; there were no criminal charges or bail conditions that prevented contact against a parent; and that there had not been a recently completed private custody assessment or clinical assessment has been prepared by the OCL.

VCRs report on children's views, based on one or more interviews between a child and a legal or mental health professional. VCRs may be evaluative (i.e. include a comment or opinion of the professional carrying out the report) or they may be non-evaluative (i.e. only report on the views of the child). Birnbaum and Bala (2017) reported that VCRs were broadly well received by professionals and parents. They attributed VCRs to early resolution of almost half of cases. They also reported that children were satisfied with their VCRs and from having an opportunity to express their views. However, some parents and lawyers raised particular concerns about the suitability of VCRs for cases where a child does not want to have contact with a parent and in cases of domestic abuse. Birnbaum and colleagues (2016) report that VCRs are a practical, cost effective and expeditious way in which to engage children in family law when compared to other mechanisms like custody assessments or children's legal representation. However, they caution that while VCRs 'have a place in the continuum of services' for children, they should not be seen as a replacement for other mechanisms, especially in cases where there are allegations of domestic abuse, alienation or other forms of neglect and abuse.

6.4.3 New Zealand

Unlike the other jurisdictions, New Zealand has a long history of children's legal representation and of judicial interviewing. Reforms to family law that were made in 2014 aimed to shift disputes about contact from court to out-of-court mediation. Taylor (2017) notes that despite the focus on out-of-court mediation the reforms were somewhat silent on

children's participation in mediation. Interviews with experts reported that despite reforms made in 2014, the Lawyer for the Child remains a critical role in the family justice system and a conduit through which a child may meet a judge.

A lawyer for a child is appointed in every case that is likely to reach court. The appointed lawyer is required to meet with the child. They provide independent representation for the child and the child's best interests. The lawyer is also responsible for explaining any expert report or court orders to the child, acting as a 'go-between' between the judge and child to arrange a judicial meeting, and attending any meetings the child has with a judge. Should there be a conflict between the child's views, and what the lawyer considers to be the child's best interests, the lawyer must attempt to resolve these with the child. If it is not possible to reconcile these, then a second lawyer may be appointed to represent the child's welfare and best interests. Taylor and Caldwell (2013) report positive attitudes towards and increased use of judicial interviewing amongst judiciary. It is of note that judges in their study reported the purpose of judicial interviewing was not to elicit the views of the child. Children's views are contained in the report of the lawyer for the child or through other submitted evidence. Rather, judges viewed judicial interviewing primarily as a means for children to convey their views directly to the decision maker.

6.4.4 England and Wales

The Children and Family Court Advisory and Support Service (Cafcass) operates in England and Cafcass Cymru operates in Wales. In cases of disputed child contact or residence, a court can request a 'welfare report' under Section 7 of the Children Act 1989 and appoint a Cafcass worker to undertake this. As part of this report, the Cafcass officer is required to ascertain and report on the child's views. Any recommendation to the court in a welfare report is based on what the Cafcass worker considers to be in the child's best interests. In some circumstances the court may order that the child is made party to the proceedings. However, cases where children are themselves legally represented are exceptional. In England and Wales, judicial interviewing is not routine and has been discouraged. Nonetheless, guidance on judicial interviewing has been published by the Family Justice Council. In the majority of cases children's views are represented in welfare reports or from the accounts of others e.g.

parents. Daly (2017) notes in 2015 that the Vulnerable Witnesses and Children Working Group highlighted stark differences between criminal law, where mechanisms for hearing children are highly developed, to family law where they are not.

6.5 Key themes from the reviews of evidence on children's participation in family actions

In this section we elaborate on key findings from the review of international evidence on children's participation in family actions and from the interviews with key experts. We begin by examining how adult views on children's competence and capacity, their distress and their vulnerability to manipulation or influence may act as barriers to implementing children's participation rights. We then look at how the issues raised by the Children's Expert Group are addressed and resonate across jurisdictions.

6.5.1 Barriers to children's participation

Across jurisdictions, the empirical evidence we reviewed and interviews with experts confirmed that the concepts of children's competence and capacity, as well as concerns about children's distress and their vulnerability to manipulation or influence, were barriers to implementing children's participation rights. When these concepts and concerns surface, the tension between a desire to protect children and children's rights to participate is laid bare. Several experts challenged constraining children's participation rights out of concern that it exposed children to conflict. They argued this was contrary to children's welfare. This is illustrated in the following extract, where one expert reflects on the impact of children's perceived vulnerability and their participation rights:

'I think our system is very protectionist and if you ask most judges or family consultants they will say that children need to be protected from the dispute, from the conflict and that is a reason to exclude them from as much as possible, keep them away from the litigation. [But] what we are hearing from children is the exact opposite which is [...] that children are not protected [by this].'

(Expert 1, Australia)

Many expert interviews linked implementation of children's participation rights to promoting children's welfare. Experts noted that, while there may be a desire to protect children from conflict, restricting children's participation does not necessarily result in such protection. In the following extract, one expert highlights that regardless of children's participation in court processes, children are still involved in disputes about contact and they may well be distressed by this:

'Children are already involved in the dispute, they are already "caught in the middle" and are already effected by the distress caused [...] Children want a say and understand the difference between having a say and making the decision, and research shows that there are better outcomes for children who feel that they have been heard.'

(Expert 2, Canada)

Across jurisdictions, domestic abuse and manipulation were 'live issues'. The evidence reviews identified manipulation and domestic abuse as being particularly problematic for mechanisms that aim to facilitate children's participation. For instance, Birnbaum and Bala (2017) and Fernando (2012) report concerns from the judiciary on judicial interviewing in these contexts and Birnbaum and colleagues (2016) caution about the suitability of Voice of the Child Reports for such circumstances. The following extract from an interview illuminates that, while children's participation rights in these contexts may not be entirely extinguished, how children participate, and the extent of their participation rights may be limited:

'[...] some judges truly believe that irrespective of alienation or whether there's domestic violence children should at least have an opportunity to be heard. Other courts might take the position: absolutely not. I don't want the child involved at all. I only want to hear from an assessor. [...] it's not because there is a reluctance to hear from the child, it's more of a reluctance to put the child in the middle of it. So they would rather have the information come from a broader source like an assessment.'

