



*‘Voice of the Child’  
Under the Children  
(Scotland) Act 1995:*

*Volume 1 –  
Mapping Paper*



'VOICE OF THE CHILD' UNDER THE CHILDREN  
(SCOTLAND) ACT 1995:

GIVING DUE REGARD TO CHILDREN'S VIEWS  
IN ALL MATTERS THAT AFFECT THEM

Volume 1 – Mapping Paper

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## **EXECUTIVE SUMMARY**

### **THE MAPPING PAPER – BACKGROUND AND AIMS**

The Children (Scotland) Act 1995 brings together aspects of family, child care and adoption law that affect children. The Act deliberately seeks to incorporate the 3 key principles of the United Nations Convention on the Rights of the Child (UNCRC) – i.e. non-discrimination (Article 2); a child’s welfare as a primary consideration (Article 3); and listening to children’s views (Article 12) — into Scottish legislation and practice.

This ‘mapping paper’ undertakes a detailed analysis of the Act, and accompanying regulations and guidance, asking the following questions:

1. In relation to which decisions do the views of children need to be sought? Which children are included in any such requirements?
2. What processes are specified for ascertaining children’s views? What weight is given to the child’s views?
3. Is provision made for feedback to the child?

Relevant reported case law is considered.

The mapping paper is part of a feasibility study, funded by the Scottish Executive. The feasibility study sought to examine how best to conceptualise and evaluate how decision-making in children’s lives takes due account of their views, with particular attention to processes related to Part I of the Children (Scotland) Act 1995 and the implications for compliance with the UNCRC. A second volume reports on the feasibility study itself, including literature reviews on relevant research and methodology.

### **SUMMARY OF KEY PROVISIONS AND MECHANISMS**

**Key provisions** within the Act and related regulations and guidance, when children’s views must be considered, are as follows:

- When a person is making ‘any major decision’ on the exercise of parental responsibilities/rights (S. 6), including the nomination of a testamentary guardian (S. 7)
- When someone with ‘care or control’ of the child (but not parental responsibilities/rights) is making ‘any major decision’ in relation to safeguarding the child’s health, development and welfare and/or surgical, medical or dental treatment or procedure (S. 6)
- When courts are considering making an order in regard to parental responsibilities/rights etc. (S. 11)
- Before a local authority makes a decision with respect to a child whom they are looking after, or proposing to look after (S. 17)
- Before a local authority informs another local authority that a young person, who has a right to after-care, is proposing to live in that authority (S. 29)
- When a local authority provides or arranges for a safe refuge for a child (S. 38)
- When a court or children’s hearing are involved in certain proceedings relating to children’s hearings or orders in regards to child protection (S. 16)
- When a court is making, varying or discharging parental responsibilities orders (S. 16)
- The ‘specified person’s’ actions in terms of emergency child-protection measures under S. 61

- When a court or adoption agency is considering ‘any decision relating to the adoption’ (S. 6 of the Adoption (Scotland) Act 1978)
- In all adoptions and freeings for adoption, a child aged 12 years or over must consent (unless the child is incapable of consenting) (S. 12 (8) and S. 18 (8) of the Adoption (Scotland) Act 1978)

**Mechanisms** outlined within the Act and related regulations and guidance, for ascertaining children’s views, are as follows:

- A child could sue or defend proceedings in relation to any exercise of parental responsibilities and rights
- A person under the age of 16 years has the legal capacity to instruct a solicitor in any civil matter, where that person has a general understanding of what it means to do so
- Children’s involvement within court proceedings for S. 11 orders (e.g. response to intimation, written affidavit, participation in child welfare hearings, third party minuter in any family action)
- Discretionary appointment of people to report on children’s best interests, including their views: i.e. court reporters, curators ad litem, safe-guarders (in relation to children’s hearings). A curator ad litem *must* be appointed in applications for parental responsibilities, adoption and freeing orders
- At certain points when making or reviewing plans for looked-after children, within regulations
- Recommendations for listening to children in child-care services, within guidance, such as: providing information; supporting children in developing views; advocacy/key workers; preparation for, arrangements and chairing of meetings
- Complaints procedures within local authorities, listening to children during service inspections
- The right of the child to attend his/her own children’s hearing (S. 45); invitation to the child, subject to a children’s hearing, to submit written views; exclusion of ‘relevant people’, their representatives and/or press from children’s hearings (S. 43 and 46)

## **COMPARISONS AND CONTRASTS ACROSS THE LEGISLATION, REGULATIONS AND GUIDANCE**

- Coverage: The principle of listening to children’s views is not consistently applied in all decisions and processes
- Limited case law exists on children’s views under the 1995 Act
- Which children? Different qualifications, presumptions or thresholds are applied in the weight given to children’s views
- Process versus event: The legal provisions differ in their specification of procedures for ascertaining children’s views
- Only child-care guidance recognises that children’s views develop and change over time
- Giving notice to children of decisions made is not consistently specified
- Best interests versus views: Only a legal representative’s remit is primarily to represent a child’s views
- Confidentiality: Proceedings differ in the confidentiality of children’s views
- The individual child, the child in the family or children as a group: Most references are made to decisions for an individual child

## **FURTHER QUESTIONS**

**What counts as a decision?** Whether or not a child's views must be taken into account is dependent on what constitutes a 'major decision' (under S. 6) or a 'decision' (for looked-after children). Do matters important to children count as decisions?

**Discretion: On what basis are decisions about competency and/or maturity made?** Little specification is given within legislation or guidance on how such decisions are made, what contextual factors should be considered and what skills are required to do so. For instruction of a solicitor, a child must be considered to have a 'general understanding' of what it means to do so; for consent to surgical, medical or dental procedure or treatment, a child must understand the nature and possible consequences of the treatment or procedure (Age of Legal Capacity (Scotland) Act 1991 S. 2 (4)).

**On involving children in decision-making:** Decisions made by adults – e.g. sheriffs dispensing with intimations to children, separating parents making decisions outwith the courts, parents showing children's hearing reports to their child, the Scottish Legal Aid Board granting legal aid for a child to be legally represented – can prevent or facilitate children's views being gathered and taken into account.

**Confidentiality:** What is the appropriate balance between ensuring a child's views are taken into consideration, the child's welfare, and ensuring 'due process' requirements are met?

## **PROCESS VERSUS EVENT:**

- How do the particular 'events' required by legislation – e.g. a child welfare hearing, a children's panel, a court decision on adoption – impact on children's lives?
- How do time-scales help or hinder children's participation and welfare?
- What opportunity is there for review of decisions? What account should be taken of children's development over time, changes in their situations, changes in their views?
- What facilitates or prevents children from participating: i.e., what information do they need and how might they best receive it, what support do they need, what feedback on decisions should they have? What account is taken of children's differing communication styles, abilities/disabilities, backgrounds etc.?

## **KEY QUESTIONS**

- How are the legal requirements being interpreted in practice?**
- How do children experience them?**
- What constitutes 'good practice'? From whose perspective?**

## CHAPTER ONE: BACKGROUND AND INTRODUCTION

1.1 This Mapping Paper has been produced as part of a feasibility study, commissioned by the Scottish Executive Justice Department, in relation to aspects of the operation of Part I of the Children (Scotland) Act 1995. The Act greatly strengthened the rights and avenues for children to have their views considered in court decisions affecting them, in line with Article 12 of the United Nations Convention on the Rights of the Child (UNCRC). Further, Section 6 of the Act directs that parents, and others exercising parental responsibilities and rights, are to have regard to the views of the child in making major decisions that will affect the child.

1.2 The Justice Department is concerned with identifying how and when the views of children are heard in the context of parental separation and/or divorce. The feasibility study is designed to explore the practical and methodological issues associated with the research, in order to inform the design of the main study.

1.3 While the central focus of the research is Part I of the Act, the Mapping Paper analyses the whole of the Act, so that the principles and practice relating to children involved in parental separation and divorce can be assessed within the broader context of decisions and processes affecting children in terms of the Act.

### INTRODUCTION TO THE MAPPING PAPER

1.5 This paper identifies and explores themes and issues with regard to the extent to which the views of the child are taken into account in decisions regulated by the Children (Scotland) Act 1995, and associated Rules/Regulations and Guidance. Reference is also made to the Adoption (Scotland) Act 1978, as amended. It draws upon the appended tabular analysis (Appendix B), which sets out in summary form the relevant provisions together with some particular comments, and Appendix A, which sets out some relevant case law. This mapping paper was completed in March 2001; legal and policy decisions since that time are not included. The exception is a note in the case law Appendix, following the significant decision on children's legal representation in children's hearings.

1.6 The following table lists the Statutes, Rules, Regulations, Directions and Guidance drawn upon in making this analysis, together with any abbreviations by which they are identified within the tabular appendix:

**Table 1.1 Legal and Policy Sources and Abbreviations**

Name	Abbreviation
<i>Statutes</i>	
Adoption (Scotland) Act 1978	
Age of Legal Capacity (Scotland) Act 1991	ALCA 1991
Children (Scotland) Act 1995	The 1995 Act
<i>Rules</i>	
Children's Hearings (Scotland) Rules 1996 (1996 No. 3261 (S. 251))	CH Rules
Children's Hearings (Transmission of Information etc.) (Scotland) Regulations 1996 (1996 No. 3260 (S. 250))	
Rules of the Court of Session, 1994, as amended	RCS
Sheriff Court, Scotland, Act of Sederunt (Sheriff Court Ordinary Cause	A.S. 93

Rules) 1993, as amended by the Sheriff Court, Scotland, Act of Sederunt (Family Proceedings in the Sheriff Court) 1996	
Sheriff Court, Scotland, Act of Sederunt (Child Care and Maintenance Rules) 1997	A.S. 97
<i>Regulations</i>	
The Adoption Agencies (Scotland) Regulations 1996 (1996 No. 3266)	
The Adoption Allowances (Scotland) Regulations 1996 (1996 NO. 3257)	
The Arrangements to Look After Children (Scotland) Regulations 1996 (1996 No. 3262 (S. 252))	Arrangements Regs
The Emergency Child Protection Measures (Scotland) Regulations 1996 (1996 No. 3258 (S. 248))	Emergency Regs
The Fostering of Children (Scotland) Regulations 1996 (1996 No. 3263 (S. 253))	Fostering Regs
The Refuges for Children (Scotland) Regulations 1996 (1996 No. 3259 (S. 249))	
The Residential Establishments – Child Care (Scotland) Regulations 1996 (1996 No. 3256 (S. 246))	Residential Regs
The Secure Accommodation (Scotland) Regulations 1996 (1996 No. 3255 (S. 245))	
<i>Directions</i>	
The Plans for Services for Children Directions 1996	
The Publication of Information about Services for Children Direction 1996	
<i>Guidance</i>	
Scotland’s Children – The Children (Scotland) Act 1995 Guidance; The Scottish Office Social Work Services Group, 1997: Vols. 1, 2 and 3	Scottish Office Guidance

1.7 The tabular analysis in Appendix B follows the sequence of the provisions of the Act. This thematic paper addresses the following questions:

*Which decisions require children’s views to be considered?*

- In which situations does consideration have to be given to the ascertainment of the child’s views?
- Which situations do not require this?
- Is there any pattern in the picture presented?

*Which children are included in any such requirements?*

- Are fixed ages prescribed?
- Is there a presumption at age 12?
- Is there a “gradualist” approach? If so, who makes the judgement and on what criteria is it based?
- Is there any pattern in the picture presented?

*What processes are specified for ascertainment of the child’s views?*

- In what situations is a process prescribed?
- How do such processes compare with each other?
- Is provision made for an advocate/representative of the child?
- Is there a provision about facilitating expression of views by the child by limiting the number of people present, or by excluding specific individuals?
- Is it possible for a child’s views to be kept confidential?
- Is there any pattern in the picture presented?

*What weight is to be given to the child's views?*

- Is a formula prescribed relating to age, maturity, understanding etc.?
- Is there any pattern in the picture presented?

*Is there provision for feedback to the child about the decision and the consideration given to the child's views?*

- What process is prescribed/suggested?
- Is there any pattern in the picture presented?

1.8 This paper presumes knowledge of Scottish legal terms and of Scottish legal systems. For definitions of legal terms, see Duncan 1992. For description of Scottish legal systems described here, see Cleland and Sutherland 2001.

## **CHAPTER TWO: PART I OF THE CHILDREN (SCOTLAND) ACT 1995**

### **WHICH DECISIONS REQUIRE CHILDREN'S VIEWS TO BE CONSIDERED?**

2.1.1 Section 1 sets out the responsibilities owed by parents to their children. Subsection 3 states that the child, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those responsibilities.

2.1.2 Section 2 sets out the parental rights available to facilitate the exercise of parental responsibilities, and gives parents title to sue or defend in any proceedings as respects those rights.

2.1.3 Section 3 says that mothers, and those fathers who were married to the mother at the time of the child's conception or subsequently, have parental responsibilities and rights without recourse to legal process. Section 4 provides that a mother and an unmarried father (who does not have responsibilities and rights) of a child may enter into a formal agreement, with the effect of vesting all parental responsibilities and rights in the father as well as the mother.

2.1.4 Parental responsibilities and rights include the responsibility to safeguard and promote the child's health, development and welfare, and the right to control, direct or guide the child's upbringing. Decisions involved in the exercise of such responsibilities and rights could include choice of school, medical treatment and examination, relocation of the family home, or emigration. Parents may go to court if agreement cannot be reached about these matters, but Section 1(3) means that the child may, even where there are not proceedings in court, take the matter to court.

2.1.5 Section 11 gives examples of orders that the court may make in relation to parental responsibilities and rights. These include: removal or imposition of parental responsibilities or rights; residence and contact orders; specific issue orders; interdict in relation to administration of the child's property; management of the child's property, including the appointment of a judicial factor or a referral to the accountant of court. The court is not restricted to the orders listed in Section 11, and is empowered to make such order "as it thinks fit" within the broad scope of parental responsibilities and rights, guardianship and the administration of children's property. A child could initiate or be represented in proceedings where any such orders were sought.

2.1.6 In order to facilitate the exercise of these rights, Schedule 4 of the Children (Scotland) Act 1995 added S2(4A) to the Age of Legal Capacity (Scotland) Act 1991 to provide that a person under the age of 16 years shall have the legal capacity to instruct a solicitor in any civil matter, where that person has a general understanding of what it means to do so. Without prejudice to the generality of that subsection, a person 12 years of age or more is presumed to be of sufficient age and maturity to have such an understanding.

2.1.7 It is clear that there is a wide range of proceedings that could, theoretically, be raised by a child. This could include seeking interdict against the exercise of a particular right (for example, a move away from the area known to the child). It could include specific implement, where a child wished a parent to carry out a particular function (for example, if a parent were refusing to

agree to allow a child to take a particular subject at school). Most interestingly, it could include an action by a child to seek to interdict a parent from signing a Parental Responsibilities and Rights Agreement under Section 4 of the 1995 Act.

2.1.8 A child would also be able to raise an action for damages against a parent who had failed adequately to fulfil parental responsibilities and rights and thereby caused damage to the child. A child who had not received adequate medical care due to parental refusal to allow a procedure to go ahead, or who had been damaged by a parental refusal to maintain contact, could also raise proceedings.

