

**Review of Part 1 of the Children  
(Scotland) Act 1995 and creation of  
a Family Justice Moderisation Strategy: A consultation  
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## **Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy: A Consultation**

### **Scottish Commission for Learning Disability Response**

The Scottish Commission for Learning Disability (SCLD) welcomes the opportunity to respond to this important consultation. SCLD is an independent charitable organisation and strategic partner to the Scottish Government in the delivery of Scotland's learning disability strategy, *The keys to life*<sup>1</sup>. The strategy defines a learning disability as a significant, lifelong, condition that starts before adulthood, which affects development and means individuals need help to understand information, learn skills, and cope independently. SCLD is committed to finding new and better ways to improve the lives of people with learning disabilities and is focused on sharing innovation and good practice so that those providing services and interventions can learn from each other. SCLD also aims to be a knowledge hub and to build an evidence base, sharing how policy is being implemented and building on an understanding of what really works.

The aim of this response is to support the Scottish Government in the development and delivery of policy through sharing knowledge and providing practical solutions to policy based challenges in line with SCLD's strategic plan 2017-21.

The Review of Part 1 of The Children (Scotland) Act 1995 and Creation of a Family Justice Modernisation Strategy is of significance to parents who have learning disabilities, due to significant barriers they face in raising their children and challenges in negotiating family law procedures. This is demonstrated through Stewart et al (2016)<sup>2</sup> who drew on existing research which estimated that 40% to 60% of parents with learning disabilities have their children removed from their care. *The keys to life* (2013)<sup>3</sup> stated that evidence pointed to disproportionate numbers of children being removed from parents with learning disabilities and recommended that by 2014, parents with learning disabilities should have access to supported parenting services based on the Refreshed Good Practice Guidelines for Supporting Parents with Learning Disabilities<sup>4</sup>. This consultation presents a valuable opportunity

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<sup>1</sup> [The keys to life \(2013\)](#)

<sup>2</sup> [Stewart, MacIntyre, & McGregor \(2016\)](#)

<sup>3</sup> [The keys to Life \(2013\)](#)

<sup>4</sup> [SCLD \(2015\)](#)

for parents with learning disabilities to ensure that their needs are addressed in a system which at time can act against their wishes.

In responding to this consultation, SCLD:

- Held a consultation event with parents with learning disabilities and staff from advocacy organisations
- Drew from existing research regarding the experiences of parents with learning disabilities
- Reflected on wider available research on domestic abuse and cross-examination of individuals with learning disabilities
- Took part in a roundtable discussion with policy officers from a range of key organisations, held by The Children's and Young People's Commissioner for Scotland.

Due to the scope and scale of this consultation document SCLD has chosen to focus on particular areas which may have a significant impact on parents who have a learning disability and their children. SCLD has chosen to focus its response on the following key areas:

- Commission and diligence (Question 5)
- Regulation of contact centres (Question 6)
- Contact with Grandparents (Question 8)
- Contact with Siblings (Question 9)
- Enforcement of Contact Orders (Question 11)
- Parental Responsibilities and Rights (Question 16 & 24)
- Removing Parental Rights from The Children in (Scotland) 1995 Act (Question 17)
- Domestic Abuse (Question 32 & 33)
- Alternatives to Court (Question 42)
- Children's Hearings (Question 49 & 51).

## Commission and diligence

### *Question 5*

57% of the illustrative sample group with whom SCLD consulted, stated that they thought that confidential documents should only be disclosed if the information will be what is best for a child. The majority of the group felt that a child should be asked first if the information should be shared, and that consideration should be given to what information sharing is in the child's best interest. One parent in the group said, "Children should have the right to decide who sees information".

While the majority of the group were in favour of this proposal, there were concerns from a parent that information may need to be shared to protect a child. They said, "...if the court needs the papers as evidence they should get it". There is validity in this concern, as courts need relevant information to make balanced and informed decisions.

In taking the views of the illustrative sample group into consideration and the view of relevant organisations, SCLD supports a strengthening of court rules for children's cases requiring that that applicants must state what information is sought and why. This process should ensure children's views have been taken into account. However, SCLD would welcome a range of caveats being added. This would help professionals balance the views of a child with a child's best interest and recognise that these may not always be the same.

These caveats should address the following:

- Protecting a child from neglect and abuse
- The age and capacity of a child to make decisions regarding information sharing
- The relevance of the information being shared to inform a court's decision.

In addition to this balanced approach, SCLD also welcomes careful consideration being given to how the views of a child on information sharing are gained. SCLD believes a thoughtful approach will be required when seeking the views of a child who has a learning disability. In these cases, specialist advice and guidance should be sought. Where this guidance is not available it should be created with input from specialist learning disability organisations.

## Regulation of Contact Centres

### Question 6

In response to Question 6 of the consultation document, SCLD believes that contact centres should be regulated. 86% of the illustrative sample group stated that child contact centres should be regulated (Appendix 1: Figure 1.1). The group explained a number of reasons why they felt contact centres should be regulated. Their reasons fall into three main themes which are best described as:

- Ensuring Quality of Service
- Keeping Safe
- Feeling Welcome.

### Ensuring Quality of Service

Figures from Civil Justice Statistics in Scotland 2015-16<sup>5</sup> highlighted that of 77,700 civil law cases in Scotland, 12,900 of these cases were regarding family law. Figures from the same document highlighted that the number of cases regarding contact which was both initiated and disposed of by the Sheriff Court in this year was 1,719. This figure in conjunction with the 1,427 children used contact centres managed by Relationships Scotland and the levels of use of independent contact centres from 2015 to 2018<sup>6</sup>, provides an insight into the high levels of need for this type of provision.

This need for contact centres was acknowledged by the illustrative sample group. However, many members of the group felt that some contact centres did not currently provide a quality service. This is best illustrated by a comment from an advocate who when asked how contact centres could improve said, “Well...they can't get any worse”.

A parent in the group also said there was a need for regulation because it would help to make sure people in contact centres were meeting standards. When asked why they thought contact centres should be regulated they said, “So they do their job

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<sup>5</sup> [The Scottish Government \(2017\)](#)

<sup>6</sup> [The Scottish Government \(2018\)](#)

right". This statement can be interpreted to suggest that this particular parent did not feel contact centres were currently carrying out their role correctly.

### Keeping Children Safe

Parents in the group felt that regulation of contact centres was important to ensure children were kept safe. One parent said, "Children are involved so it needs to be safe". An advocate within the group also stated that if a child was attending a contact centre because of identified risk then regulations may help to ensure the child's safety. The group's statements are supported by research by Aris, Harrison, and Humphreys<sup>7</sup> on the role of contact centres in cases involving domestic abuse and welfare concerns. As part of this research 21 children who used contact centres, completed a survey. Of those who took part in the survey, 33% felt unsure about their safety.

### Feeling Welcome

All members of the sample group agreed that contact centres they had experience of were not welcoming places. One advocate described a contact centre they had attended with a family as having visible damp throughout the building. The group talked about contact centres being sterile places which looked like a court. They also said sometimes contact could take place at social work offices which did not feel like a nice place to spend their time. The group also said that sterile and unwelcoming contact centres could potentially decrease child attendance.

The group's comments are also supported by Aris, Harrison, and Humphreys<sup>8</sup> which found that a number of the children who took part in their study did not enjoy visiting the contact centre, irrespective of their relationship with the family member they were seeing. This was due to a number of factors including:

- Not having toys or games for older children
- Not having anything to do
- A lack of space
- Being overwhelmed by the number of other children and families using the centre.

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<sup>7</sup> [Aris, Harrison, & Humphreys \(2002\)](#)

<sup>8</sup> [Aris, Harrison, & Humphreys \(2002\)](#)

Feeling welcome and at ease during contact was important to those in the illustrative sample group. One advocate spoke about a parent they worked with who had contact with their children through social work organised family gatherings. This was described as a family party where a number of family members got together to facilitate contact with a social worker present. The advocate said that for this parent this particular type of contact worked well. This type of contact required organisation between their social worker and the family and was re-visited regularly to consider the family's current circumstances. The advocate felt this had the potential to be offered on a larger scale to more families instead of contact centres. However, they did acknowledge that in some cases this would not be appropriate. The advocate also highlighted that they had only seen a family party as contact in this one instance. They stated this was a result of the positive attitude and work of the individual social worker and was not a widespread practice.