(Expert 1, Canada)

Curtailling the rights of children to be heard directly in proceedings runs counter to the General Comment (see chapter 2); it also runs counter to research carried out with children. For instance, Cashmore and Parkinson (2009) found that children with experience of violence and abuse wanted greater influence on court decisions than other children. We found very limited evidence on approaches to support participation in complex cases like domestic abuse or manipulation. An exception was a small-scale evaluation of an extended approach to children's participation in Calgary. These involved children having emotional support from a counsellor and their own legal representation. The approach supported children to articulate their views and then with legal representation to advance them (see Fotheringham et al. 2013).

Experts felt that too much attention had been paid to notions of influence in contested child contact. This is illustrated well in the following quotation:

'It is parent's job to manipulate their children, that's what bringing up children is all about, alienation is talked about too much.'

(Expert 1, Canada)

Nonetheless, the seeming lack of suitable mechanisms for children's participation in these contexts is a significant and serious gap when we consider that allegations of domestic abuse and manipulation make up a large proportion of cases of contested child contact (see CAFCASS and Women's Aid, 2017; Mackay, 2013 a and b).

6.5.2 Children's power and place in contested contact

In reviewing the evidence and practice across jurisdictions, different approaches and conceptualisations of children's participation emerge. We see the use of different terms implying a different status for children's participation e.g. 'wishes', 'views' and 'participate'. As we describe above, New Zealand is somewhat of an exception, in that children are legally represented. While this may appear progressive, there was disquiet amongst some experts about this implementation mechanism in practice. Concerns were raised that even with legal representation, children's views are still *mediated* to the court by a lawyer, who might not

always have the expertise to properly interpret them.³⁵ Nonetheless, experts outwith New Zealand viewed legal representation of the child as crucial to ensure children and their participation rights were not marginalised in legal processes. This point is illustrated well in the following extract:

‘[We are] not really taking children seriously as serious actors in proceedings that are supposed to be about them. I would like to see a system where children have the opportunity whether it's directly or through a representative to actually argue their own corner because I think that is a far more important issue.’

(Expert 1, England and Wales)

Similar concerns about children’s status were raised by other experts in the research. Below, an expert links a need for legal representation for children and their views to our earlier discussion on the legal construction of contested contact as an adult dispute that is not necessarily inclusive of or orientated towards the needs of children:

‘My question is always especially if there are no lawyers is, 'who is there for the child?' 'how is that voice, [the] child's voice, got before the court?' The parents are so focused on the parental dispute that are not focused on hearing from children. I think that's an international challenge as well given the legal aid cutbacks and services etc.’

(Expert 1, Canada)

A key tension in the evidence relates to the relationship between and reporting of children’s best interests and children’s views. Many of the mechanisms that aim to facilitate children’s participation ‘roll up’ the child’s views as part of an overall report on the child’s best interests. This means that children’s views are mediated by an adult in the reporting and in the interpretation of these views by the expert and the court. These points are reflected in an interview with an expert reflecting on Australia’s best interests reports that are compiled by family law consultants:

³⁵ One of the recommendations of the New Zealand’s Independent Panel on family law form is that views should be given verbatim. (see <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/family-court-rewrite/>)

‘The big limitation is the fact that the evidence of children's views are being presented by a third party and they are qualified by that third party. [The child] is given no opportunity to directly present their views to the court. Neither are they given the opportunity to check how their views are presented to the report.’

(Expert 1, Australia)

The mediation of children’s views, by adults, has implications for compliance with the UNCRC, as the General Comment on Article 12 requires children to have opportunity to be heard *directly* in judicial proceedings where possible (para 35). The Voice of the Child Reports that have been piloted in Ontario are a means to ensure that children’s views are reported *directly* into the court process. Small-scale evaluation points this to be a promising practice (Birnbaum and Bala, 2017) but, as we highlight earlier, caveats have been made about their suitability for cases where there are allegations of domestic abuse or manipulation.

Evidence on judicial interviewing reveals that judges may use such interviewing for particular purposes. Like our interviews with Scottish legal and advocacy participants, evidence points to judicial interviewing being used for a range of purposes including: ‘testing’ children’s views (e.g. to assess for manipulation), ‘getting a feel’ for the child whose lives they are making decisions about, and giving children the opportunity to meet the decision maker. Such aims, though, may well be different from children’s motivations for speaking to the judge, as discussed by an expert:

‘... the main reason that children want to speak with judges is that, they want to talk directly to the decision maker and secondly they want to say things that they don't want their parents to know, usually when the relationship with one parent has broken down, either because they are concerned about the consequences for them or they are concerned about hurting their parents. The ones who really wanted to speak with the judge were the ones who were really fed up with the process [...] they are fed up, they don't think the system works for them and they don't want their views transmitted, mediated by someone else, I want to say it in my words and they also want to see the face of the person who is making decisions about their lives, which is fair enough.’

(Expert 3, Australia)

The comparison between judges’ and children’s motivations shows a stark divergence. It is questionable whether all of these aims might be realised through judicial interviewing. It also raises questions about whether some of the judges’ aims can be reconciled with children’s participation rights.

6.5.3 The need for skilled and individualised support

Across the literature and our interviews with experts, there are significant concerns about the extent to which legal mechanisms are calibrated to meet the needs of children when implementing participation rights. One expert commented that this may be explained by legislation and accompanying legal processes not being established with children in mind. So it follows that across jurisdictions we see family law practice struggle to meet the needs of children and to implement their participation rights:

‘The court process was never set up for children, it was set up for adults and more specifically lawyers. So that's why the courts all over the globe are just having a really difficult time because now all of a sudden they have to talk to people who are not lawyers and they don't know how to talk to them.’