2.1.9 Children's rights are not restricted to legal proceedings. Section 6 requires those making 'any major decision' in fulfilment of a parental responsibility, in exercise of a parental right, or in giving consent, to have regard 'so far as practicable' to the child's views. There is a rebuttable presumption of maturity at age 12. This provision covers not only those with formal parental responsibilities and rights but also those accorded more limited and temporary responsibilities and rights by Section 5 (1). This provides that someone over 16 who has care and control of the child, but does not have parental responsibilities or rights in relation to the child, has responsibility to promote the child's health, development and welfare. That person may give consent to surgical, medical or dental treatment or procedure where the child is unable to consent, and the person does not have knowledge that the parent would refuse to consent. Section 5 (2) states that the section does not apply to a person with care and control of a child in school. This means that foster parents and other temporary carers are legally empowered to make decisions in relation to 'health, development and welfare'. This phrase is broad and could include decisions about enrolment in school, psychological counselling or other types of therapy, decisions about diet, friends and many subjects of great importance to children.

2.1.10 Section 6 does not define the "major decisions" to which it is to apply. However, Section 7 specifically provides that the appointment of a guardian, to take effect on the death of the parent, is a "major decision" for the purpose of Section 6.

2.1.11 The Act is less clear about its application to other parental decisions that will significantly affect the child. It does not explicitly apply to the Section 4 agreement vesting responsibilities and rights in the unmarried father. However, whilst it is not specifically designated as guidance, the material issued by The Scottish Office as an accompaniment to the form prescribed for this agreement quotes Section 6 with regard to the views of the child. It adds:

"The mother should pay attention to the child's views if he or she wishes to express them ... If the child really understands what it is about and doesn't want the mother to make the agreement, the mother should think very hard about whether it would still be in the child's interests to make the agreement."

2.1.12 The following table lists decisions affecting children made in terms of Part I of the Act, and indicates whether there is any requirement to seek to ascertain children's views.

**Table 2.1 Analysis of Decisions under Part I**

Ref.	Requirement re Views	No Requirement re Views
	<i>In Family etc</i>	
1	Major decisions by persons exercising parental responsibility, including those with <i>de facto</i> care and control under S5. (S6)	
2		Minor decisions by persons exercising parental responsibility (S6)
3		Lack of due consideration for child's views regarding consent to leave the UK (S2(3) and (6))
4	Nomination of a testamentary guardian (S7)	
5		Assumption of authority by a testamentary guardian (S7)
	<i>In Court</i>	
6	Child can sue or defend proceedings re parental responsibilities (S1(3))	
7	Child can enter the process as third party minuter in a family action (A.S.97, r.13.1)	
8	Child should receive intimation of applications for S11 orders (A.S.93 r. 33.7h)	
9		Dispensation with requirement to intimate on child (A.S.93, r. 33.7(7))
10	Making of court orders re parental responsibility, even where parties submit joint minute, if child has indicated wish to express views (S11; A.S. rr. 33.19 and 26)	
11		Referral to Principal Reporter with grounds established for children's hearing (S54)
12	Application of foreign law in Scottish courts must respect the views of the child (S14)	
13	Competent child may act on own behalf or agree to "legal representative" (in terms of Ss1 and 2) to sue or defend on his behalf (S15(5)).	
	<i>Property</i>	
14	If regarded as "major" in terms of S6 - parents' administration of children's property and their decision to have recourse to the Accountant of Court (where that is discretionary) (S9).	
15		Accountant of Court's decision to apply for appointment of a judicial factor? The consideration of such an application? (S9)
16		Query whether there is any obligation on the Accountant of Court or judicial factor to take account of the views of children. (S10)
17		Court's decision re person to whom payment should be made when damages awarded to a child (S13)

These are further discussed below in the text, with references made to the table.

*Comment on the above*

2.1.13 A limitation on the child's ability to raise such proceedings lies in the fact that most children will require to be granted legal aid before going to court. The legal aid rules provide for children who apply on their own behalf to be assessed on their own resources, and most children

will, therefore, fulfil the financial criteria. However, the Scottish Legal Aid Board must find that there is *probabilis causa* and that the grant of legal aid would be an appropriate use of public funds. No regulations govern the Board's decisions in this area: it is a matter of administrative discretion. Research might explore the criteria applied by the board in assessing the applications of children, and the consistency of approach taken.

2.1.14 It would also be instructive to investigate the decision-making process whereby a child client and the solicitor reach the view that court action should be taken. It may be that, while a legal aid certificate was made available to the child to 'sue' a parent, it was decided that this route would not be appropriate for the child, who may still be living with, or in contact with, the parent.

2.1.15 The interpretation of 'major decision' in terms of Section 6 (Ref. 1) will determine the extent of its application to decisions within the family or by those with 'care or control'. As indicated above, there is no general definition of 'any major decision', so that the child has no absolute legal right to be consulted on, for example, moving house or emigrating (except if the child is 'looked-after'). Would there be much benefit in attempting to define 'major decision'? The potential for encouraging a restrictive or exclusive application may be greater by attempting to do so than by leaving the matter open. Perhaps the matter requires preliminary monitoring before any decision about further guidance is made.

2.1.16 It is appreciated that Section 2 (3) and (6) (Ref 3) was inserted to alleviate some difficulties with regard to international child abduction and that these considerations still apply, but it has an impact on more everyday expectations of children where the lack of a requirement to have regard for the child's views can be frustrating for the child and may lead to resentment. It is relevant to children who wish to go on holiday abroad, either with one parent who has joint parental responsibility and who is being obstructed by the other parent, or by a child in foster care, for example, who might wish to go abroad with the foster family in the face of parental objection. The impact of this provision might be softened by Section 2 (6), which says that the persons with the right to give or withhold consent have to be actually exercising the rights of residence or *regular* contact, before their consent is required. Furthermore, Section 11 allows the child to apply to the courts for an order permitting the child to leave the country. However, this seems a little heavy-handed.

2.1.17 Sections 6 and 7 require consideration for the child's views when the guardian is nominated (Ref 5). However, the nomination might take place when the child is very young, whereas the appointment might take automatic effect when the child is much older and has firm views. The child may of course apply to the court to have the appointment revoked, but this seems quite onerous. It would be better were the child's views taken on board also at the time the appointment was due to take effect.

2.1.18 Norrie (1998) suggests that referral to the Principal Reporter (Ref 11) will be appropriate only where the ground is established in the proceedings "with the sufficiency of evidence required for a sheriff to determine that a ground has been established on application of the reporter under S68". However, this is not explicitly required by law. Norrie adds, "Courts will have to be very careful here to ensure that there is sufficient opportunity to challenge any evidence suggesting that the appropriate ground of referral exists, since the main purpose of the proceedings is not directed towards that finding." There is potential here for the child to discover

that grounds for referral have been established without any opportunity to take part in a process setting out to establish them.

2.1.19 The Act is very concerned to ensure that third parties do not lose out on property matters merely because children have not been appropriately consulted (Sections 6(2) and 11(8)). There is also a lack of clarity about the duties laid on the Accountant of Court, and judicial factors as regards taking account of children's views. (Refs 15-17)

## **WHICH CHILDREN ARE INCLUDED IN ANY SUCH REQUIREMENTS?**

2.2.1 Section 15(1) says that, for the purposes of Part I:

“‘Child’ means, where the expression is not otherwise defined, a person under the age of eighteen years.”

The expression *is* otherwise defined for the purposes of Sections 1 and 2 of the Act, relating respectively to parental responsibilities and parental rights. Section 1(2) defines “child” for the purpose of parental responsibilities as a person under the age of 16. For one aspect only of parental responsibilities, the age is raised to 18: the responsibility to provide guidance to the child in a manner appropriate to the child's stage of development. Section 2(7) applies the parental rights provisions to children under the age of 16. There are no exceptions. This means that, where a child is over 16 but under 18, a parent has no parental rights, but retains a responsibility to give appropriate guidance.

2.2.2 Section 1(3) gives the child, or any person acting on his behalf, title to sue or to defend, in any proceedings as respects those parental responsibilities. Section 11(5) interprets the word “person” in Section 11(3)(a), as inclusive of “the child concerned”. This clarifies the title of the child to apply for an order under Section 11 relating to parental responsibilities and rights. The effect of this is to widen the scope of the child's potential action, from the responsibilities mentioned in Section 1 to the whole spectrum of responsibilities and rights listed in Section 11(1). More specifically, Section 9(9) defines “child” for the purpose of that section (safeguarding of children's property) as “a person under the age of 16 years who is habitually resident in Scotland.” Section 6 provides no specific definition of child; therefore the Section 15(1) definition applies. However, the scope of application will largely be restricted to those aged under 16, as Section 6 would apply to 16–18 year-olds only to the extent of requiring parents and others to consult their child about major decisions about which they were offering guidance. Both Section 6 and Section 11 require parents and the court respectively to have regard, so far as practicable, to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity. Both sections contain a presumption that a child of 12 years of age or more is of sufficient age and maturity to form a view.

2.2.3 The difference in approach between sections 6 and 11 lies in the fact that the court has a more positively-stated obligation to give a child an opportunity to indicate whether s/he wishes to express a view and, if so, to give her/him an opportunity to express it (Section 11(7)). The parental obligation is less clearly defined. Norrie (1998) comments that “the wording suggests that the person making the decision is obliged to seek out, or at the very least to give the child the opportunity to express, his or her views.”

## **WHAT PROCESSES ARE SPECIFIED FOR THE ASCERTAINMENT OF CHILDREN'S VIEWS?**

2.3.1 While Section 6 obliges parents and carers to have regard to the views of children when taking 'major decisions', there is no mechanism in place to ensure that this is carried out. In contrast with the court's duty under Section 11, there is no duty on the parent's part to seek the child's views. It may be that it was assumed that the parent, unlike a court, would have no difficulty in simply asking a child what s/he thinks, and that any mechanisms were unnecessary. The drafting does mean, however, that while the parent is under a duty to take account of views if expressed, s/he is not obliged to seek the child's views as a preliminary step. Further, there is no requirement that documentation supporting an exercise of parental responsibilities or rights should indicate the child's views or confirm whether the child had been consulted. A parent deciding to move abroad, enrol a child in a boarding school, or enter with a separated spouse into a Minute of Agreement detailing care arrangements for the child, is not required to answer any questions about what the child's views are, to confirm, for example, that the child is unable to express a view. The parent and any solicitor involved are protected by Section 6 (2), which provides that a transaction entered into by a third party and a child's representative cannot be set aside simply because the child has not been consulted. This could cover selling or acquiring property. It might also cover a situation where a child is to perform in film or theatre. The result is that if a child wished to be involved in a decision that s/he considered 'major', the only mechanism provided by the act is that of raising proceedings 'in respect of' parental responsibilities and rights. One imagines that a child's application for legal aid in these circumstances might be met with the 'reasonable expenditure of public funds' argument.

2.3.2 It is notable that those with parental rights and responsibilities are not obliged to advise children that they should be consulted in relation to major decisions, although the Scottish Office publication 'Your Children Matter' refers to the legal position and encourages parents to consult their children. Nor has literature been provided specifically to advise children about the duty on parents to consult them. The booklet for young people 'You Matter' is aimed at those children and young people whose parents are separating. Nevertheless, it is capable of more general application, so that wider dissemination might be encouraged.

2.3.3 Section 7 (6) provides that the appointment of a guardian is a 'major decision', and therefore those making the decision must have regard, so far as practicable, to the child's views. Again, there is no provision that the written appointment confirms whether the child's views were sought and if so, what they were. In both appointment of guardians and in Section 4 parental responsibilities and rights agreements, such provision could have been made.

2.3.4 Section 11(1) provides that a sheriff court or the Court of Session may make an order in relation to parental responsibilities, parental rights, guardianship and administration of the child's property, in "the relevant circumstances". Those circumstances include an application by anyone who "claims an interest". That would include an application by a child. Section 11(1) also provides that the proceedings may be independent of other proceedings. This means that a child, or anyone with an interest, could raise an action to have a decision made about a child's life, even where there were no ongoing proceedings such as a divorce action. The wording of the subsection also means that where there are ongoing proceedings, an order relating to parental responsibilities and rights may still be sought.

2.3.5 There is a wide range of proceedings covered by Section 11, the most common being residence orders, contact orders, and imposition or removal of parental responsibilities and rights.

2.3.6 Unlike in Section 6, the decision-maker, in this case the court, must find out whether the child wishes to express a view (Refs 8 and 9). Section 11(7)(b) says that the court “taking account of the child’s age and maturity, shall, so far as practicable –

- (i) give him an 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.”

The entire edifice falls if the child is not given an adequate opportunity to indicate whether he or she wishes to express a view. The Rules of Court address this by requiring intimation on a child to alert him or her to the fact that an important decision is going to be made and to explain how the child can start the process of expression of any views which he or she may have.

2.3.7 The Sheriff Court rules - 33.7 (h) - provide that in an action where a Section 11 order is sought, there should be a crave either for service on the child or for dispensing with the need for service. The approach of the bench is crucial to the operation of stage one. A writ will be sent up to court, and will either crave service on the child or will ask for dispensation. There are indications that some solicitors, having regard to the presumption of maturity at age 12 (Section 11(10)), ask for a warrant for service only on children aged 12 or over and seek dispensation below that age. The writ asking for dispensation will simply say “on account of the child’s tender years” or “on account of the child’s age and immaturity”. Research might survey family lawyers and others on their practice with regard to writs containing craves for orders relating to children.

2.3.8 When the writ goes up to court seeking warrants for service, the court (sheriff) will be required to decide whether to serve notice on the child. The Rules give the sheriff discretion to dispense with intimation where “appropriate,” although in one instance an additional reference is made to the child’s ability to form a view (see Comment in Appendix B re Section 12). If the sheriff accepts the argument that the child is of tender years etc., without further enquiry, then the first chance to give the child an opportunity to indicate whether he wishes to express a view has been lost. Thereafter, a child who does not receive notice of the action will be reliant on one of the adults in the process – the parties, the solicitors or the sheriff – providing a way in to the action.

2.3.9 No guidance is given as to what criteria the sheriff should apply. The child does not have to be consulted about the sheriff’s decision to dispense with intimation. Whilst it might seem circular to do so, it could be that in the case of a child who is ‘capable of forming a view’ in terms of Article 12 of the UNCRC, some exploration should be made of the ‘appropriateness’ of intimation through some contact with the child, before a decision is made.

2.3.10 The official notification, the Form F9, also presents difficulties. It may be intercepted by a parent and not received by the child. It may be completed by a child who is being advised by a parent who is a party to the action. It may be difficult for a child to understand, and that child may find there is no answer from the Scottish Child Law Centre’s advice line, due to changes within that organisation, including a change of the telephone number given on the form. It would seem that the actions of parents cannot be legislated for, and that there will always be difficulties in ‘official’ notification, unless the system were prepared to appoint, in every case, a person (e.g.

court reporter) whose job it would be to go through the form with a child personally, explaining the process and supporting the child.

2.3.11 Intimation is only one of a number of ways in which the court *could* seek to ascertain whether a child does wish to express a view. The following questions arise:

- What criteria do sheriffs apply when deciding to dispense with intimation, and how consistent are they?
- When sheriffs do dispense with intimation, do they take any other measures to ascertain whether the child has views, as Section 11(7) would seem to require sheriffs to do?

Interestingly, both A.S. 93, r. 33.19(2) and A.S 97, r. 3.5 (which applies to public law cases) show that the sheriff is expected to use his or her imagination and discretion in deciding how to ascertain the views of a child who *has indicated* a wish to express them. Perhaps the same expectation should be laid upon a sheriff considering how to ascertain *whether* a child wishes to express views.

2.3.12 The Rules appropriately extend the free expression of the child's views to matters that are the subject of joint minute between the parties.

2.3.13 The second stage of the process is to give the child the opportunity of expressing a view. This can be done in several different ways. The child may fill in the Form F9 and send it back. Return rates and numbers containing views should be researched. The court may appoint a court reporter or curator to report on the child's views. Research might explore whether the number of such appointments, particularly of reporters, has increased since implementation of Part I of the Act. The court may express the wish to hear directly from the child and ask for the child to be brought to the court. Some sheriffs have now built up considerable experience in talking to children, and any research should consider the methods of communication used and the sheriff's perceptions of the influence of those views on their decisions.