In considering the key themes highlighted by the illustrative sample group, SCLD believes contact centres should be regulated. This may best sit with the Care Inspectorate with support from a specialist organisation working to support children and families rights. While SCLD acknowledges that the majority of contact centres in Scotland are operated by Relationships Scotland who follow National Standards and that independent contact centres follow guidance, SCLD supports further regulation and inspection. This would have the potential to ensure the quality of service, safety, and a welcoming environment. By regulating all contact centres, standards across Relationship Scotland centres and independent centres will become consistent. SCLD acknowledges that this may pose challenges for some centres and would, therefore, suggest support and advice should be offered by centres operating at national standard. SCLD believes that the regulation of contact centres cannot happen in isolation and will require appropriate funding and investment. This regulation should be focused on providing high quality services. This is in line with CELCIS response which stated, "If contact centres are regulated, it is important that regulation facilitates consistently high quality experiences for children and their families, rather than focusing on scrutiny and compliance around minimum

standards” (2018, p10)<sup>9</sup>. This should reflect the focus on high quality service provision set out in the new Health and Social Care Standards<sup>10</sup>.

SCLD would support this regulation happening alongside research. This research should examine the current provision of contact centres to date. A clear aim should be to get the views of parents, children, and staff about the current provision and what practice could be replicated or improved. Following regulation, the areas identified in need of improvement should be evaluated to increase understanding of centre development. This would also serve to fill a gap in knowledge with regard to the contact centre landscape in Scotland and its outcomes. This research should also pay particular attention to the experience of families where the parent has a learning disability in accessing these contact centres.

SCLD welcomes the opportunity to support the regulation of contact centres by providing advice on ensuring accessible environments for both parents and children with learning disabilities.

## **Contact with Grandparents**

### *Question 8*

In response to Question 8 of the consultation document, 71% of the illustrative sample group said that the law should presume it would be of benefit for a child to have contact with their grandparents. Of the 71%, 57% were parents and 14% were advocacy staff (Appendix 1: Figure 1.2). However, when the group was asked for more detail a number of parents and staff felt that children having contact with grandparents should be dependent on their relationship with the child and the circumstances surrounding the grandparent. This is best illustrated by a comment from one parent in the group who said that grandparents should have contact with a child “...unless there is a reason not to”.

The types of reasons for grandparents not being able to have contact with their grandchildren could potentially include:

- A poor relationship with the child
- Causing distress to the child

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<sup>9</sup> [CELCIS \(September 2018\)](#)

<sup>10</sup> [Health and Social Care Standards: My Support, My Life \(2017\)](#)

- Connecting the child with a parent they are not permitted to have contact with
- The grandparent having committed a schedule one offence and having been assessed as presenting a risk of harm to a child.

While acknowledging potential exclusions, there has been research which shows that children and young people benefit from ties to their cultural family history. This was highlighted by Owusu-Bempah and Howitt<sup>11</sup> who stated that socio-genealogical knowledge was central to a child's development and self-understanding. Therefore, in cases where a child no longer has contact with one or both their parents, contact with grandparents or other family members may be critical to developing self-understanding.

Focusing on the experience of parents with learning disabilities, the presumption that grandparents can have contact with a child could potentially give children, no longer in contact with one or more parent, the opportunity to maintain links with their family and their heritage. Findings from Booth, Booth, and McConnell<sup>12</sup> found that of 127 children of parents with learning disabilities, 74.8% were placed in care out with their extended family network.

There is some potential benefit to presuming children benefit from contact with grandparents. For example where a child removed from parents with learning disabilities or who no longer have contact with one parent, a presumed contact with grandparents could in some cases increase family connection and strengthen personal identity and relations. This could counter what Owusu-Bempah and Howitt<sup>13</sup> termed 'insecure attachment' which they said could lead to "shaky internal working models of themselves and others..."(p.200). In some circumstances, a child's best resource for support, care and development of their emotional wellbeing, is their own family network.

However, while SCLD acknowledges the potential benefit that having contact with grandparents can have, particular consideration needs to be given to three complex

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<sup>11</sup> [Owusu-Bempah & Howitt \(1997\)](#)

<sup>12</sup> [Booth, Booth, & McConnell \(2004\)](#)

<sup>13</sup> [Owusu-Bempah & Howitt \(1997\)](#)

factors of presumed contact with grandparents which could negatively impact parents with learning disabilities and their children. Each of these is outlined below:

1. Ensuring grandparents' views and rights do not outweigh those of a parent with learning disabilities

SCLD views it as important that acknowledgment is given to the fact that the views of a person with learning disabilities may be different from that of their own parent (a child's grandparent). In some cases, the views of a grandparent could potentially outweigh the wishes of a parent with a learning disability where they are unsupported to make their views and opinions heard. Therefore, careful consideration of the impact of a grandparent's contact with a child may have on a parent with learning disabilities and their child's relationship will be required.

2. Presumed contact with grandparents instead of parenting support

It is paramount that contact between a child and their grandparent is not viewed as a suitable replacement for family life and connection with a child's own parent. This should not be seen as an alternative to children with parents with learning disabilities in the absence of parenting support outlined in Part 12 of The Children and Young People (Scotland) Act (2014)<sup>14</sup>. A presumed benefit of contact with grandparents should only be enacted when contact with one or both parents has broken down as either a result of divorce or removal of the child from the parents' care.

3. Increasing the rights of adults instead of children

SCLD acknowledges the concerns highlighted by CELCIS<sup>15</sup> that creating a presumption in law that children benefit from contact with grandparents and could detract from increasing the rights of children. In acknowledging the value of this critique, SCLD would urge caution and suggest that the rights of children should be carefully balanced with the rights of parents and significant adults, particularly where the adults in question are parents with learning disabilities.

In considering these three points, caution must be given to this presumption. There is potential unintended consequences including contact with grandparents being viewed as suitable replacement for families remaining together with parenting

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<sup>14</sup> [Children and Young People \(Scotland\) Act \(2014\)](#)

<sup>15</sup> [CELCIS \(September 2018\)](#)

support. In instances where all avenues of support have been explored with families, grandparents should be able to access support in navigating the application process for contact. However, this should not be presumed. Within this process, it should be ensured that children's voices are heard. Where the child's parents have a learning disability ensuring their voices are also heard in this process is critical. This is a question of balance and a thorough assessment of each individual situation will be required.

## **Contact with Siblings**

### *Question 9*

With regard to Question 9 of the consultation, the illustrative sample group were asked if all brothers and sisters should be able to ask for contact with their siblings. 86% of the group thought that individuals should be able to ask for contact with their sibling. The majority of the group thought this was important as they felt the children would benefit from being able to see each other and having time to bond. Further, that this should be based on the circumstances surrounding the siblings and their relationship. SCLD therefore agrees that siblings of all ages should be able to request contact with their siblings without being granted parental responsibilities and rights. SCLD is in agreement with CELCIS<sup>16</sup> regarding ensuring that legislation is clear that contact between siblings does not mean that the sibling will always be granted parental rights and responsibilities. SCLD also agrees with the need for information regarding sibling's rights to be accessible, which will be critical where one or more sibling has a learning disability. In addition to this, to facilitate contact between siblings SCLD believes children of all ages and abilities should be supported through appropriate services to ensure this contact takes place and is beneficial for the siblings involved.

## **Enforcement of Contact Orders**

### *Question 11*

In responding to Question 11 of the consultation document, the illustrative sample group were asked how they thought contact orders could be best enforced (see Appendix 1, Figure 1.4). 71% of those who took part felt that of the available options,

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<sup>16</sup> [CELCIS \(September 2018\)](#)

something else would be the most preferable while 28% selected parenting classes, sanctions or fines. It is important to note that those who selected the second option, chose this because they supported the idea of parenting classes but not that of sanctions or fines. As a whole, the group felt that making failing to comply with a contact order a criminal offence and sanctioning a person for failure to comply with a contact order was not appropriate. This is even more pertinent when the person in question may have a learning disability and may not fully understand the terms of their contact order and the consequences if they fail to comply. This was highlighted by members of the group who said there could be a number of different reasons people did not comply with their contact orders. This could include:

- A person not understanding the order
- A person needing support to arrange contact
- A person not having appropriate funds to attend contact.