(Expert 1, Canada)

This dissonance between legal systems that have not been designed for children, but that are required to facilitate their view, risks children's participation rights being unmet. Across jurisdictions, experts commented how legal systems struggle to accommodate the needs of children. For instance, children's need to develop trusting relationships with adults in order to give their views was often unmet:

'I don't think there's much about options or support or long periods of time building up of trust and rapport.'

(Expert 2, England and Wales)

The limitations of existing legal processes for children's participation is captured well in the following extract:

'Preparing children is more about finding out what's the best support for them. I think we're still working through those sorts of issues. Children need to be comfortable in the environment, they've got to feel trust. They're already in a difficult situation, I don't think we put enough thought into that it...'

(Expert 1, New Zealand)

In practice, across jurisdictions and in different ways, children's participation does not always seem to be embedded in family law practice. Entitlements for children to be informed about processes, to have options for participation, access to the decision maker (judge) and control over the accuracy of and how their views are conveyed is found wanting in many of the jurisdictions we examined. This lack of anchoring of children's full participation rights is exemplified in the following extract where the expert reflects on practice in England and Wales:

'It just doesn't seem to be anybody's responsibility or role to do these child-friendly judgements [...] they are the exception rather than the rule. I think it's really problematic that after taking the time and effort to take part and give their painful views and then children might not have any follow up in terms of anybody explaining to them and in terms of why something was decided the way that it was.'

(Expert 1, England and Wales)

Across jurisdictions we see variable practice within mechanisms for facilitating children's views. Here, an expert reflects on practice of family consultants:

'Some of them see their role as quite relational and take that very seriously and others don't see that aspect as being important so they discharge their primary role which is to present their child's best interests of the court.'

(Expert 1, Australia)

There are disagreements in the evidence about who is best placed to fulfil the role of facilitating children's participation rights: e.g. whether it should be a lawyer, judge, psychologist or social worker. Evidence points to legal professionals having particular concerns about talking to children in order to facilitate children's participation rights. This ranges from whether they are adequately skilled to carry out such a task, whether they are skilled to interpret children's views, to what the evidentiary status of interviews with children might be. In the following extract, we see concerns expressed by lawyers about inadvertently harming children when talking with them:

'...there have been lawyers who have taken the view that it is 'systems abuse' to talk to children. To some extent I think that that is to do with their own capacity to talk to kids in that way, so that they don't feel very comfortable about it.'

(Expert 3, Australia)

'There is a need for advocacy for children, possibly child's advocates, who are trained in child development and listening and talking to children to sit alongside lawyers when they interview children.'

(Expert 4, New Zealand)

These extracts are especially powerful, when we consider the connections they make with the Children's Expert Group's priority for the skilled and individualised support for children to participate in family actions. They highlight the need for support for both children and for legal personnel so that children's participation rights are upheld.

6.6 Summary

In this chapter we have summarised the ways in which each jurisdiction facilitates children's views in contested contact. The interviews with international experts have helped to elaborate on the tensions and dilemmas that arise from the empirical evidence.

Placing at children at the centre of family actions

Across the review we see jurisdictions struggle to facilitate children's participation in what are systems that are orientated towards adults. There is a need for an overhaul of current law and policy so that is designed with children at the centre. This would move away from a current model where eliciting children's views is largely an 'add on' to an adult system.

There is not one solution or an ideal mechanism to address children's participation

Across the evidence we see different conceptualisations of children's participation and why children's views are elicited in family actions. There is a need for clarity on the purpose of involving children and what the parameters of their involvement might be. Each of the mechanisms discussed has limitations and not all will be suitable for or desired by every child.

Mechanisms must be calibrated to deal with concerns about domestic abuse and manipulation

Many of the mechanisms discussed here are highlighted as unsuitable for cases where there are allegations of domestic abuse, manipulation and other complex issues. These are the very cases that come to court and are the cases where children's participation is especially contested. There is an urgent need to consider how mechanisms might be developed or adapted to accommodate these groups of children who are the main constituents of family courts. This would take engage with the need for skilled and individualised support for children.

The mediation of children's views

There are significant concerns about how children's views are interpreted and mediated to the court by adults, even in jurisdictions like New Zealand, with its long history of legal representation for children. There needs to be urgent consideration on how children's views are fed directly into the court process.

The evidence base is limited

While there has been a growing interest in areas like judicial interviewing, research has focused predominantly on legal professionals' views of this. There is scant research with children about their views and experience of this. The evidence base is thus limited.

7 Moving Forward – Achieving Compliance with the UNCRC for Children’s Participation in Family Actions in Scotland

7.1 Introduction

In this chapter, we now examine the developing legislation, the Children (Scotland) Bill at Stage 1 of the Parliamentary process. Drawing on the research findings thus far, we offer directions for how the legislation might be strengthened to ensure that children’s participation rights are implemented in family actions.³⁶

7.2 Ensuring compliance

As we highlight in Chapter 2, a key policy objective of the Children (Scotland) Bill is to achieve further compliance with the UNCRC in family actions.³⁷ Compliance is especially urgent when we consider the Scottish Government’s commitment to incorporate the UNCRC into domestic legislation in this parliament. It is important to note that the UNCRC is *the minimum standard* that States Parties must achieve.

In this chapter, we use the UNCRC and the UN Committee on the Rights of the Child’s General Comment on Article 12 as a framework to analyse the extent to which the Bill will safeguard and implement children’s participation rights. The General Comments of the UN Committee on the Rights of the Child provide authoritative interpretation of the UNCRC and provide practical frameworks for implementation. While not legally binding, as authoritative interpretations, the General Comments provide a detailed framework by which to consider UNCRC compliance in law, policy and practice.