2.3.14 A child may take independent legal advice. If this is done, there are, again, several ways in which the child's views may be expressed. The solicitor may help the child to fill in the Form F9, or may write to the court on the child's behalf or may seek to have the child **sisted** as a third party to the action.

2.3.15 Alternatively, the solicitor may appear on the child's behalf at the Child Welfare Hearing to express the child's views. The Child Welfare Hearing (CWH) is a forum introduced by the 1996 amendment to A.S. 93 with the aim of facilitating a speedy resolution of matters relating to children in the context of family actions. Whilst Section 11(9) of the Act is clear that a child does not require to be legally represented in proceedings, the attraction for a solicitor of appearing at a CWH is that, since under rule 33.22A the hearing should take place early in the case, it may be a chance to influence the adult parties and the decision-maker before major decisions have been taken. There may be a feeling among experienced practitioners that it is not advisable for children themselves to attend CWHs, although they may do so (rule 33.22A (5)).

2.3.16 In the majority of cases, it is likely that the child will not be legally represented but will have expressed a view to a reporter, curator or sheriff directly. Rule 33.20 provides that where a child has expressed a view, the sheriff or someone appointed by the sheriff must record the view. The rule also provides that the sheriff may decide whether it should be kept confidential. It can

be seen from this that there is no automatic right to confidentiality for the child. There are indications that some reporters and curators have adopted a practice of recording the child's views separately from other information in their reports, thus facilitating their request that the views be kept confidential, where the child has said s/he does not want the parents to know. The extent of this practice might be explored in the research.

2.3.17 The decision on confidentiality is the sheriff's. The case law set out in Appendix A shows a concern that the child's right to be able freely to express views be balanced against the parties' rights to due process. It is still possible, and indeed may be common in some sheriffdoms, for the child to be given confidentiality in expressing views, but the matter is uncertain. It may be that it is particularly difficult for a sheriff who sees a child him or herself to offer this, as the sheriff must be seen to allow parties the opportunity to challenge any evidence to which s/he has given weight.

### **WHAT WEIGHT IS TO BE GIVEN TO THE CHILD'S VIEWS?**

2.4.1 The third stage of the process of taking account of the child's views is to 'have regard to such views'. Except for the presumption of maturity at age 12, there is no further guidance to the court on what weight to give children's views. Research might explore whether the age is regarded as particularly significant. It may be that experienced curators and reporters, known to the court, will give a description of the child which could be used by the court as an aid to decisions on weight to be given. Research might explore the weight that sheriffs attach to the views of court-appointed persons.

2.4.2 The ability of the child to express views clearly "and in his [her] own words" will be influential when the weight to be given to the views is being considered. Children who are not well educated, or who have learning difficulties or a language barrier, may all have had less influence on decisions when expressing their views. This is a matter for research to explore.

2.4.3 Crucially, whether the child has legal representation or not may affect the weight to be given to his/her views. In relation to a proof hearing, that is legally certain, since the child will be a third party and his/her evidence must be considered with all other parties. It may also be the case that having a legal representative to discuss matters with the child, to explore issues and to explain processes, could improve the child's understanding and help the child influence the decision-making. In addition, there is the simple fact that a party who is legally represented appears on a level playing field with all other parties, and does not start at a disadvantage.

### **IS THERE PROVISION FOR FEEDBACK TO THE CHILD ABOUT THE DECISION AND THE CONSIDERATION GIVEN TO THE CHILD'S VIEWS?**

2.5.1 There is no provision made for feedback within these processes to anyone except an unrepresented party. Therefore, if a child were a party to the proceedings, and were unrepresented (which is unlikely), s/he would receive information from the court as a party litigant.

## **COMMENT ON THE ABOVE**

2.6.1 The actual impact of the provisions of the Act and associated rules of court will depend upon the way in which they are interpreted and used. In particular, the interpretation of 'major decision' in terms of Section 6 will determine the extent of its application to decisions within the family. The use made by sheriffs of their power to dispense with intimation on the child will determine whether the principle of regard for the child's views is allowed even to start to make an impact.

## **CHAPTER THREE: PART II OF THE CHILDREN (SCOTLAND) ACT 1995, CHAPTER 1**

### **WHICH DECISIONS REQUIRE CHILDREN'S VIEWS TO BE CONSIDERED?**

#### *Basic Principles: Sections 16 and 17*

3.1.1 Section 16 requires children's hearings and sheriffs to take account of the views of children in certain circumstances. The application of this section is considered later in relation to Chapters 2, 3 and 4 of this Part of the Act.

3.1.2 Section 17 obliges the local authority to listen to a child who is, or may become, 'looked-after' by them:

“(3) Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the views of –

(a) the child; ...

(4) In making any such decision a local authority shall have regard so far as practicable –

(a) to the views (if he wishes to express them) of the child concerned, taking account of his age and maturity;....”

This section applies in two ways the legal principle of listening to children's views. First, the Section defines a wide category of 'looked-after' children<sup>1</sup>. Section 17 (6) specifies that 'looked-after' children include: those for whom accommodation is provided under Section 25; those on a supervision requirement (including those on home supervision); those subject to an order, authorisation or warrant under emergency orders in child protection, children's hearings or similar orders etc. made elsewhere in the UK, for whom the local authority have responsibilities; and those subject to a parental responsibilities order. Second, local authority is defined 'corporately' within the Act. Such local authority services as school education, community learning, recreation and leisure, as well as social work services, should technically seek to ascertain a 'looked-after' child's views and give them 'regard'. In state schools, for example, teachers should consider the views of a 'looked-after' child before making any decision. While such services may consult children as a matter of good practice, it is unlikely that most 'mainstream' services are aware of this duty (e.g. Maguire and Marshall 1999; SCF 1999 and 2000).

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<sup>1</sup> According to Scottish Executive statistics (1999), 11 191 children were looked-after as of 31st March 1999 with 5309 of these children living at home.

3.1.3 Although this section is reasonably comprehensive, there are gaps. For example, Section 17(6)(c) includes within the definition of ‘looked-after’ a child:

“...who is subject to an order made, or authorisation or warrant granted, by virtue of Chapter 2, 3 or 4 of this Part of this Act, being an order, authorisation or warrant in accordance with which they have responsibilities as respects the child.”

The Act allows for the possibility that child protection orders under Section 57, or emergency protection measures under Section 61, might be initiated and implemented by ‘any person’. Whilst this is unlikely to be a frequent occurrence, it does mean that some children in emergency protection situations will fall outside the definition of ‘looked-after’. The provisions of the Emergency Regulations mitigate this difficulty by requiring some early consideration of the views of the child. Section 17 applies to local authority decisions but not to parents’ decisions. Parents’ requirement to have regard to children’s views under Section 6 applies to any *major* decision but not any decision; it is thus more constrained in its requirement than Section 17.

3.1.4 The principle of listening to children is gradually becoming accepted in other service legislation that affects children. Health services do not have an explicit duty to consult children; however, the Age of Legal Capacity (Scotland) Act 1991 allows ‘competent’ children under the age of 16 to give or refuse consent to medical treatment, examinations etc. Where the right to consent rests with the parents, Section 6 of the 1995 Act applies, requiring them to take account of the views of the child as regards “major” decisions. More recently, the Standards in Scotland’s Schools etc. (Scotland) Act 2000 (referred to here as “the Schools Act”) provides that children and young people must be consulted by education authorities about their annual statement of improvement objectives (Section 5) and about the content of schools’ development plans (Section 6). The development plans must state how and to what extent headteachers will consult pupils and seek to involve them when decisions are being made on the “everyday running of the school”. This provision is not worded as strongly as the Section 17 (3) and (4) of the 1995 Act. For example, a school development plan might legally state that pupils will *not* be consulted. Section 2 of the Schools Act requires the local authority to “have due regard, so far as is reasonably practical, to the views (if there is a wish to express them) of the child or young person in decisions that significantly affect that child or young person, taking account of the child or young person’s age and maturity.” Whilst this is an important innovation, it is also less strongly worded than Section 17 of the 1995 Act, in respect that it applies only to decisions with a “significant” effect, rather than “any decision”. Section 41 of the Schools Act extends the right to appeal against school exclusion to those pupils judged to have a general understanding of what that means. Where that criterion is not fulfilled, school exclusion guidance (The Scottish Office Education and Industry Department (SOEID) 1998) will still apply a recommendation that children’s views be considered. The Scottish Executive Education Department (2000) has proposed that this guidance be put on a statutory footing by regulations.

3.1.5 Children with special educational needs are also affected by the Schools Act. They will fall within the general provisions of Section 2 with reference to having due regard to the views of the child in significant matters. Further, Section 15 requires local authorities to take account of the views of children as regards mainstream schooling, in cases where the criteria for special schooling might be fulfilled. Guidance on special educational needs (SOEID 1996) also refers to listening to children within the recording process and reviews.

3.1.6 Section 17 (5) does allow for due regard to a ‘looked-after’ child’s views – as well as the paramount importance of the child’s welfare – to be ignored. To protect members of the public from ‘serious harm’, local authorities may disregard such duties. The process leading up to or following such a decision to disregard is not specified, nor the possibilities for appeal, nor a time frame for review. How this section is being applied within Scotland is presently unknown. In a survey of English child care managers in social services departments (Tisdall et al, 1998), a large majority (78%) had never known of a situation where the parallel section was used. Over half (58%) of respondents felt the section required clarification, particularly in its relationship to secure accommodation.

3.1.7 The overarching principle of due regard to a ‘looked-after’ child’s views is determined by the definition of a ‘decision’. A ‘decision’ presumably covers making care plans and placements, reviewing care plans and terminations of placement – but how comprehensively? What is a ‘decision’ by other local authority services, such as education, which would be covered by Section 17? How can children raise an issue not on ‘the agenda’, so that it becomes something a decision is made about? Where do children’s views come into the various elements of the process that may add up to a decision?

3.1.8 The table below concentrates on requirements under regulations that deal with the details of care plans, placements and reviews: The Arrangements to Look After Children (Scotland) Regulations 1996; The Fostering of Children (Scotland) Regulations 1996; and The Residential Establishments - Child Care (Scotland) Regulations 1996. It notes where a requirement to consider children’s views is specifically made – or is not.

**Table 3.1 Analysis of Decisions under Part II, Chapter 1, and Associated Regulations**

<b>Requirement re Views</b>	<b>No Specific Requirement re Views</b>
	Information that must be obtained and recorded in <i>writing</i> in a care plan. [Arrangements Reg.3 (2) (a) and Schedule 1]
Information that must be taken into account in <i>drawing up</i> a care plan, referring to S. 17 (1-5) [Arrangements Reg. 3 (2) (b)]	
In <i>making</i> a care plan, local authority shall have regard to S. 17 (4) [Arrangements Reg. 4 (2) (f)]	
Care plan should ensure a child is brought up in accordance with the child’s religious persuasion if fostered or placed in a residential establishment, so far as is consistent with S. 17 [Arrangements Reg. 5 (3)]	
Having regard to the child’s wishes and feelings, ensure child able to attend religious services and receive religious instruction as appropriate to child’s religious persuasion, in residential establishment [Residential Reg. 14]	
Care plan must seek same placement or mutual contact and access of children from the same family, so far as is consistent with S. 17 [Arrangements Reg. 5 (4)]	

Care plan must make and review arrangements for involving child in decision-making if child placed [Arrangements Reg.6 (1), referring to Sch. 2 Part II (6)]	Care plan must make and review arrangements for involving child in decision-making if looked-after and placed – but not if looked-after and <i>not</i> placed in accommodation [Arrangements Reg.6 (2)]
Care plan must be agreed by child $\geq$ 16, if receiving accommodation under S. 25 (7) (a), as far as is reasonably practicable [Arrangements Reg. 6 (2)]	
If considered relevant, local authority must provide information on child's wishes and feelings about the placement, <i>if in a residential establishment</i> [Residential Reg. 17 (a) (ii)]	Information to be provided to foster carer [Fostering Reg. Sch 3 (1)]
	Notification by and relevant information from local authority, on placement to: other local authority if placed in another area; school; health board; each parent or relevant person [Arrangements Reg. 7 (1)]
Arrangements for taking into account needs and wishes of each child placed, in statement of functions and objectives of residential establishment. [Residential Regs- Schedule]	
	Fostering placements (Although presumably covered by S. 17 for 'looked-after' child.) (Does not require other children living in the proposed foster carers to be considered, in foster agreements.) [Fostering Reg. 12-15]
	Local authority's agreement with person in charge of residential establishment, for child placed there, in relation to contact between child and family, education and health [Residential Reg. 17 (b)]
	Provision of education for child placed in residential establishment [Residential Reg. 11]
Care plan reviews must cover same issues as Reg. 4 and 5 [Arrangements Reg. 8]	
	Care plan reviews on set timetable, unless under a supervision requirement from a CH and child's requests a review of this requirement. [Arrangements Reg 9 (3) (b)]
	Care plan reviews recorded information, details of proceedings and decisions [Arrangements Reg 10]
	Retention and confidentiality of records, subject to statutory provisions or court orders re access. [Arrangements Reg 12 (3)]
Registration with medical practitioners, medical examination and treatments subject to Age of Legal Capacity (Scotland) Act 1991 [Arrangements Reg. 13 (3)]	
	If a child dies, is seriously ill or injured, or leaves or is taken from where placed, the person with whom a

	child is placed must notify the local authority, and the local authority shall notify those with parental responsibilities [Arrangements Reg. 14 ]
	Arranging for looked-after child to be cared for by child's parents or other person with parental responsibilities [Arrangements Reg. 16]
Local authority to visit child in placements if 'reasonably' requested to do so by child [Arrangements Reg. 18]	
	Local authority to produce written reports to be considered in care plan reviews [Arrangements Reg. 18]
	Termination of placement decided by a child's best interests. Written notice to those who received notice under Reg. 7 [Arrangements Reg. 19]

Numerous gaps and differences are noted when the regulations are solely considered. For example:

- no specific requirement is made that children's wishes, feelings or views are *recorded* as part of care planning, review and termination;
- children receive neither information on nor copies of their care plans, as a legal right;
- measures to address a child's religious persuasion are subject to due regard for a child's views, and health examinations and treatments are subject to the Age of Legal Capacity Act, but no specific mention is made of children's views in educational arrangements;
- a child can only initiate a care plan review, under the regulations, if the child is under supervision and requests a review of this by a children's hearing.

In considering these, the question then returns to those raised above. Are such matters considered 'decisions' and thus covered by Section 17 (3-4), or merely part of procedures and processes?

*Going beyond Section 17 – gaps for children receiving other services under Part II, Chapter 1*

3.1.9 The legal principle of 'due regard' to a child's views is *not* applied to children receiving local authority services under Chapter 1, Part II, who are not 'looked-after'. While welcome, there appears to be a misapprehension in some official documents – and more generally with those providing services – that the principle is enshrined in law for such children (e.g. Riddell Committee 1999). This is not to negate the power of the overarching principle described in Scottish Office Guidance (1997). Guidance, however, does not have the same legal status as primary legislation. This results in the following gaps in legislation for:

- planning for children's services, under Section 19 – while voluntary organisations that represent the interests of people who use services must be consulted, there is no requirement for organisations that *represent* young service users to be consulted nor children and young people to be consulted *directly*. The Secretary of State does have the power to make directions on who should be additionally consulted (Section 19 (5) (f)) but has not done so;

- a ‘child in need’ receiving services under Section 22 (unless the child is also ‘looked-after’ in terms of Section 11(6));
- more specifically, a child ‘affected by disability’ assessed under Section 23 and/ or 24. The requirement to assess under Section 23 is based on a parent’s or guardian’s request, and carers’ assessments under Section 24 are available for people aged 16 or over;
- in determining the welfare of a child in hospitals and nursing homes, without parental contact (Section 36);
- when a child is in a ‘safe refuge’ under Section 38 (a child, however, must *request* a safe refuge, which was an amendment inserted into the Act as it went through Parliament to ensure that safe refuges were a child-initiated service).