During this discussion, one advocacy member of staff said, "There is probably a reason they are not following the contact order. It is important for professionals to understand the family's circumstance and history and take that into account."

The majority of the group were in agreement that something different to what has been suggested in the consultation document should be available. The group said any kind of enforcement should not be based on punishment. Instead it should be based on principles of understanding, advocacy and offering help to ensure contact took place.

The views and concerns expressed by the illustrative sample group will need to be carefully balanced with the understanding that children's views are often not heard or considered with regard to contact. A report for The Children and Young People's Commissioner Scotland<sup>17</sup> regarding the treatment of views of 155 children from 97 contact cases where there had been allegations of abuse, found that the clear views of 44 children had been collected by the court. Of those children who expressed clear views, 34% had a contact outcome that bore no resemblance to the view they expressed. This report stated that a range of factors could impact the weight of a

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<sup>17</sup> [Mackay \(2013\)](#)

child's views. This could include the child's age, prior involvement of statutory agencies or the attitude of the person collecting the views.

The impact of disruptive contact orders which do not take into account the view of children has been highlighted by The Children and Young People's Commissioner Scotland in their joint project with Scottish Women's Aid, 'Power up, Power Down'<sup>18</sup>. This work should also be considered.

In taking the views of the illustrative sample group and findings from The Children and Young People's Commissioner in Scotland, SCLD believes that something different to what has been suggested in this consultation document would be most appropriate where one or more parent has a learning disability or an identified or suspected learning need. While SCLD understands the serious nature of breaching a contact order, SCLD does not believe that sanctioning, fining or custodial sentencing would be of the best interest of a parent with a learning disability or their child. Instead where parents have a learning disability, support should be put into place to facilitate contact. This should be carefully balanced with ensuring that the views of a child are appropriately gathered and given due weight and the impact of contact order on the child's wellbeing is considered.

## **Parental Responsibilities and Rights**

### *Question 16 & Question 29*

To facilitate a discussion around who the illustrative sample group thought should have parental responsibilities and rights, the illustrative sample group considered who they thought could have those rights (See Appendix 2, Figure 2.2). Below is who the group stated should definitely have parental responsibilities and rights:

- A mother
- A father
- Biological parent
- A carer
- A legal guardian

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<sup>18</sup> [The Children and Young People's Commissioner Scotland](#)

The group felt that in some circumstances there should be conditionality of parental responsibilities and rights. The conditionality of having parental responsibilities and rights was discussed in relation to step-parents or those who had criminal convictions. In relation to Question 16, the group felt that a step-parent should be able to have parental responsibilities and rights if they can demonstrate that they have been a part of a child's life for a significant period of time and that they have a positive relationship with the child. The group said it was important that the child felt happy and safe with the step-parent. Therefore a child's views should be sought in these matters where appropriate. On balance, SCLD suggests that parental responsibilities and rights for step-parents should be determined with the oversight of courts. This could potentially serve to safeguard vulnerable single parents with learning disabilities and their children, when the parent enters into a new long-term relationship. This is in line with CELCIS response to this consultation.

With regard to Question 29, the illustrative sample group also discussed conditionality in relation to parents with criminal convictions. The group said that they thought that people who had criminal convictions should be able to have parental responsibilities and rights, as long as they had not committed a schedule 1 offence and were assessed as not presenting a risk to a child. In relation to Question 29, which asks if a person convicted of a serious criminal offense should have their parental responsibilities and rights removed by a criminal court, SCLD selects option c. This is based on comments made by the illustrative sample group and a lack of clarity in the consultation document about what qualifies as a serious offence. SCLD questions whether removing the parental responsibilities and rights of an individual convicted of a serious offense would not be compliant with Article 8 of The Human Rights Act (1998)<sup>19</sup> which states every person has a right to a private and family life. Infringing Article 8 of The Human Rights Act in this way could create a slippery slope, with an impetus to extend such requirements to others at a future stage. This could lead to the removal of these rights from a wider number of parents including those stigmatised and viewed as other or as deviant as a result of criminality, disability, mental ill health, illness, sexual orientation and race etc. However, where

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<sup>19</sup> [The Human Rights Act \(1998\)](#)

the nature of a parent's crime presents an identifiable risk to the child's wellbeing, steps should be taken to ensure this child is protected from the risk of harm.

### **Removal of Parental Rights from the 1995 Act**

#### *Question 17*

In response to Question 17, SCLD believes that the term 'Parental Rights' should not be removed from the 1995 act. The scoping exercise on behalf of the Scottish Government, 'Supporting Parents with Learning Disabilities in Scotland: Challenges and Opportunities' (Stewart et al<sup>20</sup>), drew from Wilson et al<sup>21</sup> and estimated that between 40% to 60% of parents with learning disabilities have their children removed from their care as a result of being assessed as not being able to provide a required standard of parenting.

While at present in Scotland there are no exact figures of the number of parents with learning disabilities due to ethical challenges in data collection and consistency of data collection across health and social work, there is a growing body of UK and international evidence that parents with learning disabilities are over represented on social work caseloads and in child protection measures (See; McConnell and Llewellyn: 2000<sup>22</sup>, Booth et al; 2004<sup>23</sup>).

Booth et al<sup>24</sup> study of 66 child protection cases involving parents with learning disabilities stated that the majority of these cases were a result of professional concerns about:

- Parents with learning disabilities' ability to foster a child's developmental needs (26)
- Fears about mothers with learning disabilities living with partners who may pose harm to children (17)
- Parents having had children previously removed from their care (13).

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<sup>20</sup> [Stewart, MacIntyre, & McGregor \(2016\)](#)

<sup>21</sup> [Wilson, McKenzie, Quayle, & Murray \(2013\)](#)

<sup>22</sup> [McConnell & Llewellyn \(2000\)](#)

<sup>23</sup> [Booth, Booth, & McConnell \(2004\)](#)

<sup>24</sup> [Booth, Booth, & McConnell \(2004\)](#)

Tarleton et al<sup>25</sup> study highlighted that high rates of removal of children from parents with learning disabilities could be attributed to a range of complex barriers experienced by parents with learning disabilities which, included but was not limited to, negative stereotypes about parents with learning disabilities and a lack of information about parents with learning disabilities and their support needs. One common theme, which emerges regularly in SCLD's conversations with Parents through [The Working Together with Parents Network](#), is that parents often feel they have to meet higher standards of parenting than other parents.

To address these barriers in Scotland, The keys to life<sup>26</sup> recommendation 38 sets out that by 2014, parents with learning disabilities should have access to supported parenting services based on the principles of supported parenting. The scoping exercise set out to examine the provision of these supported parenting services in Scotland and outcomes for parents. The scoping exercise identified pockets of good practice but an inconsistent Scotland wide approach to supporting parents with learning disabilities. Given these limitations in support, SCLD views the removal of the term "Parental Rights" from the 1995 Act as presenting a significant challenge for parents with learning disabilities.

For parents with learning disabilities the term "Parental Rights" is of critical importance. The removal of this term could potentially undermine parents with learning disabilities right to a family life as stated in The Human Rights Act (1998)<sup>27</sup> and loosen local authority responsibility to provide supported parenting services to parents with learning disabilities in line with Part 12 of The Children and Young People (Scotland) Act (2014)<sup>28</sup>. The critical importance of the rights can be demonstrated in a legal case: A Local Authority v G (Parent with Learning Disability) (2017)<sup>29</sup> in which the judge took account of the good practice guidelines for supporting parents with learning disabilities and the role in which parental rights play in accessing parenting support. As the judgment stated:

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<sup>25</sup> [Tarleton, Ward, & Howarth \(2006\)](#)

<sup>26</sup> [The keys to life \(2013\)](#)

<sup>27</sup> [The Human Rights Act \(1998\)](#)

<sup>28</sup> [The Children and Young People \(Scotland\) Act \(2014\)](#)

<sup>29</sup> [Family Law Week \(2017\)](#)

*“It is particularly important to avoid the situation where poor standards of parental care, which do not, however, meet the threshold of being of significant harm to a child, subsequently deteriorate because of a lack of support provided to the parent. A failure to provide support in this type of situation can undermine a parent's rights to a private and family life, and may also contravene an authority's disability equality duty.” (2017,p.25)*

While SCLD acknowledges the semantic argument presented in the consultation document, SCLD believes the term ‘rights’ is far too critical for parents with learning disabilities in establishing their role as parental caregivers in child protection procedures, which evidence suggests do not often operate in their favour.