³⁶ This chapters draws on evidence submitted to the Justice Committee on the Children (Scotland) Bill, by Friskney, Morrison and Tisdall.

https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS519CH26_Morrison_Friskney_Tisdall.pdf

³⁷[https://www.parliament.scot/S5_Bills/Children%20\(Scotland\)%20Bill/SPBILL52PMS052019.pdf](https://www.parliament.scot/S5_Bills/Children%20(Scotland)%20Bill/SPBILL52PMS052019.pdf)

7.3 Progress towards compliance

The Bill has made progress towards compliance with the UNCRC. Key areas of progress include the following:

- Removing the presumption of children over 12 years being sufficiently mature to form views, for most provisions.
- The expansion of mechanisms for children’s participation in s. (11ZB) (1)(a) ‘give the child an opportunity to express the child’s views in a manner suitable to the child’.
- The introduction of explanations of decisions to children by the court or welfare reporter in s. 15(2)(11E)(3).
- The introduction of a register for child welfare reporters and curators ad litem has potential to address gaps in training and skills.

7.4 Specific areas for the Bill to address for compliance with UNCRC

To achieve compliance with the UNCRC there are specific issues that must be addressed in the Children (Scotland) Bill. This analysis was undertaken at Stage 1 of the Bill.

Children’s capacity and capability

Children’s participation rights risk being set aside by adults (often untested) concerns about their capacity (Morrison et al, 2020; Tisdall, 2018). It is positive that the Bill removes the presumption that children aged 12 and over have sufficient maturity to form a view. However, the Bill introduces a new provision about children’s capability that acts to limit children’s participation rights.³⁸ This is contrary to the General Comment on Article 12 that:

³⁸ An example of such wording can be found in s. 11ZB of the Children (Scotland) Bill (Stage 1): (1)) In deciding whether or not to make an order under section 11(1) and what order (if any) to make, the court must— (a) give the child an opportunity to express the child’s views in a manner suitable to the child, and (b) have regard to any views expressed by the child, taking into account the child’s age and maturity. (2) But the court is not required to comply with subsection (1) if satisfied that— (a) the child is not capable of forming a view, or (b) the location of the child is not known.

‘States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.’ (para 20)

‘The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child’s right to be heard in all matters affecting her or him.’ (para 21)

This means that *all children should be presumed to have capacity and it is not for the child to prove their capacity*. The introduction of ‘capable’ in s. 11ZB(2) and elsewhere in the Bill poses a risk to particular groups of children (e.g. young children and children with learning disabilities).

To achieve compliance with the UNCRC, the wording in the Bill needs to remove this negative construction of children’s capability, to ensure there is a presumption of capability.

Being supported to participate throughout the legal process

The CRC General Comment on Article 12 directs that, when giving views in legal processes, all children are entitled to support throughout the process. In Scotland there is an absence of sustained infrastructure to support child advocacy and ensure that these entitlements are realised. The Bill has not addressed this. This risks children’s participation rights being dealt with inconsistently, on an ad hoc basis and as a result not upheld. A system of child advocacy is urgently needed; children need to receive independent information and advice, ongoing support and opportunities to develop trusting relationships with adults who can safeguard their participation rights. While the Scottish Government’s (2019) Family Law Modernisation Strategy suggests the lack of infrastructure may be addressed through the introduction of a Child Support Worker role, it is unclear when and how this will be implemented. Without this infrastructure the General Comment, the Bill does not meet the requirements of the UNCRC.

To achieve compliance, the Bill should provide entitlements for children's participation, based on the UNCRC. These should include: all children having the right to express their views; a presumption that all children are capable to form a view; no age limit on the right to express views; children should have opportunity to be heard directly in proceedings; and information and support must be provided to children before, during and after proceedings.

Children being heard directly in proceedings

The General Comment on Article 12 directs that wherever possible children should be heard directly in proceedings. In Scotland, children's views are largely mediated by adults, mostly child welfare reporters. There are significant concerns (including from children) that this leads to their views being reported inaccurately or being subject to a layer of interpretation. The Children (Scotland) Bill has not sufficiently addressed this problem. More needs to be done to ensure that children's views are reported accurately so that *they are heard directly by the court*, especially when children are not legally represented.

The Bill is not positive about children's own legal representation in family actions. The presumption of age 12 has been retained for a child to instruct a solicitor (see Section 1 (11ZB)(3) and (4)). This acts to limit rather than expand children's participation rights. The age of 12 is a historical convention in Scots law, but it is not supported by empirical evidence. Children's access to legal representation has already been seriously curtailed by changes in legal aid provision. The Bill needs to reframe this so children's legal representation is viewed positively and should be available to children who need it and want it.

Complaints and redress

The UN Committee on the Rights of the Child's General Comment 5 states that children must have access to effective remedy for their rights to be meaningful (para 24). This means that if a child believes their right (including rights to participate) have been breached, then they should have an accessible way to complain and seek redress. In its current form, the Bill is silent on this.

To achieve compliance with the UNCRC, the Bill must provide systems of child-friendly remedy and redress should children's rights be breached. There is no robust data on how children's participation rights are implemented in Scottish courts. There is an urgent need for data to be gathered systematically by courts in order to monitor the implementation of children's rights.

7.5 Next Steps for Compliance with the UNCRC

The Bill provides an important opportunity to ensure that children's participation rights are upheld in family actions. While notable progress has been made, in the current drafting of the Bill children's participation rights are not sufficiently embedded nor safeguarded. There are key improvements that can be made to the Bill to achieve this. We believe there is also more fundamental and long-term change is necessary to improve how children's rights are addressed in family law.

To improve the Bill and achieve greater compliance with the UNCRC, the following is necessary:

- All qualifications about children's capability should be removed from the legislation. This limits children's rights and is contrary the UNCRC. All children should be presumed to be capable.
- Children must be given opportunity to be heard directly in legal proceedings. The presumption that children over 12 can instruct a solicitor should be removed. Section 11 ZB(3)(4) which frames children's legal representation negatively should be removed. More work must be done so that when children's views are mediated by an adult (e.g. child welfare reporter), there are safeguards in place to ensure that children's views are reported accurately and directly to the court. These safeguards must involve and be accountable to children.
- There is an urgent need to legislate for, and invest in, an independent advocacy system for children who are subject to court proceedings. Doing this would ensure that children receive independent information and advice, as well as ongoing

support and opportunities to develop trusting relationships with adults who can safeguard their participation rights.