3.1.10 Guidance on these sections does recommend that children be consulted. As mentioned above, the guidance’s foreword states an essential principle behind the Act: “each child who can form a view on matters affecting him or her has the right to express those views if he or she so wishes” (Scottish Office Guidance, Vol.1, p. vii). Details are included within guidance. For example:

- Children’s services plans: local authorities may wish to consult on how to ascertain the views of children and their families. It is ‘necessary’ that local authorities take account the views of users and potential users. (Scottish Office Guidance, Vol.1, Ch.2, Paras. 21-23<sup>2</sup>).
- Children in need: under the title ‘delivering services’, the guidance states that local authorities should listen to children and take account of their views (Scottish Office Guidance, Vol.1, Ch.1, Para. 22) and similarly in the chapter on children and disability (Scottish Office Guidance, Vol.1, Ch.6, Para. 21). This is not specified within the preceding section on individual assessment of need (Scottish Office Guidance, Vol.1, Ch.6, Paras. 11-19).
- Children affected by disability: the guidance states that it would be ‘good practice’ for a local authority to consider any request for help made directly by a child (Scottish Office Guidance, Vol.1, Ch.6, Para. 5). When undertaking assessment for such children, a child’s views should be listened to and respected (Scottish Office Guidance, Vol.1, Ch. 6, Para. 21).
- Children in safe refuges: substantial details on the process of listening to children are given for two elements of safe refuges: to ascertain whether a child asking for help would like a ‘safe refuge’, and when deciding on whether to reveal the child’s ‘safe refuge’ to others, such as a parent (Scottish Office Guidance, Vol.1, Ch.8, Paras. 16, 22).

Guidance thus asserts the principle of listening to children strongly, but the principle is not given the same legal strength as it is for ‘looked-after’ children.

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<sup>2</sup> The reference follows the convention: author date, chapter: paragraphs.

## **WHICH CHILDREN ARE INCLUDED IN ANY SUCH REQUIREMENTS? WHAT WEIGHT IS GIVEN TO THEIR VIEWS?**

3.2.1 The presumption that a child ‘aged 12 or above has sufficient age and maturity to form a view’ is not applied under Sections 17-38. Age and maturity are frequently referred to in connection with listening to children, but with different phrasing. For example:

- a local authority must have regard to a ‘looked-after’ child’s views “taking account of his age and maturity” (Section 17 (4) (a));
- the home supervision plan should be agreed to by “the child (where of sufficient age and maturity), the parents, the local authority...” (Scottish Office Guidance, Vol.2, Ch.2, Para. 16);
- before a ‘looked-after’ child emigrates, a local authority should ensure the child “if he or she is old enough to form an opinion” wishes to emigrate (Scottish Office Guidance, Vol.2, Ch.1, Para. 157);
- a local authority should take account of the child’s views “subject to his or her age and understanding”, including foster care. “The more mature the child, the more fully the child will be able to enter into discussions about plans and proposals.” (Scottish Office Guidance, Vol.2, Ch.3, Para. 89);
- young people aged 16 and above can insist on staying within local authority accommodation, under Section 25, even if their parents wish the young people to leave. Similarly, young people of this age would have a right to a carer’s assessment under the Carers (Recognition and Services) Act 1995.

These differences can be typified as either a ‘sliding scale’ of competency or a binary division between competent and incompetent. Examples of the ‘sliding scale’ are Section 17 and the foster care situation. All children’s views should be considered, but their weight will be subject to a view on “age and maturity”. A binary division is exemplified by agreements to home supervision plans and emigration, for children considered sufficiently old (and mature) – and conversely this implies that agreements are not for those children not considered old enough. The age of 16 is used to divide young people who can make certain decisions from younger ones who cannot.

3.2.2 Terminology also differs. Local authority must have *regard* to a ‘looked-after’ child’s views; a child should *agree* to a home supervision plan; a young person of 16 can make a *decision* against his/her parents’ wishes under Section 25. Such terms seem to correlate with increasing power for the young people and decreasing power for local authorities and/or parents. ‘Views’ is the most common term but at times ‘wishes’ and/or ‘feelings’ is used instead or alongside (e.g. ‘wishes’ is used in relation to ‘looked-after’ children’s contact with their families, in guidance (Scottish Office Guidance, Vol.2, Ch.1, Para. 44)). ‘Views’ would seem the stronger term, while ‘wishes’ and ‘feelings’ have a lesser status. Do such differences have an impact on practice and the experiences of children? The age of 16 provides an absolute age line, which presumably does make a difference in young people’s ability to choose. Research would need to be undertaken in the other situations, to determine how involving children in decision-making is understood and experienced.

3.2.3 Ascertaining children’s views is found in 4 situations that raise questions about their potential inclusion/exclusion in other areas under the Act, and how they frame children’s rights.

First, a ‘looked-after’ placement should be chosen congruent with a child’s religious persuasion after “having ascertained so far as practicable the views of the child...” (The Arrangements to Look After Children (Scotland) Regulations 1996 Regulation 5 (3)). Similarly, managers of residential establishments should ensure every accommodated child is able to attend religious services and receive religious instruction “having regard to the child’s wishes and feelings” (Residential Establishments – Child Care (Scotland) Regulations 1996 Regulation 14). Such phrasing recognises a potential conflict between a child’s cultural background (and potentially the parents’ wishes) and the child’s own evolving and developing choices.

3.2.4 Second, the necessity to consider different means of communication, particularly for disabled children, is raised not only for services for children affected by disability but also, for example, in guidance for foster care and after care. Local authority service providers are advised to be *proactive* in ascertaining children’s views. (Note similar emphasis on stage-appropriate methods of ascertaining children’s views is not given the same prominence.)

3.2.5 Third, the guidance at times refers to siblings. The views of potential foster siblings should be considered in preparing a family for a foster child (Scottish Office Guidance, Vol.2, Ch.3, Paras. 23-24); ‘looked-after’ case records should distinguish between siblings (Scottish Office Guidance, Vol.2, Ch.1, Para. 127). Family ties are thus recognised as potentially more varied than those between parent and child, also including sibling relationships. Children are seen as individuals, connected but yet not merged with their families. However, The Fostering of Children (Scotland) Regulations 1996 do not specifically require other children within a foster family to be considered in approving foster parents and placements.

3.2.6 Fourth, the collective views of children should be included in planning about throughcare and aftercare (Scottish Office Guidance, Vol.2, Ch.7, Paras. 23-24), external management of residential care (Scottish Office Guidance, Vol.2, Ch.4, Para. 56) and children’s services planning (Scottish Office Guidance, Vol.2, Ch.2, Para. 22). Due regard to children’s collective views, however, is not specified in the primary legislation. The 1995 Act and ensuing regulations and guidance are predominantly focused on the individual and not the collective child.

## **WHAT PROCESSES ARE SPECIFIED FOR ASCERTAINMENT OF CHILDREN’S VIEWS?**

3.3.1 At certain points within the guidance, numerous details are provided on the necessary *components* for listening to children and involving them in decision making:

- adequate information and an awareness of the consequences of decisions;
- ensuring welcoming, convenient and comfortable locations for meetings;
- advocacy, as a role of social workers but also the possibility of independent advocates<sup>3</sup>;
- privacy for the child, in which to speak to the professional or to use confidential helplines;
- means of communication, with particular mention of disabled children’s needs;
- knowledge and support about complaints procedures<sup>2</sup>.

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<sup>3</sup> The Kent Report (1997) specifically recommended increased independent advocacy for ‘looked-after’ children and improved complaints procedures.

Such extensive detailing (although not comprehensive for each group) can be found for children affected by disabilities, 'looked-after' children, and children accessing safe refuges and after-care.

3.3.2 Different elements of *confidentiality* are mentioned within the guidance: confidentiality of records, the opportunity to speak to an independent professional; protecting identity and location; and confidentiality in decision-making. For children with and affected by disabilities, the confidentiality of records is mentioned. Of note is the phrasing "families' and parents' consent should be sought" before information is shared, which does not exclude children but does not specify them (Scottish Office Guidance, Vol.1, Ch. 6, Para. 14). Regulations require the confidentiality of records for children in a range of 'looked-after' living situations. Confidentiality is stressed for children accessing safe refuges – having the opportunity to speak to someone independent of a local authority on their reasons for running away and the need to protect the identity and location of the child (Scottish Office Guidance, Vol.1, Ch.8, Paras. 42, 46) – and for 'looked-after' children, particularly those in foster care (Scottish Office Guidance, Vol.2, Ch.1, Para. 76 and Ch.3, Paras. 94-95). Confidentiality within decision-making is addressed in making arrangements to look after a child. Information should normally be shared with parents or carers and the child. It should only be withheld when a child is unable to understand the assessment due to the child's age or maturity, or when disclosure to parents, carers or child would breach confidentiality or cause harm (Scottish Office Guidance, Vol.2, Ch.1, Para. 9). Regulations may require confidentiality, but they do not require children's views on whether or not they wish information to be shared to be considered (see Table C).

3.3.3 The process of listening to children and involving them in decision-making is also covered for some groups of children. Guidance applying to 'looked-after' children, for example, details the requirements and process for listening to children at numerous stages, such as when making and reviewing a care plan, or deciding on a placement or contact. Guidance – but not regulations – emphasises *recording* children's views and the process of decision-making in care plans and case records. Guidance on reviews for 'looked-after' children details attention to venue, people attending and a chairperson's responsibility to facilitate children's participation (Scottish Office Guidance, Vol.2, Ch.1, Paras. 20-23).

## **IS THERE PROVISION FOR FEEDBACK TO THE CHILD ABOUT THE DECISION AND THE CONSIDERATION GIVEN TO THE CHILD'S VIEWS?**

3.4.1 While considerably more print is expended on the gaining of children's views, some attention is given to *feedback*. For example, "If a local authority makes a decision about a child that is at odds with his or her views, the child's social worker or equivalent should take care to explain the reasons why this is necessary to the child" (Scottish Office Guidance, Vol.1, Ch.6, Para. 27). Children with and affected by disabilities, if "of sufficient age and understanding", should be informed in writing and verbally of the outcome of any assessment concerning the child or the child's carers (Scottish Office Guidance, Vol.1, Ch.6, Para. 17). 'Looked-after' children should receive a copy of their care plan (Scottish Office Guidance, Vol.2, Ch.1, Para. 13). Again, feedback is at the level of guidance, and not primary or secondary legislation.

## COMMENT ON THE ABOVE

3.5.1 In particular situations, the *complexities* of ascertaining children's views and involving them in decision-making are raised. A "fine balance" is required between ensuring children have the option of being involved but are not overburdened by the responsibilities of decision-making (e.g. children affected by disability (Scottish Office Guidance, Vol.1, Ch.6, Para. 27) and 'looked-after' children in relation to contact (Scottish Office Guidance, Vol.2, Ch.1, Para. 44). For 'looked-after' children considering contact, children involved in 'after care' or children considering safe refuges, social workers should help the child to clarify his or her views (Scottish Office Guidance, Vol.2, Ch.1, Para. 44 and Ch.7, Para. 27; Scottish Office Guidance, Vol.1, Ch.8, Para. 22). Children's evolving views are referred to within contact for 'looked-after' children and after care, providing recognition of child development and change.

3.5.2 In summary, guidance contains numerous elements that emphasise the *process* of listening to children. The need for information, advocacy, a welcoming environment, confidentiality, help in developing one's views, different communication means and feedback are all recognised in different portions of the guidance. These elements are not consistently applied to all situations.

## CHAPTER FOUR: PART II OF THE CHILDREN (SCOTLAND) ACT 1995, CHAPTERS 2 AND 3

### WHICH DECISIONS REQUIRE CHILDREN'S VIEWS TO BE CONSIDERED?

4.1.1 The following table lists decisions affecting children made in terms of Chapters 2 and 3 of Part II of the Act, and indicates whether there is any requirement to seek to ascertain their views. It organises these decisions according to who makes them: the children's hearing, the sheriff, the police, and 'others'. Within each category, it seeks to follow a logical sequence of events, although some provisions, such as those for warrants, are listed together for the sake of comparison. It then looks at the decisions made in the context of criminal proceedings, as well as those made by the Principal Reporter and the Secretary of State, neither of whom is subject to any requirement to seek the views of children.

4.1.2 With regard to courts and children's hearings, Section 16(2) of the Act requires them to take account of children's views in the circumstances set out in Section 16(4). The impact of Section 16 in this respect is assumed throughout the table and it is specifically referred to only in the context of the issue about the extent to which this is undermined by the sheriff's power to dispense with service on, or attendance of, the child.

4.1.3 In some of the situations omitted from Section 16(4), a requirement to seek the views of the child has been inserted in Rules or Regulations having legal effect. The table acknowledges this and also includes reference to the situation with regard to the making of a child protection order and accompanying directions (Sections 57 and 58), when official guidance gives encouragement to ascertainment of the views of the child, even though this is not legally required.

**Table 4.1 Analysis of Decisions under Part II, Chapters 2 and 3, and Associated Rules, etc.**

Ref.	Requirement re Views	No Requirement re Views
	<i>Children's Hearings</i>	
1	Child has a right to attend [S45]	
2	Matters to be considered by a business meeting of members of the children's panel [S64; CH Rule 4]	
3	Issue of warrants to secure child's attendance: S45(4) and (5) [CH Rules 15 and 26]	
4	Decision to grant or continue a warrant when consideration of a case is continued [S66(1) and (5)]	
5	Imposition of a warrant where consideration continued, or in connection with a residential requirement for the purpose of assessment [S69]	
6	Decision to issue a warrant re a child arrested by the police - S63(5) [CH Rules 15 and 26]	
7	Review of use of secure accommodation for	

	a child detained under criminal provision [Secure Accommodation Reg. 15]	
8		Attachment of a secure condition, or prohibition of disclosure of child's whereabouts, in connection with warrants granted under S66(1) or continued under S66(5), or re warrants granted under S69
9	Decisions to issue warrants under the Secure Accommodation (Sc) 1996 Regs [CH Rules 15 and 26, BUT see Appendix B comments re S75]	
10	Decision to continue a CPO [CH Rules 15 and 26]	
11	Decision to continue a S58 direction accompanying a CPO [CH Rule 26]	
12	Provision of advice for a sheriff re recall or variation of a CPO [S60(10)]	
13	Children's hearing will not proceed if child denies the grounds for referral or is incapable of understanding them [S65]	
14		Appointment of a safeguarder (S41)
15		Exclusion of newspaper or news agency representatives from the hearing. Also, the Chairman's decision about whether to explain to the excluded person(s) the substance of what has taken place during the exclusion (S43) Chairman's decision to allow an observer to attend (S43 and CH Rule 13)
16		Exclusion of "relevant persons" and/or their representative(s) from the hearing. (The Chairman has a duty to explain the substance of what has taken place during the exclusion, so there is no decision to be made about it.) (S46)
17		Sharing with "relevant persons" of all information given to hearing members, including that submitted by the child (CH Rule 5)
18		Transfer of case to another children's hearing (S48)
19	Imposition of a residential requirement for purpose of assessment – S69(3) [CH Rule 15]	
20	Decision to make a supervision requirement [S70]	
21		Decisions (when making a supervision requirement) to: set date for review; authorise secure accommodation; prohibit disclosure of child's whereabouts (S70)
22	Child may apply for suspension of supervision requirement pending appeal. Reporter must give child notice of arrangements for hearing the application. If the child is the applicant, s/he has a right to be heard. [S51(9); CH Rule 23]	
23		Consideration of application for suspension of a supervision requirement pending appeal, when the child is not the applicant (S51(9)); CH Rule 23)
24	Child can initiate a review of a supervision requirement [S73]	
25	Review of supervision requirement [S73]	