This reflects Sen’s analysis of The Capabilities Approach. Sen stated, “The capability approach can help to identify the possibility that two persons can have very different substantial opportunities even when they have exactly the same set of means: for example, a disabled person can do far less than an able-bodied person can, with exactly the same income and other ‘primary goods’. The disabled person cannot, thus, be judged to be equally advantaged — with the same opportunities — as the person without any physical handicap but with the same set of means or instruments (such as income and wealth and other primary goods and resources)” (2005,p.154)<sup>30</sup>.

For SCLD this demonstrates the importance that Rights for parents with learning disabilities. These rights must both stated and critically enacted with the required support services to achieve these rights.

In addition to this, the terminology ‘Parental Rights’ are central in empowering parents with learning disabilities through individual and peer advocacy. The scoping exercise by Stewart et al (2016)<sup>31</sup> identified advocacy and representation as a way in which parents with learning disabilities can ensure their legal rights are met. This has proved important to families and the authors identified that this has helped to improve relationships between parents and professionals.

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<sup>30</sup> [Sen \(2005\)](#)

<sup>31</sup> [Stewart, MacIntyre, & McGregor \(2016\)](#)

The proposed change in wording (i.e. the removal of the term 'rights') could potentially impact wider legislation and policy, as well as negatively impacting families where a parent has a learning disability. SCLD believes rights are important, as they form the basis of beliefs and set our intentions. By omitting rights from this act, the intention of giving these rights to parents is omitted. This belief was echoed by all those in the illustrative sample group. All of the participants stated parental rights should not be removed from the act. This is best summed up in the words of one parent who said, "Parents should always have rights".

## **Domestic Abuse**

### *Question 32 & Question 33*

Research regarding women with learning disabilities' experience of domestic abuse to date has been limited. However, there are indicators in existing research that women with impairments, long-term ill health, and learning disabilities are at risk of gender-based violence including domestic abuse. While the official statistics for Scotland examining domestic abuse recorded by police in 2016-17<sup>32</sup> does not present figures on the protected characteristics of victims, findings from the Crime Survey in England and Wales 2017-18 highlights that women with both physical impairments and learning disabilities are represented and make up 5,470 instances of reported partner abuse of all 32,265 cases reported between 2015 and 2017<sup>33</sup>. This is in line with McCarthy et al<sup>34</sup> who stated that a whole range of partner abuse from financial, physical and sexual was experienced by women with learning disabilities. This is also supported by Thiara et al<sup>35</sup> who highlighted that partners of disabled women often used their position to abuse and control the women while being viewed by the outside world as a caring and loving partner.

This, in conjunction with additional research linking domestic abuse to pregnancy (Mezey & Bewley<sup>36</sup> cited in McCarthy<sup>37</sup>) leads SCLD to the view that mothers with learning disabilities are potentially at higher risk of domestic abuse. This could mean

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<sup>32</sup> [The Scottish Government \(2018\)](#)

<sup>33</sup> [Office for National Statistics \(2018\)](#)

<sup>34</sup> [McCarthy, Hunt, & Milne \(2017\)](#)

<sup>35</sup> [Thiara, Hauge, & Mullender \(2011\)](#)

<sup>36</sup> [Mezey & Bewley \(1997\)](#)

<sup>37</sup> [McCarthy, Hunt, & Milne \(2017\)](#)

that they are therefore likely to go through the process and experience of cross-examination in matters relating to contact and residence. As the consultation document correctly identifies, this could potentially prolong the experience of abuse.

In understanding this, SCLD discussed with the illustrative sample group if victims of domestic abuse should be cross-examined. To facilitate this discussion SCLD staff asked the group to discuss how they thought this process would make people feel.

Below is what the group said:

- Guilty
- Ashamed
- Embarrassed
- Scared
- Vulnerable
- Unsafe
- Shy
- Nervous
- Frightened
- Responsible

In addition to this, one parent in the group said that this experience may make an individual feel like they failed to protect their children. The same parent also talked about cross-examination causing a person to 'relive the experience' and make them question why they had been a victim of domestic abuse in the first place. They also said they might ask themselves if they could have made things different. The parent said, "...they would cross-examine themselves".

An advocacy member of staff spoke about a parent they were currently supporting through similar proceedings. They said that this individual often said that the process of being asked questions by legal professionals left them feeling a combination of flustered and frustrated.

As part of this discussion, SCLD staff also asked the illustrative sample group to think about ways in which legal professionals and the legal process could operate to lessen the negative feelings individuals may experience during a cross-examination.

The group said that when cross-examining a victim of domestic abuse with a learning disability, techniques should be used to make the process less stressful.

This included:

- The use of plain language and accessible information
- Ensuring cross examinations do not go on for a long period of time

- Only including people who need to be present
- Having someone present to support the person being cross-examined
- Giving the person being cross-examined regular breaks
- Providing emotional support like peer support groups outside of legal proceedings
- Being sensitive in how questions are framed.

In addition to this SCLD would support the creation of an appropriate environment where individuals felt comfortable and secure to answer difficult questions.

With regard to Question 32 of the consultation document, in considering both existing research and the comments made by the illustrative sample group, SCLD supports the banning of cross-examination of domestic abuse victims in court cases concerning contact and residence with the caveat that this protection should be done with the consent of the victim. SCLD believes that on balance this would help to ensure that victims of domestic abuse who have learning disabilities are not forced to relive the experience, 'cross-examine themselves' and potentially be placed at additional risk from the perpetrator. SCLD also supports this measure being extended to any child involved in the case. SCLD acknowledges the additional cost this may present with regard to providing legal aid. However, on balance SCLD believes this is a worthwhile cost to protect victims of domestic abuse who may have increased vulnerability due to a learning disability. If the decision is taken that these cross-examinations should not be banned, SCLD recommends that the points made by the illustrative sample group about how this process could be improved are considered and implemented.

Similarly, in response to Question 33 of the consultation document, SCLD agrees that Section 11 of the 1995 Act should be amended to provide that, if a court sees fit, it can give directions to protect domestic abuse victims, and vulnerable parties at any Children's Hearings heard as a result of an application under section 11. Again, SCLD believes this would serve to protect individuals with learning disabilities who had experienced domestic abuse from further negative experiences and risk. Similarly to the response to Question 32, SCLD again asks that provisions are added to ensure that those deemed vulnerable are given the opportunity to have a say in what protection is given to them and that advocacy is provided to support this

process. Advocacy can potentially play a valuable role in ensuring the views of a vulnerable witness with a learning disability views are taken into account. This should understand that while protection may be welcome in many cases, in some cases an individual may want to have the opportunity to take part.

## **Alternatives to Court**

### *Question 42*

With regard to Question 42 of the consultation document, SCLD believes that more could be done to encourage Alternative Dispute Resolution in Family Cases. SCLD believes this would be best achieved through option b, better signposting and guidance. SCLD has based this answer on the discussion held with the illustrative sample group. The group stated that of the available options of Alternative Dispute Resolution, Family Group Conferencing and Collaborative Law would be preferential. The group did not feel that mediation or arbitration would always meet the needs of a person with learning disabilities, especially if that person's partner did not face the same barriers and challenges. As one parent said, "If one person has a learning disability and the other person didn't then mediation or arbitration would not be fair". Those in the group felt that collaborative law could be beneficial to parents with learning disabilities in these types of circumstances. The group said that individuals should have access to legal advice during the proceedings and information about their rights. One advocate staff member highlighted the importance of this by saying, "...not everyone knows what rights they are entitled too". The group, however, did note that collaborative law could be impacted by the expertise of the lawyer who was representing an individual and one parent commented, "...finding a good lawyer is hard".