- A child friendly system of complaints and redress must be established for children to use when they believe their rights have been breached.
- There is no robust data on how children's participation rights are implemented in Scottish courts. There is an urgent need for this data to be gathered systematically in order to monitor and progress the implementation of children's rights

To achieve compliance with the UNCRC, three broader issues must also be addressed in the Bill and in supporting infrastructure. These are:

- Enhanced systems and services being in place to enable children's participation, e.g. provision of child support/advocacy workers and providing information to children.
- An understanding that the majority of cases of contested child contact that reach the courts will have concerns about domestic abuse and/or child welfare. Legislation, systems and services must be effective to deal with these complex circumstances. Mechanisms to facilitate children's participation in these circumstances are inadequate and the Bill does not sufficiently address this.
- Radical long-term reform is necessary, to shift the legal conceptualisation of contested child contact as an adult dispute about parental responsibilities and rights, to one where concerns about contact are squarely about and inclusive of children. Doing this would assist in realising *all* of children's human rights, including participation rights. Such reform would stop children's views being subsumed as evidence to determine welfare. It would enable children's participation rights to be recognised in themselves, as well as the intersections they have with children's welfare: the UN Committee on the Rights has itself wrestled with the articulations between a child's best interests and a child's participation rights, to ensure neither are lost. This requires more than the minor changes to the current legislation that are set out in the Bill.

8 Conclusion

Scotland has a long commitment to upholding children's rights under the UNCRC, through Part 1 of the Children (Scotland) Act 1995. However, evidence in this report shows that the implementation of children's participation rights in contested contact does not always match this commitment.

The research found a number of barriers and challenges to children's participation in family actions in Scotland. The issues of 'capacity', 'manipulation' and 'distress' were found to be especially potent in discussions about implementing children's participation rights.

The legal framing of contested contact cases as 'adult disputes' can exclude children's views being duly considered for fears that involvement will lead to undue pressure on children. In practice, concerns about children's vulnerability risk marginalising their participation rights.

The UN Committee on the Rights of the Child, in its General Comment on Article 12 (2009), recommends that, wherever possible, children are given the opportunity to be heard directly in any proceedings (para 35). This is not the general practice in Scottish courts; it is possible that through judicial interviewing this is changing but the extent and quality of this practice is not yet known through research evidence.

The research identified a range of issues about current mechanisms and practice with regard to upholding children's participation rights:

- The implementation of the F9 form is considered for many reasons to be inadequate.
- Children's independent legal representation in family actions is viewed negatively by courts. This is concerning because there is no other mechanism which ensures children know and are supported in their participation (and other) *rights* during and after the court proceedings.
- Children's views are mainly considered indirectly through court-instructed reports. This leaves children reliant on the double interpretation of the reporter (child welfare reporter or curator ad litem) and then the judge, on what their views are.

International evidence shows that Scotland is not alone in wrestling with these issues. There are particular problems with mechanisms not being attuned to issues like domestic abuse or manipulation. There is an urgent need to consider how mechanisms might be developed or adapted to accommodate these children who are the main constituents of family courts. Issues of interpretation and mediation of children's views are concerns even in jurisdictions where there is a tradition of independent legal representation for children. Thus, greater attention needs to be paid to how children's views may be given due regard in court processes. There are significant concerns about adults' skills and (in)adequate resources available to facilitate children's participation.

Particular changes could considerably improve the current Scottish system, to support children's participation rights better. More fundamentally, current law and policy could and should be redesigned so that children are at the centre. This would require a profound step away from the current model where eliciting children's views is an 'add on' to an adult system.

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Appendix A Research Materials for Children’s Expert Group

Workshop Outline

Arriving, introductions and icebreaker

Paper aeroplanes

Everyone makes a paper aeroplane and writes on it: what they like to do in their spare time; their favourite food; and how they are feeling today. The whole group throws the aeroplanes around. Participants pick one up and guess who it belongs to.

Why we are here today

Researcher to restate why we are here today and the purpose of the research.

Agree ground rules for our work together

Facilitate a discussion and agreements on issues: confidentiality; emphasise that participants do not need to answer questions; what will happen with our work today; and any other issues that participants want to raise.

What it’s like to give views for contact?

Using prepared flip charts (with an outline of a child and one side is titled hard (barriers) and the other easy (enablers)), ask children to make two small groups and talk about: what makes it hard for children to give their views in contact decisions and makes it easy for children to give their views in contact decisions. Ask groups to make notes on post its and place on the ‘hard’ or ‘easy’ side of the flip chart. Come back as a whole group and discuss our work.

How children give their views

Using flip charts illustrate the different ways that children can give their views in court (F9, court reporter, meeting the sheriff, legal representation, and blank for views not sought). Ask children to pick the one that matches their experience. Then ask them to write on post its – what was good, what was bad, what needs to change for the method they experienced.)

Break – drinks, fruit and biscuits

Learning from you

Explain that this is a chance for participants to set priorities for the research. Explain that we want to know what children think is most important for this research to focus on. Invite participants to reflect on what we have discussed this morning and to use sentence completion cards to convey what are the most important things for the research to focus on. Prepared cards have the statements ‘I would tell those in charge...’ and ‘I would ask those in charge...’ on them. Discuss participants cards as a whole group.

Thank you and close.

Thank participants for their time and explain what happens next with the research.

Research information leaflets and consent form

Leaflet for Children

Giving your views in decisions about child contact

Who are you?



My name is Fiona, I work at the University of Stirling. I am working on a project about children's rights and family law. I would like to meet with you to talk about it and see if you would like to take part.



What is your project?

The Scottish Government is planning to change the Children (Scotland) Act 1995. This is the law that tells courts how they should listen to children's views when there is dispute between parents about things like child contact.