26	Substitution of voluntary measures on termination of a supervision requirement [S73]	
27	Drawing up of a report for the court re applications re permanency [S73]	

	<i>Sheriff</i>	
28	S16(2) sets out a duty to give a child an opportunity to indicate whether s/he wishes to express views etc., in matters listed in S16(4)(b) and (c).	
29		A.S. 97 r. 3.3 allows the sheriff to dispense with service on the child, or with the attendance of the child, with regard to the matters listed in S16(4)(b) and (c).
30	Decision to grant a warrant [S67; A.S. 97 r. 3.4]	
31		Attachment of a secure condition to a warrant granted under S67
32		Decision not to disclose child's whereabouts in connection with a warrant under S67
33	Making of a CAO. [S55; A.S. 97 r. 3.4]	
34		Making of a CPO (S57) and directions (S58), although guidance encourages ascertainment of child's views by local authority, if practicable, before application is made
35	Child can apply for variation or discharge of a CPO [S60]	
36	Decision to vary or discharge a CPO [S60; A.S. 97 r. 3.4]	
37	Decision to make, vary or discharge an exclusion order or interim exclusion order [S76; A.S. 97 r.3.4]	
38		Child cannot apply for variation or discharge of an exclusion order (S79))
39	Notice of application for finding re grounds for referral [A.S. 97 r.3.4]	
40	Child has right and obligation to attend hearing of application to establish grounds for referral. [S68]	
41		Decision to dispense with hearing of evidence re grounds for referral (S68)
42		Exclusion of child from hearing application for establishment of grounds of referral, due to the nature of the evidence. (Seems this could also apply re ground of offence by the child (S68))
43		Decision to keep the child in a place of safety, whether with or without a secure condition, when grounds of referral established (S68(10))
44	Consideration of appeal against a children's hearing decision [S51]	
45	Child may initiate appeal to Sheriff Principal or Court of Session [S51]	
46	Unless service on child dispensed with, the child has a right to be sent, and to comment on, the Sheriff's draft stated case on appeal to the Sheriff Principal [A.S. 97 r.3.59]	

47		Review of establishment of grounds for referral, and possible, consequent decision to terminate, or delay termination of a supervision requirement (S85)
	<i>Police</i>	
48	The “specified person’s” actions in terms of emergency child protection measures under S61 [Emergency Child Protection Reg. 13]	
49		Duty to refer matters to the Principal Reporter (S53)
50		Recovery of fugitive children and return to persons with legitimate control (S82)
	<i>Others</i>	
51		JP authorisation of emergency protection where it is not practicable to apply to the sheriff for a child protection order (S61)
52	The “specified person’s” actions in terms of emergency child protection measures under S61 [Emergency Child Protection Reg. 13]	
53		Reference to the Principal Reporter by a court (S54)
54		Duty of local authorities, and power of others, to refer matters to the Principal Reporter (S53)
55	Local authority’s initiation of a review of the supervision requirement [S73, due to S17]	
56	Local authority’s transfer of child subject to a supervision requirement [S72, due to S17]	
57		Publication of proceedings at a children’s hearing (S44)
58		Harbouring of fugitive children (S83) [but impact softened by S38 refuges where these exist]

*The Criminal Procedure (Scotland) Act 1995, Section 49*

4.1.4 This provision replaced Section 49 of the Children (Scotland) Act 1995. It sets out the circumstances in which a criminal court must, or may, refer the case of a child, who has either pleaded or been found guilty of an offence, to the Principal Reporter for advice or disposal from, or by, a children’s hearing. An amendment effected by the Crime and Punishment (Scotland) Act 1997 allows the child to appeal the decision to remit the case for disposal. Where the case is referred for advice, CH Rule 22 requires account to be taken of the child’s views where the child is already subject to supervision, and is thus referred in terms of S49(3) of the Criminal Procedure (Sc) Act. There is no equivalent provision for a child not already under supervision, who is referred in terms of Sections 49(1) or (6) of that Act. Nevertheless, Norrie (1997) makes no distinction between Sections 49(1), (3) and (6), and implies that the provisions regarding attendance at the hearing and seeking of the child’s views apply to all such cases.

### *The Principal Reporter*

4.1.5 The Principal Reporter is not required to seek to ascertain the views of children. Relevant decisions identified by the Act include:

- action on receipt of a referral from a court (Section 54);
- initial investigation of any referral (Section 56);
- responsibility to convene an initial hearing of the case of a child subject to a child protection order (Section 59);
- decision to liberate a child detained under a child protection order; or decision not to take the case to a hearing (Section 60);
- decision to call a hearing to give advice to a sheriff re an application to recall or vary a child protection order (Section 60(10));
- decision to liberate a child detained in terms of emergency protection measures (Section 61(8));
- decision to liberate a child or hold a hearing, where a child is arrested by the police (Section 63);
- duty to refer to a hearing in the circumstances set out in Section 65.

### *The Secretary of State*

4.1.6 Neither does the Secretary of State need to consult children when carrying out his secondary legislation function identified in the Act with regard to:

- procedure at children's hearings (Section 42);
- emergency child protection measures (Section 62);
- children subject to supervision requirements (Section 74);
- secure accommodation (Section 75);
- the functions of a local authority re exclusion orders (Section 80).

### *Comment on the above*

4.1.7 The above identification of situations, in which a child's views do or do not require to be ascertained, is based upon a close reading of the Act and secondary legislation. However, some of the judgements made by the author might be open to other, more generous interpretations. In particular:

1. One might argue that ancillary decisions fall within the ambit of the requirement to ascertain views, even if not specified, on the basis that they form part of the "consideration" leading to the making of the particular decisions which *are* specified in Section 16(4). This might apply to the attachment of secure authorisations, and decisions to prohibit disclosure of the child's whereabouts, in relation to warrants and supervision requirements (Refs. 8, 21, 31, 32), and to the children's hearing decision to set a date for review of a supervision requirement (Ref. 21). It might also be arguable with regard to the sheriff's making of a secure order in connection with a Section 67 warrant (Ref. 31).
2. Ref. 9 refers to the Table in Appendix B for a discussion of the interpretation of the Children's Hearing (Scotland) Rules with regard to the requirement to take account of views when issuing of secure warrants. It would certainly appear to have been the intention to specify these matters amongst the situations in which the child's views must be sought.

3. It might also be argued that practice operates beyond the level of legal requirement with regard to ascertaining the views of the child. However, in an era when increasing emphasis is placed upon the need to comply with international instruments such as the European Convention on Human Rights, this may not be sufficient to persuade critics.

*Is there any pattern in the picture presented with regard to decisions related to a requirement to seek to ascertain the views of the child?*

4.1.8 The Children (Scotland) Act 1995 sought to move the Scottish legal system towards implementation of the UNCRC. The requirement to take account of the child's views is set out in Article 12 of that Convention. Another basic principle of the Convention is Article 3, which requires all actions concerning children to take the child's interests as a "primary consideration." Section 16(1) of the 1995 Act requires that the child's welfare be the "paramount consideration" when decisions are made in terms of Part II of the Act. Unlike the requirement concerning the child's views, which the Act applies only in the circumstances set out in Section 16(4), the requirement concerning welfare applies to "any matter". Thus, the Act goes beyond the requirements of the UNCRC in giving greater weight to the *welfare* of the child (the "paramount" rather than the "primary" consideration) but falls short of the requirements of the Convention in its restriction of the requirement to ascertain *views* to particular situations.

4.1.9 It is of interest that the Travaux Préparatoires to the Convention show that the invitation to a child to express her/his views was regarded by the drafters as integral to identification of the child's interests (Marshall 1997). This makes it difficult to justify limitation of the requirement regarding children's views, in the light of the almost unrestricted application of the primacy of the child's interests. What might be the justification for exclusion of the requirement to ascertain the child's views?

1. It might be argued that, in some of the situations omitted from Section 16(4), it would not be possible to ascertain the views of the child because of the dynamics and speed of the relevant situation. However, this is already taken account of in Section 16(2), which says that the requirement to take account of views applies only "so far as practicable." This might apply to the making of a child protection order and accompanying directions, a situation in which official guidance encourages ascertainment of the child's views so far as practicable (Ref. 34). There is no equivalent encouragement in the guidance on emergency protection measures (Ref. 51), although the relevant regulations do require the child's views to be taken account of at the earliest possible stage by a police constable implementing such measures or a person authorised by a JP to do so. It is only the actual decision by the JP that is exempt from this requirement. This may be due to an assumption that it is not practicable in these circumstances and this may well be the case in many situations. The question remains whether this is not already taken account of in the practicability qualification in Section 16(2).
2. It might reasonably be argued that it would be oppressive and illogical to require ascertainment of a child's views with regard to a decision aiming to remove barriers to their expression, such as the decision to exclude certain persons from the children's hearing (Ref. 15 and 16).
3. It might be argued that it would act against other articles of the UNCRC (Article 3 regarding welfare and Article 19 regarding protection of the child) to insist on the ascertainment of the child's views regarding decisions to refer the matter to the Principal Reporter (Refs. 49, 53,

54). This argument might also be applied to parts of the decision of the Principal Reporter himself (decisions (a), (b), (c) and (h)).

4.1.10 There are other decisions exempt from the requirement to take account of the child's views that may well be present merely as casualties of the approach taken. Had the Act stated that the child's views should be sought, where practicable, in all *except* the circumstances specified, the list of exemptions may well have been smaller. The fact that it chose to apply the principle only to specified decisions, means that there may be unintended and unjustifiable omissions. These are surveyed below.

#### *Children's Hearings*

- Secure authorisations: As indicated above, with regard to the children's hearing, these might be included on a generous interpretation of the Act and regulations. However it would be best to have the matter clarified (Ref. 8).
- Appointment of a safeguarder (Ref. 14): There seems no reason why this should not be included in the requirement to seek to ascertain children's views so far as is practicable.
- Sharing information with "relevant persons" (Ref. 17): This requirement, introduced as a consequence of the European Court decision *McMichael v UK* (1995) 20 E.H.R.R. 205, has been the cause of considerable concern to many involved in the children's hearing system who consider that it is too sweeping and inhibits the free expression of children's views.
- Transfer of a case to another children's hearing (Ref. 18): There seems no reason why this should not be included in the requirement to seek to ascertain children's views so far as practicable.
- Consideration of an application for suspension of a supervision requirement pending appeal, when the child is not the applicant. (Ref. 23): There seems no reason why this should not be included in the requirement to seek to ascertain children's views so far as practicable.

#### *Sheriff*

- Sheriff's decision to dispense with service on a child or with the child's attendance (Ref. 29): While the inclusion of a power to dispense in some circumstances is understandable, this provision has the potential to undermine the requirements of Section 16(2) with regard to the child's views. It is important to monitor its application.
- Child cannot apply for variation or discharge of an exclusion order (Ref. 38): There seems no reason why the child should not be able to apply.
- Sheriff's decision to dispense with the hearing of evidence re grounds for referral (Ref. 41): There seems no reason why this should not be included in the requirement to seek to ascertain children's views so far as practicable.
- Exclusion of child from hearing application for establishment of grounds of referral, due to the nature of the evidence (Ref. 42): One can understand why this might be appropriate in some circumstances, if the evidence was such that it would be against the child's interests to hear it in the way in which the court required that it be presented. Further consideration might be given to how the relevant substance of the information considered during the exclusion might be imparted to the child. The Rules of Court allow the safeguarder and relevant person or representative of the child to remain. In most circumstances, this would be

a sufficient safeguard of the child's rights. It is however concerning that such exclusion appears, in theory at least, to be applicable also in cases where the application is based upon an offence by the child.

- Decision to keep a child in a place of safety, whether with or without a secure condition, when grounds are established (Ref. 43): There seems no reason why this should not be included in the requirement to seek to ascertain children's views so far as practicable.
- Review of establishment of grounds for referral and possible, consequent decision to terminate, or delay termination of, a supervision requirement (Ref. 47): There seems no reason why this should not be included in the requirement to seek to ascertain children's views so far as practicable. Indeed, it would seem crucial to obtain the views of the child about the timing of the termination of the requirement and any associated arrangements.
- Recovery of fugitive children (Ref. 50): In the light of the research and findings of public inquiries about the reasons for children absconding from public care, it would be advisable to include some requirement that the child be given an opportunity to discuss their reasons, in case there is a situation of abuse or neglect.
- Harbouring of fugitive children (Ref. 58): Some of the same considerations apply as set out above regarding the recovery of fugitive children. The impact of the offence of harbouring is softened by the possibility of refuge in terms of Section 38. However, it is understood that implementation of Section 38 is patchy and inconsistent in approach.
- Publication of proceedings at children's hearings (Ref. 57): It is difficult to envisage a situation in which a child might wish or benefit from publication. However, there seems no reason to deny an opportunity for the child to present their views about both publication and non-publication, especially as the sheriff, the Court of Session and the Secretary of State have a power to dispense with the prohibition.
- Principal Reporter's decision to liberate children detained in places of safety (decisions (d), (f) and (g)): There seems no reason why this should not be included in the requirement to seek to ascertain children's views so far as practicable. Indeed the child may well have a relevant view on this matter.
- Principal Reporter's decision to call an advice hearing related to an application to the sheriff to vary or recall a child protection order (decision (e)): There seems no reason why this should not be included in the requirement to seek to ascertain children's views so far as practicable.
- Secretary of State's decision with regard to the content of secondary legislation: It would be consistent with Article 12 of the UNCRC, and would lead to more informed procedures, if relevant children were consulted about the content of such secondary legislation.

## **WHICH CHILDREN ARE INCLUDED IN ANY SUCH REQUIREMENTS?**

4.2.1 Three sets of questions were asked in the introduction: are fixed ages prescribed? Is there a presumption of age 12? Is there a 'gradualist' approach, and if so, who makes the judgement and on what criteria is it based?

### *Age and Maturity*

#### Section 16 – children’s hearings and sheriffs:

4.2.2 Section 16(2): “Without prejudice to the generality of this subsection a child of twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.”

#### Children’s Hearing (Sc) Rules 1996

4.2.3 CH Rule 15(1): “The children’s hearing, taking account of the age and maturity of the child whose case has been referred to the hearing for a purpose mentioned in paragraph (2) shall so far as practicable give the child an opportunity to indicate whether he wishes to express his views.” (Note: the “age and maturity” criterion seems to apply here to the presentation of an opportunity to express views, rather than the weight to be given to views expressed, which is the activity to which this criterion is applied in Article 12 of the UN Convention.) CH Rule 15(5) says: “For the purposes of this rule, a child of twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.”

#### Act of Sederunt

4.2.4 A.S. 97 r. 3.3: “Where the sheriff is satisfied, taking account of the age and maturity of the child, that it would be inappropriate to order service on the child, he may dispense with –

- (a) Service on the child; and
- (b) The attendance of the child at the hearing of the application.

#### Section 17 – the local authority

4.2.5 Section 17(3) regulates the local authority’s responsibilities with regard to children they look after or propose to look after, and contains no reference to age 12.

#### *Comment on the above*

4.2.6 The CH Rule provision merely reinforces Section 16(2). A.S. 97 contains no such specific reinforcement concerning the age of 12, but does allow the sheriff to consider age and maturity generally in deciding whether the child should be invited, or required, to participate in the proceedings. It may seem anomalous that Section 17(4) contains no reference to the age of 12 but this is perhaps appropriate as the local authority’s contact with the child is of a more ongoing nature, rather than procedural.