In addition to this, the illustrative sample group made a number of comments about ensuring a number of Alternatives to Court are made available. They also said that the numbers of people attending these proceedings should be kept to a minimum.

Taking the comments of the group and the information presented in the consultation document into consideration, SCLD believes alternatives to court should be promoted through signposting and guidance and that thought should be given to the most appropriate type of alternatives that should be used when one or more parent has a learning disability.

To address the concern highlighted in 11.36 (p.97) of the consultation document, regarding inaccessible information regarding Alternative Dispute Resolution. SCLD suggests ensuring that guidance is made widely available in a range of formats and is made fully accessible. SCLD believes this will help those individuals in these circumstances to find out about Alternative Dispute Resolution and to make use of this where appropriate. There is also a role here for legal professionals and those in advocacy to ensure parents are aware of these options. Finally, while SCLD supports option b, recognition is given that this may not always be appropriate in cases involving domestic abuse highlighted in 11.07 (p.91) of the consultation document.

### **Children's Hearings**

#### *Question 49 and Question 51*

In response to Question 49, SCLD agrees with the consultation documents stating that the use of technology in the Children's Hearing System could potentially serve to improve participation while keeping individuals safe (See point 13.14, p108). This was supported by the illustrative sample group who all agreed that technology should be used in the Children's Hearing System (See Appendix 1: Figure 1.7). Both parents and advocacy staff supported the benefits of using technology outlined in the document. They stated that it would improve participation, keep individuals safe and be quicker and easier for those involved. As one parent commented, "It would be good because you wouldn't have everyone looking at you".

The group also commented that the use of technology could help with issues around travel, particularly limiting long travel journeys for those who may not be able to travel independently and reducing travel expenses. Comments were also made about the use of technology ensuring that individuals were not intimidated and did not have to see people they did not want to.

While SCLD acknowledges that there are challenges around data protection and confidentiality, SCLD believes these issues can be addressed with consideration being given to: the locations in which recordings or video links are made, appropriate information sharing, securing networks and developing data protection policy around this.

SCLD also agrees that there is a significant challenge around the understanding of terminology and paperwork where the person is not physically present. SCLD believes this will be even more of a challenge when a person with a learning disability is taking part via video link. This is because those involved in the hearing may not be able to directly ensure that the person understands the documents being discussed. Therefore SCLD welcomes, where appropriate, advocates being present with individuals to support them with their understanding of documents and any questions a person may have. Documents which provide an explanation of challenging terminology, which will be used in the hearing, should be provided to the person in advance to allow them to familiarise themselves with the language and therefore reduce potential stress on the day. This should be in addition to the availability of accessible communication tools available during proceedings. By developing data protection policies and procedures and ensuring individuals are supported through the video recording process, SCLD believes modernisation of the Children's Hearing System can work successfully.

With regard to Question 51 and the suggested banning of cross-examinations of vulnerable witnesses, including children, in certain proceedings, 71% of the illustrative sample group agreed with the consultation document proposal to use mandatory and discretionary bans in cases as part of the Children's Hearing System (referred to in section 13.20,p.109-110). Individuals from the illustrative sample group felt this would be beneficial where a person has a learning disability. The group felt that cross-examination could force people into saying things they did not mean. This is in line with Kebell et al<sup>38</sup> study which examined court transcripts and the difference in the questioning of those with learning disabilities and the rest of the population. This study highlighted that:

- Lawyers were not altering questions for people with learning disabilities to their benefit or detriment
- There were significant challenges with regard to the use of open questions. For example, if a lawyer did not specifically ask about a piece of information this would not be offered

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<sup>38</sup> [Kebbell, Hatton, & Johnson \(2004\)](#)

- There were issues surrounding the suggestibility of some people with learning disabilities and the use of leading questions.

(Kebbell et al<sup>39</sup>)

While the majority of the group were in agreement that cross-examination of vulnerable witnesses in the Children's Hearing system should be banned, some members of the group valued cross-examination in gaining information. As one parent said, "Sometimes cross-examination is the only way to get to the truth".

In considering both comments from the group and findings from Kebbell et al<sup>40</sup>, SCLD believes that personal cross-examination of vulnerable witnesses should be banned in certain Children's Hearing proceedings. As the consultation correctly identifies this will need appropriate measures to ensure fairness to the person who is unable to be cross-examined and this should include appropriate legal representation. While SCLD believes personal cross-examination should not take place where a person is vulnerable and this is likely to cause distress, SCLD finds the word banning to be unhelpful when applying this to witnesses being banned from cross-examination. Therefore, SCLD suggests this is reworded to state that a court can decide to withdraw a person from that process where appropriate and that the views of the individual in question have been heard with regard to that matter.

## **Summary**

SCLD believes there are four key areas which need to be considered in this Review to ensure it does not unfairly disadvantage parents with learning disabilities and their families. The areas which require consideration are: Keeping People Safe, Contact with the Family, The Value of Parental Rights and Supporting Vulnerable People in Legal Processes.

### Keeping People Safe

Ensuring the safety of individuals should be addressed in a number of ways. This includes how confidential information is shared between professionals and the court, protecting the safety of children in both legal proceedings and during contact and keeping vulnerable witnesses safe. A range of measures will be required to ensure

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<sup>39</sup> [Kebbell, Hatton, & Johnson \(2004\)](#)

<sup>40</sup> [Kebbell, Hatton, & Johnson \(2004\)](#)

this and central. It is important that the views of the individual who is at risk are heard.

### Contact with the Family

To ensure contact is a positive experience for both children and relevant adults, contact centres should be regulated. This will help to ensure the centres provide a high quality of service and create an environment which is both safe and welcoming.

SCLD also believes that contact should be an available option for a number of extended family members, including siblings and grandparents with court oversight. However, this should not be seen as an effective replacement of a family life where the parents have a learning disability.

### The Value of Parental Rights

SCLD views Parental Rights as critical to parents with learning disabilities. Rights are pivotal in ensuring parents with learning disabilities have the opportunity to have a raise their children, it is not merely an issue of semantics. SCLD believes that rights are the starting point of enabling individuals to carry out their responsibilities. This is reflective of work by Amartya Sen<sup>41</sup>.

### Supporting Vulnerable People in the Legal Process

SCLD sees supporting vulnerable people in the legal process as an important way to reduce stress and risk to the individual. This is of particular importance where a person has experienced domestic abuse. Alternatives to court can potentially offer a less stressful experience. However, consideration is required to what process will be most beneficial to individuals with learning disabilities.

Using technology to modernise The Children's Hearing System also provides an opportunity to support vulnerable individuals to take part including those with learning disabilities and those who have experienced domestic abuse.

By considering the four key areas aforementioned, SCLD believes the Review of Part 1 of The Children (Scotland) Act 1995 and creation of a Family justice Modernisation Strategy, can ensure parents with learning disabilities are afforded the same rights and opportunities as all members of society and do not experience

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<sup>41</sup> [Sen \(2005\)](#)

disadvantage due to inaccessible, complex and stressful processes. To ensure this it is fundamental that Parental Rights remains in the 1995 Act.

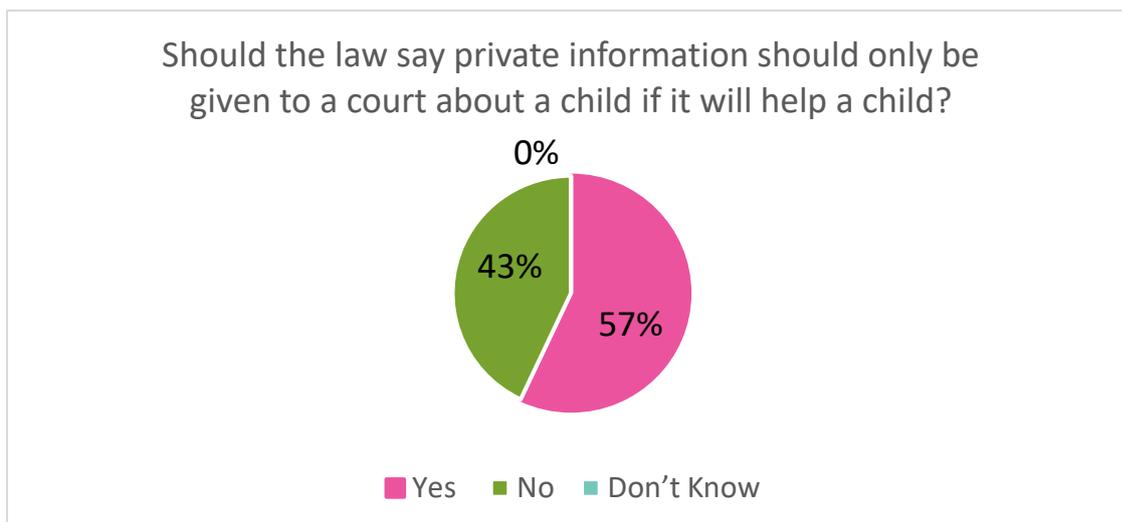
Thank you for the opportunity to respond to this important consultation.