My project is trying to find out what it's like for children and young people to give their views just now. I want to learn if there are other ways that that might be better.

The Scottish Government have asked me and my colleagues to carry out this project. They want to use what we learn to improve things for children and young people.

What do you want me to do?

I would like to set up a group of young people to help me with this project. I want to make sure that my project takes account of what it is like for children and young people who have experience of giving their views in court.

The group will meet up during the life of the project. We will meet 4-6 times over a year. There will be chances for us to meet with the people who are making changes to the Children (Scotland) Act 1995 and to share with them your views.

Who will know if I take part?

You might be worried about people knowing about your experiences. We can talk about how you can take part in this project that feels ok. You might decide not to come of all of the meetings, or that you don't want to meet with the people making changes to the law. We can do whatever you feel comfortable with.

I will not use your name in any reports that I write. If you do decide to take part, you can change your mind at any time. I will check during the project that you still want to take part.

What will happen with this research?

The research will be written up as a report for the Scottish Government. We will also produce shorter briefings about our findings. We also plan to write reports for other researchers about this topic.

Want to ask any questions?

You can contact me at f.morrison@stir.ac.uk or 01786 467 006

If you have any worries about this project you can talk to jane.callaghan@stir.ac.uk or 01786 467 7726



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Leaflet for Parents

Who are you?

My name is Fiona Morrison, I work at the University of Stirling. I am working on a research project about children's rights and family law. I would like to meet with your child to talk about it and see if they would like to take part. I would be very happy to meet with you to explain more about the project and answer any questions you may have.

What is your project?

The Scottish Government is planning to change the Children (Scotland) Act 1995. This is the legislation sets out how courts should listen to children's views when there is dispute between parents about things like child contact.

My research is trying to find out if there are ways that could improve the current legislation.

The Scottish Government have asked my colleagues and I to carry out this project. They want to use this research to inform the changes they make to the legislation.

What do you want me my child to do?

I would like to set up a group of young people to help me with this project. I want to make sure that my research takes account of what it is like for children and young people who have had experience of participating in court. The group will meet up at key points during the life of the project. We would meet 4-6 times over a year. There will be chances for the group to meet with the people that are making changes to the Children (Scotland) Act 1995 and to share with them their views.

Who will know if my child takes part?

You may be worried about people knowing about your child's experiences. If your child is interested in taking part, I would be happy to talk to you both about how your child can take part in a way that takes account of this.

I will not use your child's name in any reports that I write. If you your child does decide to take part, they can change their mind about at any time. I will check during the project that they still want to take part.

What will happen with this research?

The research will be written up as a report for the Scottish Government. We will also produce shorter briefings about our findings. We also plan to publish reports for other researchers about this topic.

Want to ask any questions?

You can contact me at f.morrison@stir.ac.uk or 01786 467 006

If you have any worries about this project you can talk to jane.callaghan@stir.ac.uk or 01786 467 7726



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Consent Form

My Name:

Date:

My Child's Name:

Please tick

I have read the information leaflet about the project.

I have had a chance to talk to Fiona about the project and ask any questions that I have.

I am happy for my child to take part in the project.



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Appendix B Research Materials for Legal and Advocacy Specialists and International Experts

Research Information Leaflet

Background

The research aims to scrutinise the current position of children's participation in family actions in Scotland. It aims to investigate what lessons might be learned from other jurisdictions where there are recent and on-going attempts to improve children's participation in family actions. We hope that the research will contribute to forthcoming policy developments in Scottish family law. The research has been funded by the Justice Analytical Services, Scottish Government. The research is being conducted by Dr Fiona Morrison and Judy Warburton (University of Stirling), Professor Kay Tisdall (University of Edinburgh), Alison Reid and Fiona Jones (Clan ChildLaw)

Your involvement

As part of the research we would like to interview you about your views and experiences of children's participation in family actions. Interviews will focus on perceived challenges and barriers to children's participation and any solutions there may be to these. Interviews will last between 45min-1hour. They will be carried out in person, or by telephone (or equivalent). We would like to record the interview and write up a record of your interview. If you chose not to have your interview recorded, the researcher will take written notes during your interview.

Although we would very much welcome your participation, you do not have to take part in this study. If at any stage you wish to withdraw from the study, please inform Dr Fiona Morrison (f.morrison@stir.ac.uk). The data you provide may be used in the production of research outputs, so please be advised to contact the research team at the earliest opportunity should you wish to withdraw from the research.

Your interview

Your interview will be written up and key points noted. If your interview was recorded, it will be transcribed. Quotations may be used for reports, academic publications, academic conferences, and for training other professionals. Audio recordings will be deleted once the research is complete, a record of your interview will be kept by the University for a minimum of 10years and then destroyed. All information will be carefully and privately stored, in either a locked cabinet, or in a safe and secure data storage device. The recordings of your interview will be stored securely in an encrypted digital store, and will be destroyed once the reports for the project have been completed.

Anonymity

The nature of the research means that anonymity may not be possible. We are seeking your views because of particular expertise in this area. However, we will offer you opportunities to raise issues that will not be attributed to you in our reporting. You will also be offered a 2-week period to review your contribution to the final report to the Scottish Government before publication. We will also offer a 2-week period to review any contribution attributed to you in any other research publications.

Legal basis for processing personal data

As part of the project we will be recording and processing personal information relating to you. This will include your name, email address, phone number, the institution where you work and your

position there. This will be processed in accordance with the General Data Protection Regulation (GDPR). Under GDPR the legal basis for processing your personal data will be public interest.

Reporting

The research will be written up as a report for the Scottish Government. We will also produce shorter policy briefings about the study. We also plan to publish academic articles from this study. We would like your permission to report your name in these documents.

Risk

We do not believe that there are any significant risks associated with participation in this research.

Control of Your Data

The University of Stirling represented by Dr. Fiona Morrison as principal researcher for this part of the project will be responsible for the control of your data.