## **WHAT PROCESSES ARE SPECIFIED FOR ASCERTAINMENT OF THE CHILD'S VIEWS?**

*In what situations is a process prescribed?*

### Section 16 – children's hearings and sheriffs

4.3.1 S16(2): "In the circumstances mentioned in subsection (4) below, a children's hearing or as the case may be a sheriff...shall so far as practicable –

- (a) Give him an opportunity to indicate whether he wishes to express his views;
- (b) If he does so wish, give him an opportunity to express them; and
- (c) Have regard to such views as he may express."

### Children's Hearing (Sc) Rules 1996

4.3.2 CH Rule 15(3): "Where he has indicated his wish to express his views –

- (a) the children's hearing and the chairman of the hearing may exercise any of their powers under the Act or these Rules as they or, as the case may be, he considers appropriate in order to ascertain the views of the child; and
- (b) the children's hearing shall not make any decision or take any action mentioned in paragraph (2) unless an opportunity has been given for the views of the child to be obtained or heard and in terms of section 16(2) of the Act they have had regard to such views as he may have expressed."

4.3.3 CH Rule 15(4): "Without prejudice to the generality of the powers mentioned in paragraph (3)(a), the views of the child may be conveyed to the children's hearing –

- (a) by the child, or by his representative, individually or together in person;
- (b) by the child in writing, on audio or video tape or through an interpreter; or
- (c) by any safeguarder appointed by the hearing."

4.3.4 CH Rule 26: refers back to Rule 15 with regard to processes.

### Act of Sederunt

4.3.5 A.S. 97 r.3.4: "(1) Subject to rule 3.3 [power to dispense with service on child] and to paragraph (2) [sheriff's order that part of the application is not served on the child], after the issue of the first order or warrant to cite... the applicant shall forthwith serve a copy of the application and first order or warrant to cite on the child, together with a notice or citation in..."

There follows a list of Forms to be used in connection with applications:

- for a CAO;
- to vary or set aside a CPO;
- for an exclusion order;
- to vary or recall an exclusion order;
- for a warrant to keep a child in a place of safety;
- in respect of an application for establishment of grounds for referral to a children's hearing.

4.3.6 A.S. 97 r.3.5:

“(1) Where a child has indicated his wish to express his views, the sheriff –

- (a) may order such steps to be taken as he considers appropriate to ascertain the views of that child; and
- (b) shall not make any order or disposal mentioned in paragraph (b) or (c) of section 16(4) of the Act unless an opportunity has been given for the views of that child to be obtained or heard.

(2) Subject to any order made by the sheriff under paragraph (1)(a) and to any other method as the sheriff in his discretion may permit, the views of the child may be conveyed –

- (a) by the child orally or in writing;
- (b) by an advocate or solicitor acting on behalf of the child;
- (c) by any safeguarder or curator *ad litem* appointed by the court; or
- (d) by any other person (either orally or in writing) provided that the sheriff is satisfied that that person is a suitable representative and is duly authorised to represent the child.

(3) Where the views of the child are conveyed orally to the sheriff, the sheriff shall record those views in writing”.

4.3.7 A.S. 97 r. 3.22: in any proceedings in the sheriff court under Part II of the Act, application can be made for the child to give evidence by live television link.

Section 17 – the local authority

4.3.8 S17(3): “Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the views of –

- (a) the child....”

S17(4): “In making any such decision a local authority shall have regard so far as practicable –

- (a) to the views (if he wishes to express them) of the child concerned...”

*How do such processes compare with each other?*

4.3.9 The processes with regard to the children’s hearing and the sheriff are roughly equivalent. There are some differences in the examples given of the ways in which the child’s views might be presented but, in both the CH Rules and A.S. 97, these are said to be illustrative only. The main difference lies in the fact that, if the sheriff dispenses with service on the child, the child might never be given an opportunity to express views, although s/he might still be able to present them through various representatives. A.S. 97 requires the sheriff to record in writing any views expressed orally by the child.

4.3.10 The local authority provision is less specific in its terms, which may be appropriate given that many of the decisions with which it will be concerned will take place outwith any formal process.

*Is provision made for an advocate/representative of the child?*

#### Children's Hearings

4.3.11 Children's Hearing (Sc) Rules 1996, rule 11(1): Any child whose case comes before a children's hearing and any relevant person who attends that children's hearing may each be accompanied by one person for the purpose of assisting the child, or as the case may be, the relevant person at the hearing.

4.3.12 Section 46(1) allows the exclusion of the relevant person's representative in certain circumstances, there is no equivalent provision regarding exclusion of the child's representative.

#### Children's Hearings and Sheriffs

4.3.13 Section 41 of the 1995 Act requires consideration by children's hearings and sheriffs of the case for appointing a person "to safeguard the interests of the child in the proceedings."

#### Sheriff

4.3.14 A.S. 97 r. 3.7:

(1) The sheriff –

(a) shall, as soon as reasonably practical after the lodging of an application or the commencing of any proceedings [apart from CPO proceedings under S57 – see A.S. 97 r. 3.6], consider whether it is necessary to appoint a safeguarder in the application or proceedings; and

(b) may at that stage, or at any later stage of the application or proceedings, appoint a safeguarder.

(2) Where a safeguarder has been appointed in proceedings before the children's hearing or the sheriff in respect of related proceedings, the appointee shall, unless the sheriff on his own motion or cause shown by a party directs otherwise, be the same person appointed as safeguarder by the children's hearing or sheriff.

4.3.15 A.S. 97r.3.8(c) says a safeguarder should "determine whether the child wishes to express his views in relation to the application and, if so, where the child so wishes transmit his views to the sheriff." R.3.9 allows the safeguarder to appear personally in the proceedings or instruct an advocate or solicitor to appear on his behalf. Any such advocate or solicitor acting for the safeguarder shall not act also as advocate or solicitor for the child in the proceedings.

4.3.16 A.S. 97 r. 3.9:

(1) A safeguarder may appear personally in the proceedings or instruct an advocate or solicitor to appear on his behalf.

(2) Where an advocate or solicitor is appointed to act as a safeguarder, he shall not act also as advocate or solicitor for the child in the proceedings.

4.3.17 A.S. 97 r. 3.5 (quoted above) also envisages that a child's views might be presented by an advocate, solicitor, curator *ad litem*, or other "suitable representative".

#### *Comment on the above*

4.3.18 Children's Hearings: The representative of the child is there to "assist" the child and may therefore be expected to support the child in his or her expression of views, although this is not explicit. Whilst Section 46(1) allows the exclusion of the relevant person's representative in

certain circumstances, there is no equivalent provision regarding exclusion of the child's representative. Whilst this may seem appropriate as a matter of principle, it is understood that some concern has been expressed about circumstances in which the person presenting as the child's representative is actually there at the instigation of the relevant person and whose presence may in fact inhibit the free expression of views by a child. Perhaps the solution lies in a more rigorous inquiry into the status of that person and the child's own wishes, although in practice this could be quite difficult and sensitive.

4.3.19 Children's Hearings and Sheriffs: The focus of the safeguarder's role is on the interests of the child rather than the child's views. Nevertheless, it is envisaged, both by Children's Hearing Rule 15(4)(c) and A.S. 97 r. 3.8(c) that the safeguarder might have a role in communicating the views of the child to the hearing or court.

4.3.20 Sheriffs: A.S. 97 identifies a number of persons who might assist in communication of the child's views.

4.3.21 Both the children's hearing and the court have provision for representation of the child's views and interests. The role of the CH representative is not specifically fixed on expression of views. The expression of the child's views in the sheriff court by any of the designated persons may be described as discretionary, which sounds negative, or flexible, which sounds positive.

4.3.22 The role of the safeguarder is interesting. The communication of views in the context of presenting an opinion about the child's interests may seem to reflect the relationship between Articles 12 and 3 of the UNCRC. However, there is a danger that this mode of presentation might give insufficient profile to the views of the child. If the child's views conflict with those of the safeguarder, this may indicate the need to explore whether the child wishes to have a separate representative to advocate his or her views.

*Is there a provision about facilitating expression of views by the child by limiting the number of people present or excluding specific individuals?*

#### Children's hearings

4.3.23 Section 43(4) allows a children's hearing to exclude representatives of newspapers or news agencies from any part or parts of a children's hearing for so long as they are satisfied that:

1. it is necessary to do so, in the interests of the child, in order to obtain the child's views in relation to the case before the hearing; or
2. the presence of that person is causing, or is likely to cause, significant distress to the child.

4.3.24 Section 46(1) allows the children's hearing to exclude relevant persons and/or their representatives from any part or parts of the hearing for so long as is necessary in the interests of the child, where they are satisfied that:

- (a) they must do so in order to obtain the views of the child in relation to the case before the hearing; or
- (b) the presence of the person or persons in question is causing, or is likely to cause, significant distress to the child.

4.3.25 Where newspaper and news agency representatives are excluded, Section 43(5) says that the chairman *may*, after the exclusion has ended, explain to the excluded person the substance of what has taken place in his/her absence. Where a relevant person has been excluded, Section 46(2) says the chairman *shall* explain to the excluded person the substance of what has taken place in his/her absence.

S65(7) and (9) applications for establishment of grounds for referral

4.3.26 A.S. 97 3.47:

(6) “Subject to paragraph (7), the sheriff may exclude any person, including the relevant person, while any child is giving evidence if the sheriff is satisfied that this is necessary in the interests of the child and that:

- (a) he must do so in order to obtain the evidence of the child; or
- (b) the presence of the person or persons in question is causing, or is likely to cause, significant distress to the child.

(7) Where the relevant person is not legally represented at the hearing and has been excluded under paragraph (6), the sheriff shall inform that relevant person of the substance of any evidence given by the child and shall give that relevant person an opportunity to respond by leading evidence or otherwise.”

*Comment on the above*

4.3.27 The A.S. 97 provision implies that, if the relevant person is legally represented, that representative will impart this information. This raises a question about the availability of guidance or training for such legal representatives to help them to communicate the child’s views in a way that will not make life more difficult for the child. In both the CH and the Sheriff Court, it is possible to exclude relevant persons, who must later be given some information about what took place in their absence. The CH may exclude media representatives, and the Sheriff can exclude “any person” other than a relevant person, without any duty to communicate what took place in their absence. The Sheriff’s power of exclusion is set out only in relation to the hearing of evidence in applications to establish grounds of referral. It may be appropriate to ask Sheriffs whether they would welcome an equivalent power with regard to other procedures.

*Is it possible for a child’s views to be kept confidential?*

Children’s hearings

4.3.28 CH Rule 5 requires the Reporter to give to the relevant persons and other specified persons, any information that is supplied to members of the children’s hearing. This includes any views of the child given orally to the Reporter. It is therefore not possible for the child’s views to be kept confidential.

Sheriff

4.3.29 A.S. 97 3.5(4) “The sheriff may direct that any written views given by a child, or any written record of those views, shall:

- (a) be sealed in an envelope marked “Views of the child – confidential”;
- (b) be kept in the court process without being recorded in the inventory of process;
- (c) be available to a sheriff only;
- (d) not be opened by any person other than a sheriff; and
- (e) not form a borrow able part of the process.”

*Comment on the above*

4.3.30 It is difficult to justify the discrepancy between the practice at the children's hearing and the court with regard to the confidentiality of the child's views. It cannot be justified on the basis that the court has a distinct function with regard to the hearing of evidence, for it is precisely when the child's views fail to be regarded as evidence as such, as opposed to preferences, that sheriffs are reluctant to maintain confidentiality. If it is the preference of the child for the information to be confidential, the process of expression of views may be halted at the level of the children's hearing, where it cannot be kept confidential, and may never reach the sheriff court, where it might be kept confidential.

4.3.31 No information given by a child can be kept confidential at a children's hearing. This includes expression of views. However, if the matter proceeds beyond the hearing to the sheriff, the sheriff *is* empowered to direct that the child's views be kept confidential. Case law (see Appendix A) has shown some differences of approach amongst sheriffs regarding the relationship between the child's interests in the preservation of confidentiality and the parents' rights of natural justice in having access to relevant information. In one case (*Grant v Grant* 2000 GWD 5-177) there appeared to be uncertainty about the source of the child's right to confidentiality. The differences between the children's hearing and the court in terms of the possibility of confidentiality create an illogical situation. The lack of the possibility of confidentiality at the stage of the children's hearing might inhibit a child from expressing views, and this might block progression of the case to the sheriff where confidentiality is at least a possibility. The uncertainty of sheriffs about the legal and philosophical justifications for offering confidentiality to a child may well be inhibiting a whole-hearted embrace of the provision in the Rules of Court and may signal a need for an opportunity for sheriffs to explore these issues in a principled way.

## **WHAT WEIGHT IS TO BE GIVEN TO THE CHILD'S VIEWS?**

### Children's Hearings and Courts

4.4.1 Section 16(2): "Taking account of the age and maturity of the child concerned" applies to the extent to which courts and children's hearings are required to "have regard" to children's views.

### Children's Hearings

4.4.2 CH Rule 15: paragraph (3)(b) merely says, "have regard to such views as he may have expressed," echoing the words of Section 16(2)(c). The criteria about age and maturity are located within paragraph 15(1) of the Rules and relate to giving an opportunity to express views. However, they will be applied to the weight to be given to the child's views because of the application of Section 16(2), described above.

### Sheriff

4.4.3 A.S. 97 does not refer to age and maturity. However, these criteria will be applied to the weight to be given to the child's views because of the application of Section 16(2), described above.

### Local Authority

4.4.4 Section 17(4) requires the local authority to "take account of" the child's age and maturity when having regard to the child's views.

*Is there any pattern in the picture presented?*

4.4.5 In general terms, Section 16(2) is consistent with Section 17(4), and both appear reasonable and consistent with Article 12 of the UNCRC.

## **IS THERE PROVISION FOR FEEDBACK TO THE CHILD ABOUT THE DECISION AND THE CONSIDERATION GIVEN TO THE CHILD'S VIEWS?**

(Note: The detailed information in this section of the paper is summarised in a table at the end.)

### Conduct of children's hearing considering case on referral (Section 65) or at review of supervision requirement (Section 73(8))

4.4.6 CH Rule 20(5): "After the children's hearing have considered the case of the child and made a decision disposing of the case, but before the conclusion of the hearing at which the decision is made, the chairman shall inform the child, any relevant person, any safeguarder, and any representative, if attending the hearing, of:

- (a) the decision of the hearing;
- (b) the reasons for the decision;
- (c) the right of the child and of the relevant person under Section 51(1) of the Act to appeal to the sheriff against the decision and, where the appeal is against a decision relating to a supervision requirement, to apply to the children's hearing for suspension of the requirement appealed against."

4.4.7 CH Rule 21(1): Subject to Sections 70(6) and 73(11) of the Act [non-disclosure of address], as soon as reasonably practicable after a children's hearing have made a decision disposing of the case of a child under this Part of the Rules, the Principal Reporter shall send to the child, any relevant person, any safeguarder and the local authority:

- (a) Notice of the decision and a copy of any supervision requirement or, as the case may be, any continuation of a supervision requirement;
- (b) A copy of the statement of reasons for the decision; and
- (c) Except in the case of a review which continues a supervision requirement, being a review in relation to which an order under S51(7) of the Act is in force [frivolous appeals], notice of the right of the child or, as the case may be, a relevant person under S51 of the Act to appeal to the sheriff against the decision,  
And such notice shall be given in writing."