## Appendix 1: Voting Questions and Results

To help inform this consultation response SCLD asked the illustrative sample group to vote on questions from the consultation. SCLD adapted the wording of the questions to avoid jargon or phrases which may be difficult for individuals to understand. SCLD aimed to keep the meaning of the questions as close to those in the document and explained the positives and negatives of each answer in line with the consultation document. The following figures illustrate the answers from the illustrative sample group and break the answers down between parents and staff.

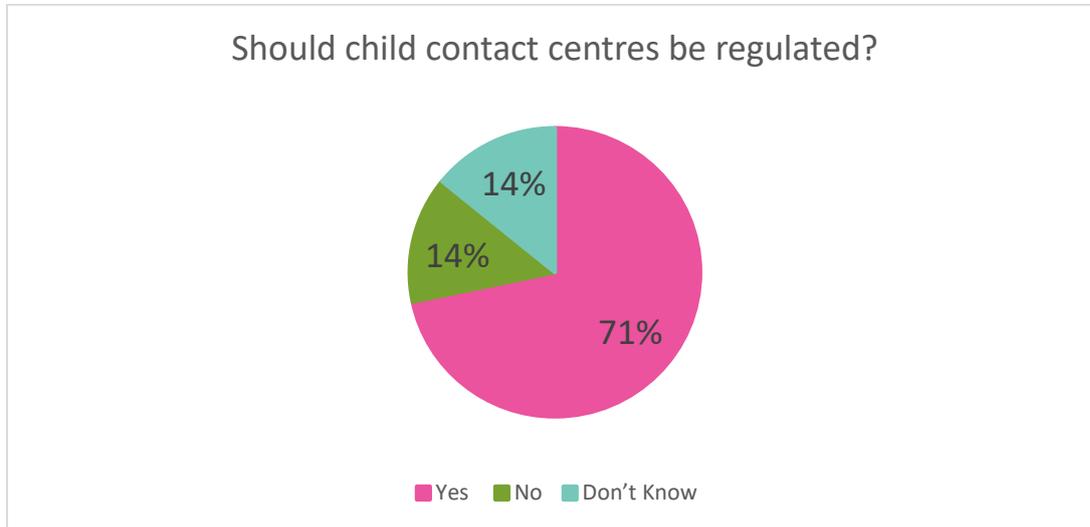
In total four parents and three members of staff attended the consultation event. Due to the low numbers of attendance this cannot be established as a representative sample, instead we understand this as illustrative.

Figure 1.0



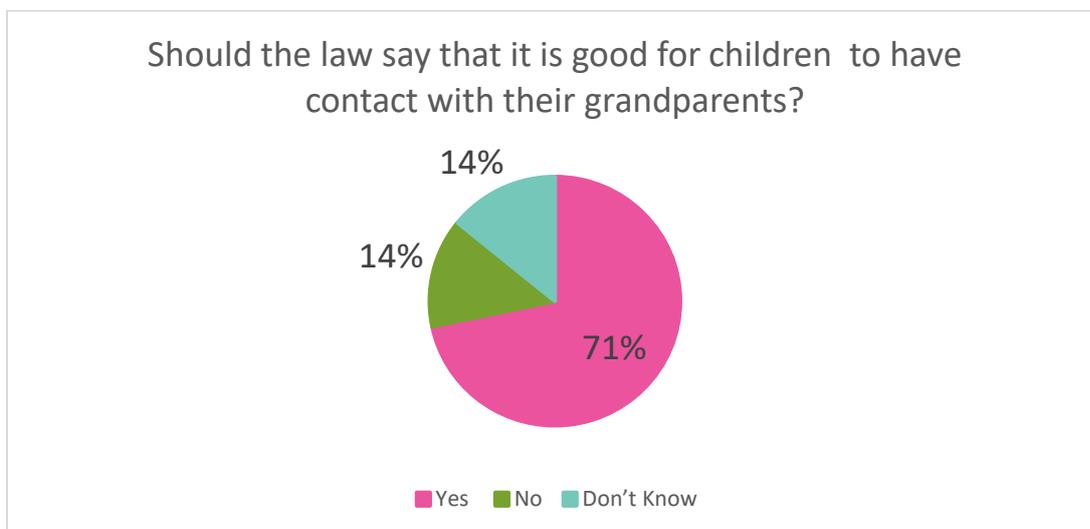
Yes	No	Don't Know
Parent: 28%	Parent: 29%	Parent: 0%
Staff: 28%	Staff: 14%	Staff 0%

Figure 1.1



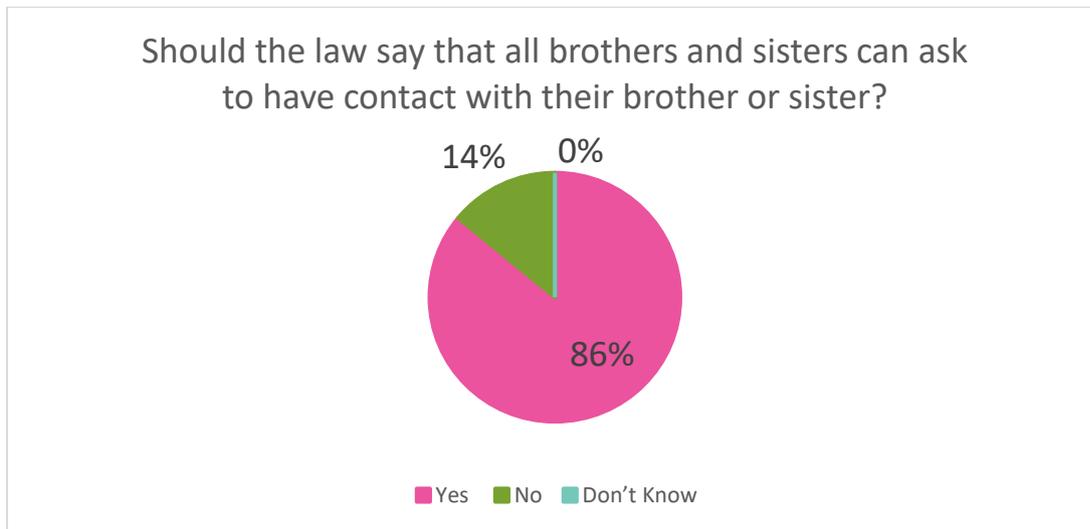
Yes	No	Don't Know
Parent: 57%	Parent: 0%	Parent: 0%
Staff: 14%	Staff: 14%	Staff: 14%

Figure 1.2



Yes	No	Don't Know
Parent: 57%	Parent: 0%	Parent: 0%
Staff: 14%	Staff: 14%	Staff: 14%