Further questions and complaints

You can read more about the research at <https://childrensparticipationinfamilylaw.wordpress.com>

If you would like to talk further about this research, please contact f.morrison@stir.ac.uk

If you have any concerns about this research, please contact jane.callaghan@stir.ac.uk

You have the right to lodge a complaint against the University regarding data protection issues with the Information Commissioner's Office (<https://ico.org.uk/concerns/>)

For more information about your rights see the University of Stirling's [Data Protection Policy](#).

The University's Data Protection Officer is Joanna Morrow, Deputy Secretary. If you have any questions relating to data protection these can be addressed to data.protection@stir.ac.uk in the first instance.

Consent Form

| | Please tick to show your agreement |
|--|---|
| I have read and understood the Research Information leaflet for Legal Professionals. I have been given the opportunity to ask questions and to have those questions answered to my satisfaction. | |
| I understand that my participation is voluntary, and I can ask to withdraw, without giving a reason. If I do this, the research team will not include my data in any new publications from this point. | |
| I understand that anonymity is not routinely offered as part of this research but that I can ask for particular views to be unattributed to me. | |
| I agree to my name and my position there being reported as part of the research. | |
| I understand that I will have the opportunity to review the final research report and publications that attribute contributions to me. | |
| I agree to my interview being audio recorded. | |
| I consent to taking part in this research. | |

Name:

Date:

Signature:

Interview schedule

- Purpose of the research
- Consent
- Anonymity
- Recording
- Reporting
- Checking final reports
- Any questions

Part 1 Children's participation in family actions

1. Would you be able to start by telling me about your experience of children participating in family actions?
2. From your experience, are you aware of any trends about the ways in which children's views are ascertained in family actions? (e.g. taken by third parties and reported to the court or in writing or video, judicial interviews, legal representation, advocacy or other).
 - a. Are there particular strengths and challenges associated with these? (ie. the ones that are used, issues around access, the limitations of them)
 - b. Why might these be? (e.g. age of child, nature of dispute – allegations of abuse, manipulation, a reluctance for children to be part of the dispute)
 - c. Are you aware of any promising practices to support children's participation in this area? (where is this happening, what evidence is there on these)

Part 2 Tensions and challenges to children's participation

3. From your perspective what the current challenges and barriers to children's participation are in family actions in Scotland?
 - a. What do you think the implications of these are for children's human rights?
4. A key tension we have seen in the literature relates to the *extent* of children's participation in disputes. At one end of the spectrum, children's views are taken and treated as evidence to be considered as part of weighing the child's interests - and at the other end - children have legal representation.
 - a. What views do you have about these different conceptualisations of participation?
 - b. What are the strengths and challenges for these different conceptualisations of children's participation?
 - c. Why might one approach be appropriate in one context and not another?

5. Another tension relates to ideas of children's 'competency' and their 'capacity' – and the implications this for participation. How has this featured in your work?
 - a. How do courts assess competence and capacity?
 - b. What impact do these ideas have on children's participation?
 - c. Are there any tensions surrounding this?
 - d. Do you have any other views about this?

6. We are interested to learn more about if and how children are supported to participate in legal processes. Thinking about your own experience, can you tell me how children are supported in these processes:
 - a. Are children routinely given information on what to expect, processes and procedures?
 - b. Are children given options about how to participate?
 - c. What support is given to children to participate? (e.g. emotional, advocacy, information)
 - d. How are decisions communicated to children?
 - e. What views do you have about the adequacy of these?
 - f. Are you aware of any promising practices surrounding this?

7. A key challenge to and for children's participation seems to be connected to concerns around children's manipulation. Can you tell me about how this feature and is addressed in your own work?
 - a. Is this a block to participation?
 - b. How do children participate in this context this e.g. what ways / methods are being used to support children to participate?
 - c. Are you aware of any promising practices in this context?

8. Another challenge relates to children's vulnerability and the distress that participation may cause children. How is this addressed in practice?
 - a. Is there particular support for children in this context?
 - b. How is child's vulnerability to the potential harm of participation balanced with that of not having an opportunity to participate?
 - c. Are you aware of any promising practices in this context?

9. From the literature we saw that there are concerns about and by those working in courts about their skills and confidence in taking children's views. Can you tell me more about this in relation to your own work?

- a. The knowledge / skills / confidence that those working in this area have to take children's views? (i.e. court reporters and all equivalents, judges, lawyers)
- b. Are there particular gaps? How might these be filled / addressed?
- c. Anything we can learn from you?

10. It seems that is especially challenging to unpick how children's views are weighed in best interests. What views do have about this?

- a. What are the challenges surrounding this?

Part 3 Further learning

11. Are there other challenges and tensions that we have not discussed? Any there any new ways of working or thinking about this that we have missed?

12. Is there any learning from how children's views are given in other aspects of the law, such as vulnerable witnesses, child protection or child abduction? E.g. any promising practices there?

13. Are you aware of anyone else working in the field that we should be talking to?

14. Thinking ahead to the government reforms in family law, what changes would you like to see to around children's rights to participate in legal decisions about contact and residence?

End

- Do you have any questions?
- Were the questions clear, did they make sense – any feedback?
- What happens next
- Thank you