### Conduct of children's hearing on reference for advice by court, the local authority or approved adoption society

4.4.8 CH Rule 22(5): After the children's hearing have considered the case of the child and determined the advice they shall provide, the hearing shall inform the child, any relevant person, any safeguarder and any representative, if attending the hearing of that advice. CH Rule 22(6): As soon as reasonably practical after the children's hearing determine the advice they shall provide, the chairman shall make or cause to be made a report in writing providing that advice, including a statement of the reasons for that advice.... CH Rule 22(7): Within 7 days following a determination by the children's hearing, the Principal Reporter shall send a copy of the report prepared under paragraph (6) to the court, the local authority or the approved adoption society, as the case may be, and the child, any relevant person and any safeguarder appointed in the proceedings."

Application for suspension of supervision requirements pending hearing of appeals. CH Rule 4.4.9 23(4) The chairman of the children’s hearing shall inform the applicant at the conclusion of the hearing of the decision of the hearing and the reasons for it. Note: the child may not be the applicant.

Procedure relating to warrants, orders, and to requirements under S69(3) of the Act

4.4.10 CH Rule 26(1) requires the views of the child to be obtained in relation to:

- (a) Section 45(4) and (5)
- (b) Section 59(4)
- (c) Section 63(5)
- (d) Section 66(1) and (5)
- (e) Section 69(4)
- (f) Section 69(7)
- (g) Continuation of Section 58 directions
- (h) Issue of warrant under the 1996 [secure accommodation] regulations
- (i) Section 69(3)

4.4.11 CH Rule 26(2): “Where a children’s hearing have issued or, as the case may be, continued such a warrant, order, direction or requirement as is mentioned in paragraph (1), the Principal Reporter shall send as soon as reasonably practicable to the child, any relevant person and any safeguarder appointed in the proceedings:

- (a) a copy of the warrant, continuation of the warrant, continuation of the order, or requirement and a copy of the statement of the reasons for the decision; and
- (b) notice of the right of the child.... Under S51 of the Act to appeal to the sheriff against the decision.”

Child Assessment Order

4.4.12 A.S. 97 r. 3.28: “The local authority shall intimate the grant or refusal of an application to such persons, if any, as the sheriff directs.”

### Making of Child Protection Order

4.4.13 A.S. 97 r. 3.32: “Where an order is granted, the applicant shall forthwith serve a copy of the order on:

- (a) the child, along with a notice in Form 50...” Form 50 is written in child-friendly language and informs the child of how to seek advice or initiate a challenge to the order.

### Application to vary or set aside a CPO

4.4.14 A.S. 97 r. 3.33(5): Where an order is made granting the application for variation, that order shall be in Form 53. r.3.33(6): “Where the sheriff so directs, intimation of the granting or refusing of an application shall be given to such person as the sheriff shall direct.” Note: No duty to intimate to the child and no consideration of intimation where the application is unsuccessful, or where it relates to the setting aside of the order. This seems to leave the child in limbo, as r.3.4 requires intimation of the application on the child, unless this is dispensed with by the sheriff.

### Making of exclusion order

4.4.15 A.S. 97 3.37(2): “Where the sheriff grants an order... it shall be in Form 55 and shall forthwith be served on:

- (c) the relevant child...”

### Variation or recall of an exclusion order

4.4.16 A.S. 97 r. 3.40(4): Intimation of the granting or refusing of an application shall be given by the applicant to such persons as the sheriff shall direct.” Note: No requirement to intimate to the child, although 3.4 requires intimation of the application on the child, unless this is dispensed with.

### Section 67 warrants for detention of a child

4.4.17 A.S. 97 r. 3.43: no provisions regarding intimation to child.

### Section 65(7) and (9) applications for establishment of grounds for referral

4.4.18 Abandonment of the application - A.S. 97 r. 3.46(2): “The Principal Reporter shall intimate such abandonment to:

- (a) the child, except where service on the child has been dispensed with....”

### Decision of sheriff

4.4.19 A.S. 97 r. 3.51(2): The sheriff clerk shall forthwith send a copy of the interlocutor containing his decision to:

- (a) the child, except where service on the child has been dispensed with....”

(3): “The sheriff may, when giving his decision ... or within 7 days thereafter, issue a note of the reasons for his decision and the sheriff clerk shall forthwith send a copy of such a note to the persons referred to in paragraph (2).”

### Section 51 Appeals

4.4.20 A.S. 97 r. 3.58(4): The sheriff clerk shall forthwith send a copy of the interlocutor containing the decision of the sheriff, and where appropriate of the note [of reasons] referred to in paragraph (2),... to the appellant (and to the child or the relevant person, if not the appellant)....”

**Section 51(11) Appeals**

4.4.21 A.S. 97 r. 3.61: “(1) The sheriff principal, on hearing the appeal, may either pronounce his decision or reserve judgement. (2) Where judgement is so reserved, the sheriff principal shall within 28 days give his decision in writing which shall be intimated by the sheriff clerk to the parties.” Might the child not be a party?

**Section 85 review of establishment of grounds of referral**

4.4.22 A.S. 97 r. 3.64(2): “The provisions of rule 3.51 shall apply to any order made under paragraph (1).” Note: this refers to the communication of the sheriff’s decision re application to establish grounds for referral in terms of Section 65(7) and (9). See above for details.

**IS THERE ANY PATTERN IN THE PICTURE PRESENTED?**

4.5.1 The following table allows a comparison of the requirements discussed above for notification of decisions to children.

**Table 4.2 Part I, Chapters 2 and 3 – Analysis of Provisions Regarding Notification of Decisions to Children**

Ref	Decision	Made by	Verbal	Mandatory written	Discretionary written
1	S65 referral or S73(8) review	CH	*	*	
2	Advice to court, local authority or adoption society	CH	*	*	
3	Suspension of supervision requirement pending appeal	CH	?		
4	Warrants, orders and S69(3)	CH		*	
5	Making of child assessment order	Sheriff			*
6	Making of child protection order	Sheriff		*	
7	Variation or setting aside of child protection order	Sheriff			*
8	Making of exclusion order	Sheriff		*	
9	Variation or recall of exclusion order	Sheriff			*
10	S67 warrants for detention of child	Sheriff			
11	Abandonment of application for establishment of grounds of referral	Sheriff			*
12	Decision re establishment of grounds of referral	Sheriff			*
13	S51(1) Appeal	Sheriff		*	
14	S51(11) Appeal	Sheriff Principal			?
15	S85 review of establishment of grounds of referral	Sheriff			*

*Comment on the above*

4.5.2 There does not appear to be a justification for some of the differences shown in the above table. In particular, A.S. 97 r. 3.3 allows the sheriff to dispense with service on the child where such service would seem inappropriate, taking account of the child’s age and maturity. A.S. 97 r. 3.2 says that this applies “where by virtue of Section 16(2) of the Act a child may be given an opportunity to indicate whether he wishes to express views in relation to the application or

proceedings.” It does not therefore apply in general to intimation of decisions. Only the decisions referred to as 11 and 12 above make reference to this prior dispensation as a qualification of a duty to give notice to the child of the decision.

## **CHAPTER FIVE: PART II OF THE CHILDREN (SCOTLAND) ACT 1995, CHAPTER 4**

5.0.1 Children who are subject to Parental Responsibilities Orders (PROs) are ‘looked-after’ children under Section 17 (6)(c) and are therefore subject to the Section 17(3) requirement that local authorities must take account of such children’s views in making “any decision with respect to a child whom they are looking after, or proposing to look after”. A fuller account of these responsibilities towards ‘looked-after’ children is set out in the commentary (above) on Chapter One.

### **WHICH DECISIONS REQUIRE CHILDREN’S VIEWS TO BE CONSIDERED?**

5.1.1 Section 16 (4)(b)(i) requires sheriffs to apply the process of seeking and having regard to a child’s views, to the making, varying or discharging a Parental Responsibilities Order (PRO). Conditions, including contact, may be part of a PRO or a variation of PRO. The implication of Section 16(2) and (4) is that the insertion of any conditions forms part of the decision to make or vary and the child’s views are therefore required.

5.1.2 However, it would appear that procedural decisions for the court are not governed by the requirement to take account of the child’s views: for example, the decision as to whether the child’s views should be treated as confidential in terms of the sheriff court rules. These decisions do not constitute making, varying or termination, but merely procedural steps in the process. (Compare McGrath v McGrath 1999 SLT (Sh Ct) 90 in Appendix A.)

5.1.3 This might be compared with the wording in Section 6 of the Adoption (Scotland) Act 1978, where the court’s duty is to have regard to a child’s views is “in reaching any decision relating to the adoption” (see below under adoption).

5.1.4 Local authority decisions about children who are subject to PROs, including internal “looked-after” reviews laid down in the Arrangements to Look After Children (Scotland) Regulations 1996, require children’s views to be sought (Section 17(3) – see also Reg 5(3) and (4) and Reg 8).

### **WHICH CHILDREN ARE INCLUDED IN ANY SUCH REQUIREMENTS?**

5.2.1 In the court process and in the local authorities’ duties, no fixed ages are prescribed (except that provisions relate to children under 18). The duty is with regard to all children. The Section 16 presumption of maturity, in relation to a child who is 12 or over, applies here.

5.2.2 So far as the local authority duties are concerned, the consideration of the views of the child requires the authority to take account of the child’s age and maturity. In Scottish Office Guidance (Vol.2, Ch.1, Para. 97), in relation to looked-after children, authorities are advised to invite to reviews a child of 12 or over and to consider younger children “in the light of their age and understanding.”

## **WHAT PROCESSES ARE SPECIFIED FOR ASCERTAINMENT OF THE CHILD'S VIEWS?**

5.3.1 In court cases relating to PROs, the 1997 sheriff court rules, Chapter 2, Part V (A.S. 97), deal with the ascertaining of children's views. The Rules of the Court of Session do not have rules for these applications, as they can be dealt with only in the sheriff court.

5.3.2 In *all* applications for PROs, there must be a curator (A.S. 97, r. 2.39), whose duties include finding out from the child whether he wishes to express a view and, if so, ascertaining that view (A.S. 97, r. 2.40(2)(c)). The child's views may be given by the curator orally to the sheriff (A.S. 97, r. 2.40(3)). However, the appointment of curators is not mandatory in variations or discharges of PROs (A.S. 97, r. 2.44(3)).

5.3.3 If the child has indicated that he wishes to express a view, there are other options for ascertaining it. Rule 2.41 deals with the procedure where a child wishes to express a view, and sheriffs can order any appropriate procedural steps.

5.3.4 The sheriff may also treat the views as confidential – A.S. 97, r. 2.41(2). Although the child's views do not have to be sought as to whether the views should be treated as confidential, it is arguable in terms of Section 16(1) that the sheriff's decision about confidentiality is governed by the child's welfare as paramount. The wording of Section 16 is different in this respect to the wording in Section 11 discussed in the case of McGrath v McGrath above.

5.3.5 Guidance in relation to looked-after reviews encourages facilitating the expression of views by children, with or without an advocate (see section above on Chapter 1).

5.3.6 In any court case, and in relation to any other matter of law, a young person is entitled to instruct his or her own solicitor if he or she has an understanding of what it means to do so in terms of the Age of Legal Capacity (Scotland) Act 1991.

## **WHAT WEIGHT IS TO BE GIVEN TO THE CHILD'S VIEWS?**

5.4.1 In the court process, the sheriff must "have regard" to the views expressed. In taking decisions about the child who is subject to a PRO, the local authority must "have regard" to the views, taking account of the child's age and maturity; no age is specified (Section 17(4)(a)).

## **IS THERE PROVISION FOR FEEDBACK TO THE CHILD ABOUT THE DECISION AND THE CONSIDERATION GIVEN TO THE CHILD'S VIEWS?**

5.5.1 There is no provision for feedback from the court process. Guidance advises that, in reviews, "looked-after" children value the opportunity to be heard etc. and that children should be encouraged to participate, although there is no specific statement that a child not attending should be given feedback (see section above on Chapter 1).

## **CHAPTER SIX: PART III AND SCHEDULE 2 OF THE CHILDREN (SCOTLAND) ACT 1995**

6.0.1 Statutory references in this part are to the Adoption (Scotland) Act 1978, unless otherwise stated. Comment is focused mainly on the 1997 Sheriff Court Rules. Generally speaking, the Court of Session position is similar, except in relation to the appointment of a curator, which is not mandatory in any Court of Session adoption process.

### **WHICH DECISIONS REQUIRE CHILDREN'S VIEWS TO BE CONSIDERED?**

6.1.1 Section 6 places a duty on adoption agencies and courts to consider the views of the child in “any decision relating to the adoption.” This covers all planning decisions by the adoption agency (who may or may not be a local authority) and all decisions by the court, including procedural decisions such as whether views should be treated as confidential. The reference to adoption includes not only adoption, but also freeing or revocation of a freeing.

6.1.2 Given the wide-ranging nature of the duty in Section 6, most situations in the process of adoption etc. are covered. The Adoption Agencies (Scotland) Regulations 1996 reiterate the duties imposed by Section 6 in relation to recommendations by adoption panels, in Reg 11(5), but all the other decisions taken in these regulations, and the decisions about an adoption allowance in terms of the Adoption Allowance (Scotland) Regulations 1996, are governed by the principle of taking account of the child's views.

### **WHICH CHILDREN ARE INCLUDED IN ANY SUCH REQUIREMENTS?**

6.2.1 No fixed age is set out in Section 6; the reference applies to all children. Agencies and courts need to consider the views “so far as practicable”, “taking account of his age and maturity”. However Section 6 (2) also states the presumption that a child of 12 years or over shall be presumed to have a view. It must be remembered that this covers not only the court process but also agency decisions.

### **WHAT PROCESSES ARE SPECIFIED FOR ASCERTAINMENT OF THE CHILD'S VIEWS?**

6.3.1 In court applications, the sheriff court rules for adoptions, freeings for adoption and revocations place a duty on the curator to find out whether the child wishes to express a view, and if so, to ascertain that view. Thereafter, the view would be expressed in a report, although it may be expressed orally (A.S. 97 r.2.8(2)(d) & (3), r.2.16(1)(c) & (2) & r.2.26(2)(u) & (3)). However, while the appointment of a curator is mandatory in adoptions and freeings for adoption, it is *not* mandatory in revocation applications. Therefore, the process of obtaining the child's views may not be so easy unless a sheriff decides to appoint a curator in these proceedings. The sheriff still has a duty to seek and consider the child's views.

6.2.2 Children's views may be treated as confidential in all three procedures in terms of A.S. 97 r. 2.9(2), 2.17(2) & 2.27(2). As indicated above, a sheriff's decision about whether to treat views as confidential or not should be made on the basis of putting the child's welfare as paramount, given the terms of Section 6.

6.2.3 A child may instruct a solicitor to appear on his behalf if he has an understanding of what it means to do so, in terms of the Age of Legal Capacity (Scotland) Act 1991.

6.2.4 So far as agency decisions are concerned, there is no process specified in the Adoption Agencies (Scotland) Regulations 1996 for the ascertaining of these views, and there is a definite gap in respect that there is no provision that a child may attend his or his adoption panel. Such a provision would be helpful. However, almost all agency adoptions are in relation to children who are 'looked-after', at least up until the adoption and/or freeing is granted, and therefore the agency/local authority will use its/their normal processes with regard to 'looked-after' children in terms of Section 17 of the 1995 Act.

### **WHAT WEIGHT IS TO BE GIVEN TO THE CHILD'S VIEWS?**

6.3.1 Section 6 requires the agency and the court to "have regard so far as practicable" to the child's views, "taking account of his age and maturity". There is no prescribed age, apart from the presumption that a child of 12 or over shall be presumed to be of sufficient age and maturity to form a view. The 1997 Sheriff Court Rules do not add anything to the weight or age position. However in all three processes, where a child has indicated his wish to express a view, the sheriff "shall not make an order" unless "an opportunity has been given for the views of that child to be obtained or heard". (A.S. 97 r.2.9(1)(b), r.2.17(1)(b) & r.2.27(1)(b)).