Figure 1.3



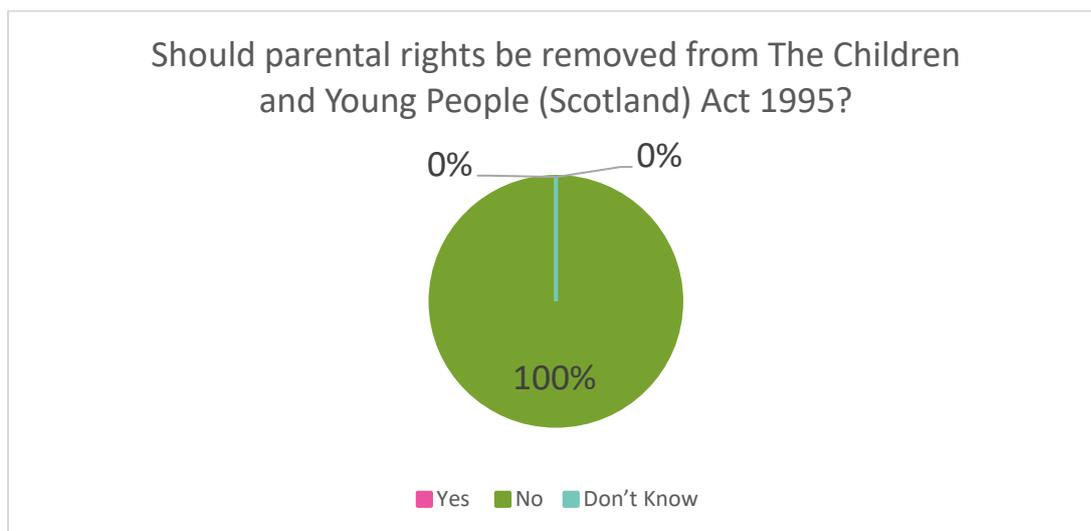
Yes	No	Don't Know
Parent:43%	Parent: 14%	Parent: 0%
Staff: 43%	Staff : 0%	Staff : 0%

Figure 1.4



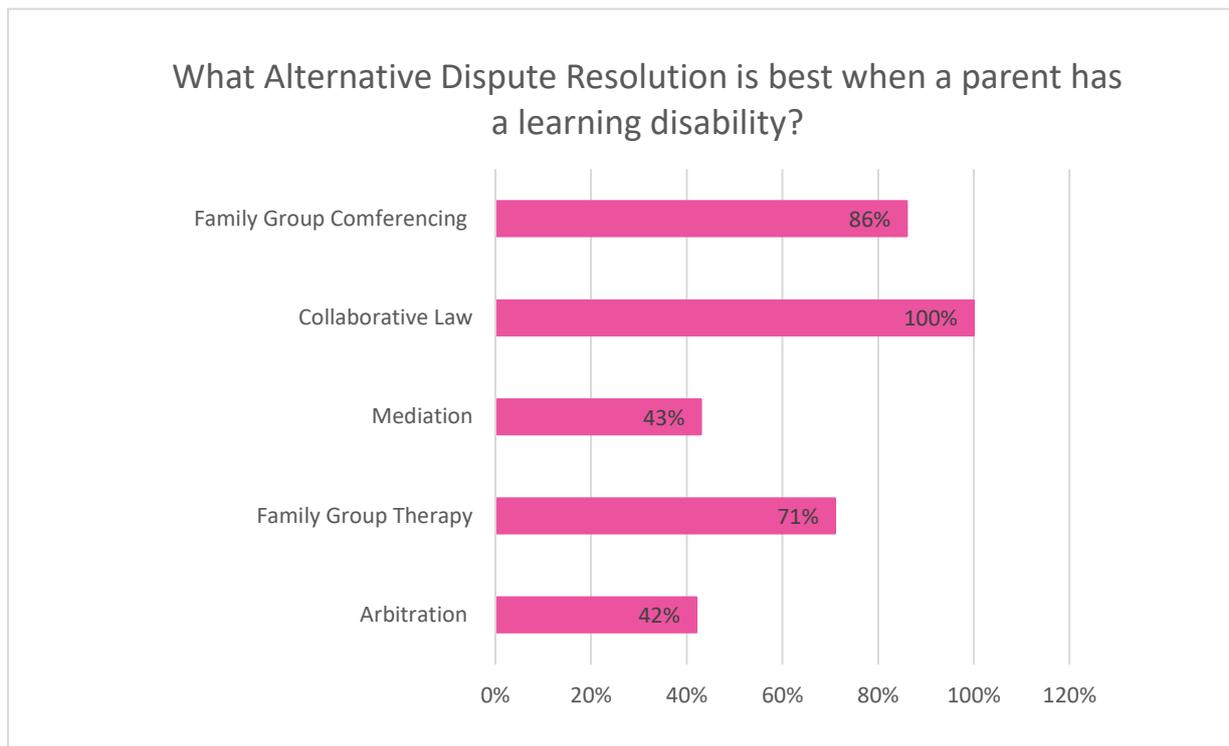
No Change	Benefits stopped Parenting Class Fines	Criminal Offence	Something Else
0%	28%	0%	71%
Parent: 0%	Parent: 28%	Parent: 0%	Parent: 28%
Staff: 0%	Staff: 0%	Staff: 0%	Staff: 43%

Figure 1.5



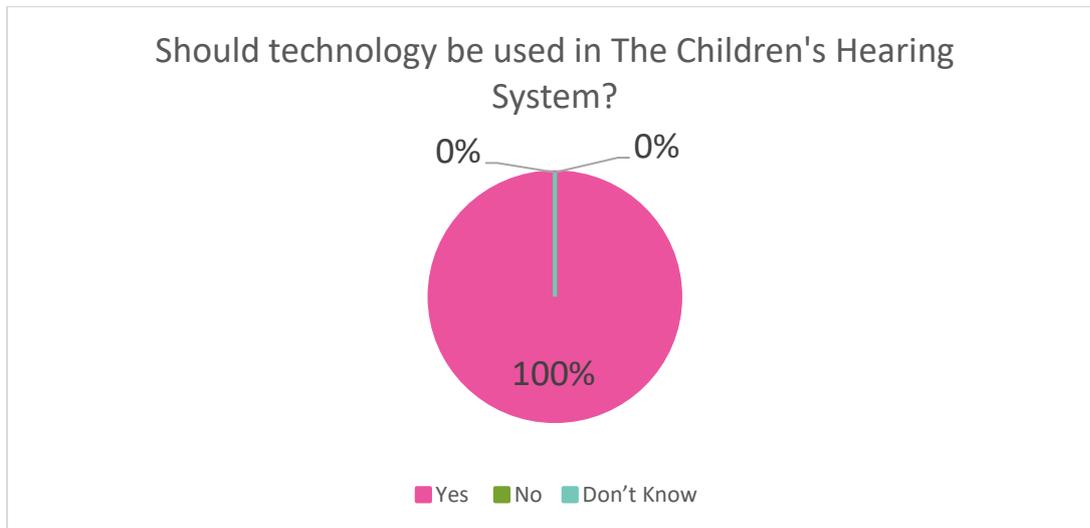
Yes	No	Don't Know
Parent: 0%	Parent: 57%	Parent: 0%
Staff: 0%	Staff: 43%	Staff: 0

Figure 1.6



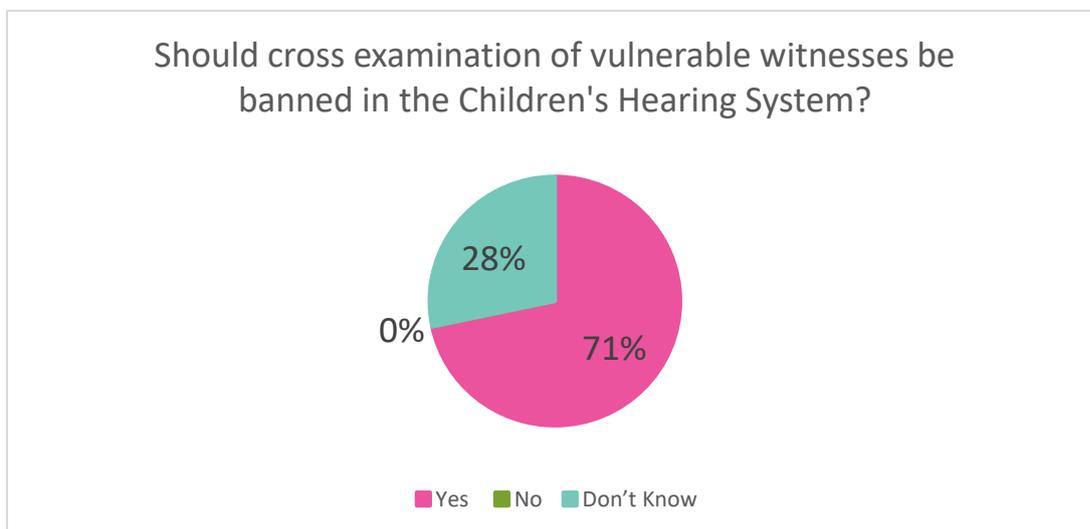
<b>Family Group Conferencing</b>	<b>Collaborative Law</b>	<b>Mediation</b>	<b>Family Group Therapy</b>	<b>Arbitration</b>
Parent: 42.3%	Parent: 57%	Parent: 14%	Parent: 28%	Parent: 28%
Staff: 42.3%	Staff: 43%	Staff: 29%	Staff: 43%	Staff: 14%