Appendix C Empirical evidence consulted for evidence review

| Record | | Overview of study methods |
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| 1 | Bailey, S., Thoburn, J. and Timms, J., 2011. Your shout too! Children's views of the arrangements made and services provided when courts adjudicate in private law disputes. <i>Journal of Social Welfare and Family Law</i> , 33(2), pp.123-138 | Survey with children (aged >10years); England. |
| 2 | Banham, V., Allan, A., Bergman, J. and Jau, J., 2017. Acknowledging Children's Voice and Participation in Family Courts: Criteria that Guide Western Australian Court Consultants. <i>Social Inclusion</i> , 5(3), pp.155-163. | Interviews with legal professionals (Family Consultants). Australia. |
| 3 | Birnbaum, R. and Bala, N., 2017. Views of the child reports: The Ontario pilot project. <i>International Journal of Law, Policy and the Family</i> , 31(3), pp.344-362. | Interviews with children (5-16years), parents and professionals. Canada. |
| 5 | Birnbaum, R., 2017. Views of the child reports: Hearing directly from children involved in post-separation disputes. <i>Social Inclusion</i> , 5(3), pp.148-154. | Interviews with children (6-17years). Canada. |
| 6 | Birnbaum, R., Bala, N. and Boyd, J.P., 2016. The Canadian experience with Views of the Child Reports: a valuable addition to the toolbox?. <i>International Journal of Law, Policy and the Family</i> , 30(2), pp.158-178 | Survey with legal and mental health professionals. Canada. |
| 7 | Birnbaum, R., Bala, N. and Cyr, F., 2011. Children's experiences with family justice professionals in Ontario and Ohio. <i>International Journal of Law, Policy and the Family</i> , 25(3), pp.398-422. | Interviews with children (7-17years). Canada and USA. |
| 8 | Cashmore, J. and Parkinson, P., 2009. Children's participation in family law disputes: The views of children, parents, lawyers and counsellors. <i>Family Matters</i> , (82), pp.15-21. | Interviews with children (aged 6-18years); interviews with parents. Australia. |
| 9 | Darlington, Y., 2006. Experiences of custody evaluation: Perspectives of young adults who were the subject of family court proceedings as children. <i>Journal of Child Custody</i> , 3(1), pp.51-66. | Interviews (retrospective) with young people (aged 18-26years). Australia. |

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| 10 | Fernando, M., 2011. Children's direct participation and the views of Australian judges. <i>Family Matters</i> , (92), pp. 41-47. | Interviews and survey with judges. Australia. |
| 11 | Fernando, M., 2012. What do Australian family law judges think about meeting with children?. <i>Australian Journal of Family Law</i> , 26(1), pp. 51-77 | Survey with judges. Australia. |
| 12 | Fitzgerald, R. and Graham, A., 2011. "Something Amazing I Guess": Children's Views on Having A Say About Supervised Contact. <i>Australian Social Work</i> , 64(4), pp. 487-501. | Interviews with children (aged 4-13years). Australia. |
| 13 | Fotheringham, S., Dunbar, J. and Hensley, D., 2013. Speaking for themselves: Hope for children caught in high conflict custody and access disputes involving domestic violence. <i>Journal of family violence</i> , 28(4), pp.311-324. | Case analysis; interviews with children and parents; interviews with professional stakeholders. Canada (Calgary). **While not Ontario, this was included as it was one of the few studies that engaged specifically with children's participation in the context of domestic abuse. |
| 14 | Kaspiew, R., Carson, R., Moore, S., De Maio, J., Deblaquiere, J., & Horsfall, B. (2014). <i>Independent Children's Lawyers Study: Final report (2nd ed.)</i> . Canberra: Attorney-General's Department. | Reporting on 4 studies. Study 1 - survey with legal professionals (lawyers, judiciary and other family law professionals); Study 2 - interviews with children and parents. Study 3 - interviews with legal professionals (independent child lawyers). Study 4 – policy and service document analysis and interviews with legal aid commissioners and child protection professionals. Australia. |
| 15 | Macdonald, G.S., 2017. Hearing children's voices? Including children's perspectives on their experiences of domestic violence in welfare reports prepared for the English courts in private family law proceedings. <i>Child abuse & neglect</i> , 65, pp.1-13. | Case analysis. England. |
| 16 | Mantle, G., 2007. Managing the tension between the child's agency and the need for protection in family court enquiries. <i>Ethics and Social Welfare</i> , 1(2), pp.163-175. | Interviews with legal practitioners. England. |

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| 17 | Mantle, G., Leslie, J., Parsons, S., Plenty, J. and Shaffer, R., 2006. Establishing children's wishes and feelings for family court reports: the significance attached to the age of the child. <i>Childhood</i> , 13(4), pp.499-518. | Analysis of children's profiles who are subject of welfare reports; interviews with legal practitioners England. |
| 18 | Neale, B., 2002. Dialogues with children: Children, divorce and citizenship. <i>Childhood</i> , 9(4), pp.455-475. | Interviews with young people. England. |
| 19 | Parkinson, P. and Cashmore, J., 2007. Judicial conversations with children in parenting disputes: The views of Australian judges. <i>International Journal of Law, Policy and the Family</i> , 21(2), pp.160-189. | Interviews with judges. Australia. |
| 20 | Parkinson, P., Cashmore, J. and Single, J., 2007. Parents' and children's views on talking to judges in parenting disputes in Australia. <i>International Journal of Law, Policy and the Family</i> , 21(1), pp.84-107. | Interviews with children (aged 6-18); interviews with parents. Australia. |
| 21 | Ross, N., 2012. Independent Children's Lawyers: Relational Approaches to Children's Representation <i>Australian Journal of Family Law</i> , 26(3), pp 220-239. | Interviews with independent child lawyers. Australia. |
| 22 | Sheehan, G. and Carson, R., 2006. Protecting children's rights in contact disputes: the role of Children's Contact Services in Australia. <i>Family Court Review</i> , 44(3), pp.412-428. | Reports on two studies. Study 1 – interviews with policymakers, service providers, referrers, children (aged 6-15), parents; Study 2- service data analysis. Australia. |
| 23 | Taylor, N., Fitzgerald, R., Morag, T., Bajpai, A. and Graham, A., 2012. International models of child participation in family law proceedings following parental separation/divorce. <i>The International Journal of Children's Rights</i> , 20(4), pp.645-673 | Survey with institutions involved in Childwatch Network. Australia, Canada (British Columbia), England/Wales, New Zealand, Nigeria, Northern Ireland, Republic of Ireland, Scotland and USA (South Carolina), Costa Rica, India, Israel and Japan. |
| 24 | Taylor, N., and Caldwell, J., 2013. Judicial meetings with children: Documenting practice within the New Zealand Family Court. <i>New Zealand Law Review</i> , 3, 445-463. | Interviews with judges, New Zealand. |