Figure 1.7



Yes	No	Don't Know
Parent: 57%	Parent: 0%	Parent: 0%
Staff: 43%	Staff: 0%	Staff: 0%

Figure 1.8



Yes	No	Don't Know
Parent: 43%	Parent: 0%	Parent: 21%
Staff: 28%	Staff: 0%	Staff: 7%

## Appendix 2: Consultation Event (13/7/18)

On the 13<sup>th</sup> of July SCLD held a consultation event at Renfield St Stephens in Glasgow. Those who attended were four parents who had learning disabilities and three advocacy workers from organisations in Scotland who work with parents with learning disabilities. Below is the agenda for the day:

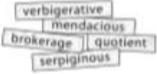
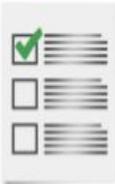
Figure 2.0



		<b>Break</b>
		<b>Alternatives to court</b>
		<b>Children's Hearings</b>
		<b>Domestic Abuse</b>
		<b>Finish</b>

In advance of the session, we sent out parents some explanation of the legal words or terms which are included in the consultation document to allow them to prepare. Below is an example section of the legal words document.

2.1

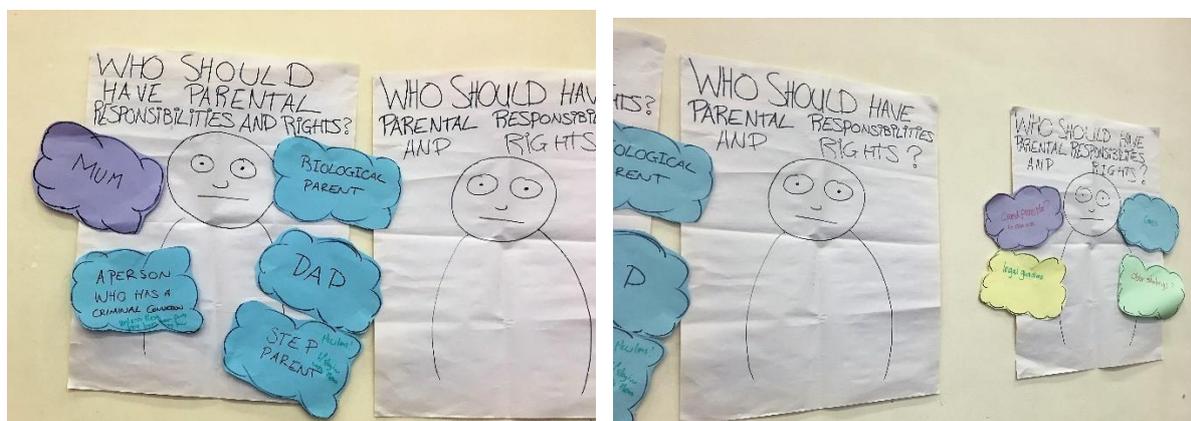
 <h3>Legal Words and Terms</h3>  <p><b>Mandatory</b> The law says something must be done</p>  <p><b>Discretionary</b> It is a person's choice if something should be done</p>  <p><b>Contempt of court</b> Not following the rules of a court or what the court tells you to do</p>	 <p><b>Cross examination</b> When a witness is asked questions by a lawyer by another person lawyer</p>  <p><b>Regulation of contact centers</b> Means that an organisation checks that contact centers do what they are supposed to</p>  <p><b>Parental responsibilities</b> Supporting a child's welfare development and health Giving the child guidance and advice Having contact with the child Representing the child</p>
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To effectively engage with parents at the event, SCLD used a mixture of presentations, videos, activities as well as click-a-pad voting slides. Below are examples of activities used to facilitate the discussion about Parental Rights and Responsibilities, Alternatives to Court and the Cross-Examination of individuals who had experienced Domestic Abuse.

### Activity: Parental Responsibilities and Rights

SCLD asked parents and staff to talk about who they think should have parental responsibilities and rights and why they thought certain people should have these responsibilities or rights.

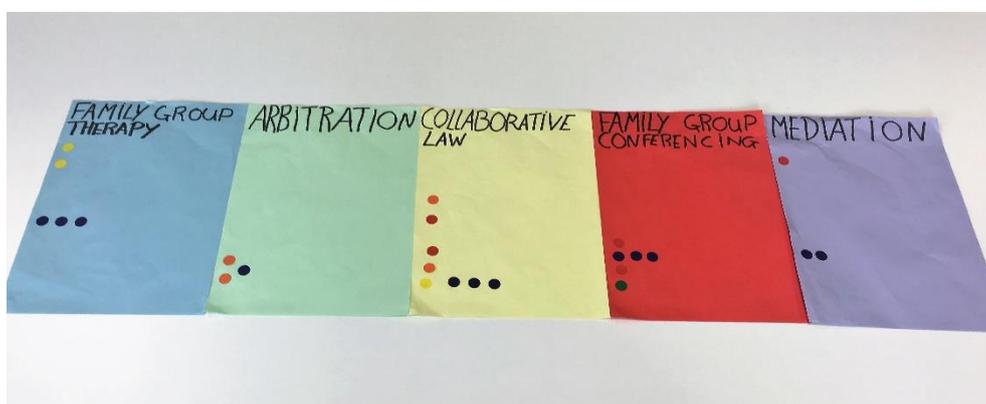
Figure 2.2



### Activity: Alternatives to Court

SCLD asked parents and staff to vote using stickers on what they thought would be the best alternatives to court if the parent/s had a learning disability.

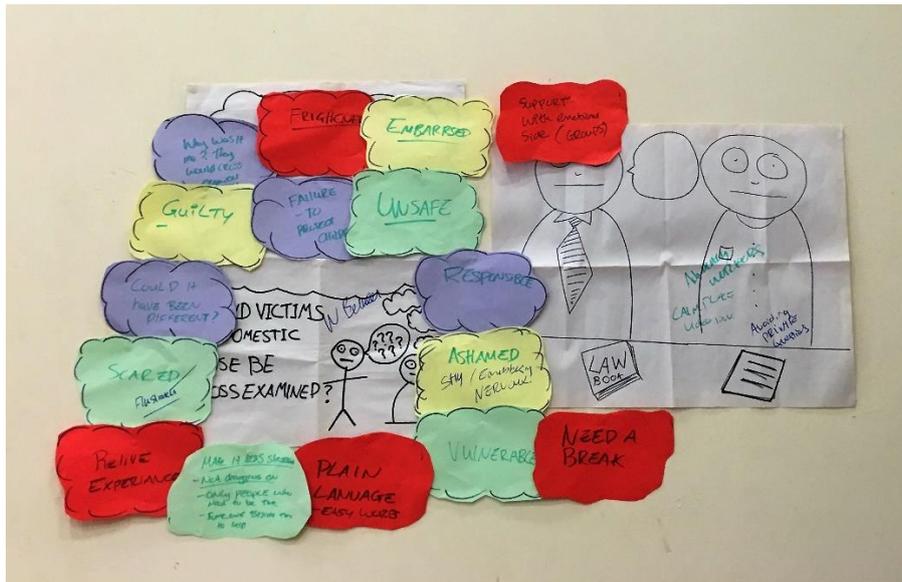
Figure 2.3



## Activity: Cross-examination of individuals who have experienced domestic abuse

Using drawings, SCLD asked parents and staff how they thought people who had experienced domestic abuse would feel if they were being cross-examined and how they thought legal professionals should treat people who were being cross-examined.

Figure 2.4



**SCLD**

Oonagh Brown

Scottish Commission for Learning Disability  
Policy and Implementation Officer (Parenting)