6.3.2 In all freeings for adoption, and in all adoptions, including post-freeing adoptions, the child of 12 or over is asked for his or her consent; no freeing or adoption can be granted without that consent. The only way in which consent may be dispensed with is if the court were to consider that the child was incapable of consenting. This means that the views of a child of 12 or over are crucial to the process. (Section 12(8) & Section 18(8))

6.3.3 Consent of a child is not required to revocation, although the views of the child are required. It should be noted that, despite the mistake in the 1997 Sheriff Court Rules, (R.2.15 refers only to Section 20(1)), revocation applications are open not only to former birth parents, but also to local authorities, in terms of Section 20(1A), and may be more numerous.

### **IS THERE PROVISION TO FEEDBACK TO THE CHILD ABOUT THE DECISION AND THE CONSIDERATION GIVEN TO THE CHILD'S VIEWS?**

6.4.1 In the court processes, there is no provision for feedback. So far as agency decisions are concerned, there is no provision (although good local authority practice as informed by Guidance, particularly in relation to 'looked-after' children) that feedback should be given.

### **COMMENT ON THE ABOVE**

6.5.1 Further thought needs to be given to the inconsistency of approach as regards the appointment of a curator, both between the sheriff court and Court of Session processes, and within the sheriff court processes themselves. The impact on the expression of the child's view needs to be assessed.

## CHAPTER SEVEN: CONCLUDING THOUGHTS – ISSUES AND QUESTIONS

7.1.1 The Children (Scotland) Act 1995, along with its parallel legislation the Children (Northern Ireland) Order 1995 and the Children Act 1989, have been held up by the UK Government as putting the UNCRC into UK legislation (1994, 1999). One of the key rights of the UNCRC so included was the right of a child to have his/her views given due consideration, in matters that affect him/her. Other key principles were also inserted into the Act: the primacy of a child's welfare (a stricter test than that required by the UNCRC) and due regard to a child's religious persuasion, racial origin and cultural and linguistic background. Ensuing regulations in many cases added to these requirements, principles or detailed procedures on how children's views should be included in decisions. Accompanying guidance (Scottish Office 1997), emphasises the need to listen to children's views across its three volumes.

7.1.2 Since the passing of the 1995 Act (and perhaps partially as a result of it), there has been a growing recognition of the need to listen to children's views in decisions that affect them. The Scottish Executive has demonstrated commitment to consulting with children and young people, as exemplified in its funding of consultations over policy initiatives (e.g. Improving Our Schools and the physical punishment of children) and the high ministerial attendance at a 'Youth Summit' (June 2000). The Standards in Scotland's Schools etc. Act 2000 requires children's views to be taken into account in significant decisions about their education. The principle of consulting, listening to and *hearing* the views of children and young people has now gained considerable official support. Practical questions remain, about how to consult them effectively and consistently, and what to do with children's and young people's views once these have been ascertained.

7.1.3 This mapping paper required extremely close reading of the Act, regulations and guidance, to ascertain when, where and how children's views require to be considered. This review suggests:

- (a) that there has been a dedicated attempt to include and think through how children's views should be heard; and
- (b) that the final result is a complicated collage that is not easily grasped, particularly in its details.

This complexity raises questions about what those interacting with the Act – legal professionals, service providers, parents and children and young people themselves – actually know about the requirements and procedures, particularly if they become involved in parts of the Act with which they are unfamiliar.

7.1.4 As Appendix A illustrates, there is not a great deal of Scottish case law focusing on the requirement to listen to children's views under the 1995 Act. Children's views are no doubt being considered in many situations; equally, there may well be breaches of children's rights to be heard but these are rarely revealed in reported Scottish case law. The views of children are arguably 'hidden' behind the reported case law, with few statements about them within cases that affect children under the 1995 Act. The focus tends to be on the other 'facts' and progress of the case.

7.1.5 One advantage of the mapping paper's breadth is the opportunity to compare and contrast how different Parts and Chapters of it – broadly applying to family law, child care, and adoption

– incorporate children’s views. The authors note eight issues that have significant conceptual or practical implications.

## 1. COVERAGE

7.2.1 The Children (Scotland) Act 1995 took a deliberately different approach than other parallel UK children’s legislation, in promoting key legal principles of the UNCRC. The Children Act 1989 and the Children (Northern Ireland) Order 1995 begin with ‘overarching’ principles for courts. In contrast, the Government decided against an overarching statement for the Scottish legislation: “... a statement of overarching principles would add to the length of the Bill ... without any very clear benefit in terms of substance” (Lord James Douglas Hamilton, House of Commons Hansard 1.5.95, Col. 93). It was argued that there was a potential *strength* in detailing the principles, section by section, in terms of ensuring its implementation. Further, this approach would prevent the need to amend the Act so as to state exceptions to listening to children (as was done in relation to ‘public safety’ in S. 17(5)). The end result was that the requirement to listen to children, along with other key legal principles such as the paramountcy of children’s welfare and due regard to a child’s religious persuasion etc., was included in particular sections with particular applications.

7.2.2 This approach has resulted in the principle of listening to children’s views being inconsistently applied to decisions and processes within the Act. Within Part I of the Act, the principle is applied to major decisions within general family life. Where court processes are involved, there is a general requirement to give a child an opportunity to state views etc., and a specific requirement in the Rules of Court to give notice to children of applications for Section 11 orders (although notice may be dispensed with on application by the pursuer, if the sheriff agrees that it is “inappropriate”). Within Part II of the Act, the principle is not applied at all to the provision of services for ‘children in need.’ It does not apply to the actions of the Principal Reporter nor the Secretary of State. The approach taken to the application of the principle to sheriffs and children’s hearings – that of identifying when children’s views should be considered, rather than stating the general principle and then identifying any exceptions – means that they need not consider children’s views in a range of situations identified within the body of this paper. Some of these exceptions were intentional; others are the unintended casualties of this particular approach. Neither did Part III of the Act extend to children a right to attend their own adoption panels.

7.2.3 Certain apparent legal gaps may be addressed by a generous interpretation of the existing law. Furthermore, there are some indications that service providers, unaware of the complexity of the Act, may mistakenly believe that there is a legal requirement to listen to children in some situations. This misconception may well lead to the principle being implemented in practice, despite its omission from the law. Moreover, such practice can be justified with reference to the UNCRC, which has a more general application than the 1995 Act. The Act does not *prohibit* the ascertainment of children’s views. It may well be the case that practice is developing beyond the hesitations and inconsistencies of the Act, to a more general integration of the child’s view into decision-making. This is something that might be explored through research.

## **2. WHICH CHILDREN, AND WHAT WEIGHT IS GIVEN TO THEIR VIEWS?**

- 7.3.1 ■ The Act generally covers children up to the age of 16, with 16-18 year-olds being included for some purposes.
- In most, but not all, provisions, there is a presumption that a child aged 12 or more is of sufficient age and maturity to form a view. This does not apply to the duty on local authorities with respect to children looked-after by them.
  - There is added significance to the age of 12 in the provisions relating to adoption where, in all but the most exceptional cases, the adoption (or freeing for adoption) cannot proceed without the consent of a child of or over that age.

Some of these differences may well be useful as well as intentional; perhaps the day-to-day decisions and the relationship of local authorities to children they look after make the presumption of age 12 irrelevant. On the other hand, certain of these differences may be confusing, suggesting ideas about children's competency that are inconsistent across different aspects of their lives, that are not matched by research evidence, and that give insufficient emphasis to listening children's views in certain situations.

## **3. PROCESS VERSUS EVENT**

7.4.1 The legal provisions differ in their specification of procedures for ascertaining children's views. For example, courts and children's hearings under Sections 11 and 16 must first give children the opportunity to indicate whether they wish to express views, before actually ascertaining their views. This two-step process is not required for local authorities' decisions on 'looked-after' children (Section 17) nor parents in making 'any major decision' (Section 6). Regulations on 'looked-after' children require children's views to be considered in relation to particular aspects of the planning process – but not at all points.

7.4.2 A further process issue relates to recognition of the potential for children's views to change, either as an evolutionary and possibly emotional response to the dynamics of a particular situation or in terms of child development. The more general aspects of child development are discussed below. What is relevant here is the pace at which legal processes move towards a decision and the extent to which decisions are open to review.

7.4.3 While it is not written into the main body of the Children (Scotland) Act (although it does appear in Schedule 2.18 as regards adoption), there is an understanding that delay in reaching decisions is prejudicial to the interests of a child. The introduction of the Child Welfare Hearing, through Rules of Court, was designed to facilitate a speedy resolution of issues relating to children. However, it may also be relevant to explore whether the views of children ascertained at an early stage of the process, when emotions may still be raw, have the permanence and stability that the legal process might then accord to them. Whereas children looked after by the local authority will have regular internal reviews, and children subject to children's hearing supervision will have reviews at least annually, there is no such expectation of review of decisions made under Part I of the Act. While it might well be argued that the introduction of an automatic review would constitute too great an intrusion into family life, and possibly introduce a degree of instability, there might be merit in exploring the views of children on this matter, and their suggestions for mechanisms that would help them pursue legitimate changes to the early determinations.

#### **4. CHILDREN'S DEVELOPMENT**

7.5.1 Only child care guidance recognises that children's views develop and change over time. Helping the child to clarify his or her views is recognised as a social worker's role in a handful of situations, within guidance. Children's change and development is explicitly recognised in decisions about contact for 'looked-after' children and implicitly in reviewing looked-after children's care plans and supervision requirements.

7.5.2 The use of 'age and maturity', qualifying the principle in several sections, can be seen as seeking to recognise children's development. Age, though, may be irrelevant in judging a child's competency if the child has a 'severe' learning difficulty. Defining maturity might benefit from the most recent psychological evidence, that suggests competency is inextricably linked to context and assessing it depends as much on the assessor's competency in determining it (Hogan and Gilligan 1998).

7.5.3 The growth of the children's rights movement, assisted and assisting the sociology of childhood, has tended to under-emphasise (if not attack) information on children's development gained through developmental psychology. Psychology now has accepted some of these criticisms and many psychologists have now themselves re-thought their theories (e.g. see Woodhead 2000 for overview). New research evidence is now emerging that provides a deeper understanding of children's competencies and their developmental stages, which could be vital to ensuring law and practice sensitively and effectively listen to children and young people.

#### **5. FEEDBACK TO CHILDREN**

7.6.1 There is no consistent approach to informing children of decisions made, and the reasons for them, even where their views have been ascertained as part of the process. For certain decisions, children have no right to receive notice (e.g. assessment results for children affected by disabilities), while in other circumstances notice is discretionary (e.g. making of a child assessment order) or mandatory (e.g. making of a child protection order).

7.6.2 Research might explore the reaction of children and young people to such omissions, and to the intelligibility of such information as is received.

#### **6. BEST INTERESTS VERSUS VIEWS**

7.7.1 Only a legal representative has a remit primarily to represent a child's views. Curators *ad litem*, court reporters and safeguarders have an explicit remit to report on children's best interests. A child's representative at a children's hearing is there to provide a supporting role. Whilst these persons might also (and in the curator's case may be required to) seek to listen to children's views, there is a tension in representing both views and interests, which has been observed and criticised by several commentators, who conclude in favour of a clearer delineation of representation/ advocacy (e.g. see CRU 1994; SCLC 1994; SACR 2000).

7.7.2 Guidance for child care services at points refers to the ‘fine balance’ between ensuring children have the option of being involved but are not overburdened by the responsibilities of decision-making. The concern that listening to children would be against their welfare has long been a barrier to the first principle being implemented (see Marshall 1997). As discussed by Marshall, a child’s ‘best interests’ can be used, due to its scope for wide interpretation, as an excuse for not involving or informing children, but it can also reflect some reasonable concerns. How do those with the power to hear and represent children’s views decide on a child’s best interests? On what criteria? In the short- or long-term?

## **7. CONFIDENTIALITY AND ACCESS TO INFORMATION**

7.8.1 Practitioners and commentators have expressed considerable concern about whether children’s views can be kept confidential, particularly in the areas of family law and children’s hearings. Proceedings differ in their capacity to afford confidentiality to the views of a child. Absolute confidentiality cannot be promised for children’s views in children’s hearings: ‘relevant persons’ must receive all information provided for the hearing members, and must be told the substance of what was discussed, should they be excluded from part of a children’s hearing to facilitate expression of the child’s view. In court proceedings, however, sheriffs do have a power to require that the views of the child be kept confidential. The case law set out in Appendix A reflects an ongoing debate about whether such confidentiality is consistent with the requirements for ‘due process’.

7.8.2 A further issue concerns children’s access to formal reports. If children were to receive all of the information available to the adults involved, they might receive detailed information on their parents, if they become involved in court proceedings. This could result in a child being abruptly aware of something concerning the child or his/ her parents (e.g. marital affairs). While one may argue that certain information should not be kept from children, such as the fact that he or she was adopted, the timing and manner of it being told is presumably critical for children’s wellbeing.

7.8.3 There is a need for further exploration of the appropriate balance between ensuring that children’s views are taken into consideration (and the barriers identified by children to their expression of views), promoting their welfare, and identifying and satisfying the requirements of ‘due process.’

## **8. THE INDIVIDUAL CHILD, THE CHILD IN THE FAMILY OR CHILDREN AS A GROUP**

7.9.1 The Children (Scotland) Act 1995 is largely concerned with the individual rights of a child rather than children as part of a family or with their peers. Thus, most references are made to decisions for an individual child. A few references are made within guidance to considering the collective views of children in planning for child care services (e.g. throughcare and aftercare and children’s services planning). One or two mentions are made of siblings.

7.9.2 These exceptions raise issues in areas requiring exploration. Should children and young people more thoroughly be identified as ‘stakeholders’, along with parents and service providers? Virtually all children live within a social context, of their families and their peers. Does an individualised approach take sufficient notice of the importance of these relationships to them?

## **FURTHER QUESTIONS ARE RAISED BY REFLECTING ACROSS THE BREADTH OF THE MAPPING PAPER:**

### 7.10.1

- What counts as a decision?* Whether or not a child’s views must be taken into account is dependent on what constitutes a ‘major decision’ (under Section 6) or a ‘decision’ (for ‘looked-after’ children). Do matters important to children count as decisions?
- What factors/expertise/values inform discretionary decisions?* As regards the competency or maturity of the child, little specification is given within legislation or guidance on how such decisions are to be made, what contextual factors should be considered and what skills are required to do so. For instruction of a solicitor, a child must be considered to have a ‘general understanding’ of what it means to do so; for consent to surgical, medical or dental procedure or treatment, a child must understand the nature and possible consequences of the treatment or procedure (Age of Legal Capacity (Scotland) Act 1991 Section 2 (4)). But one must also ask about the competency of adults charged with making discretionary decisions about children, given especially that these might determine whether children are involved at all. For example, what criteria do sheriffs apply when deciding whether to dispense with intimations to children and separating parents, when making decisions outwith the courts, or when deciding whether to show children’s hearing reports to their child; and the Scottish Legal Aid Board in deciding whether to grant legal aid for a child to be legally represented? All of these can prevent or facilitate children’s views being gathered and taken into account. Further, what criteria do court reporters and safeguarders apply when formulating recommendations based upon their assessment of the child’s interests?
- What facilitates or prevents children from participating?* What information do they need and how might they best receive it? What support do they need? What feedback on decisions should they have? What account is taken of children’s differing communication styles, abilities/ disabilities, backgrounds etc.?

## **AREAS OF FUTURE RESEARCH AND CONSIDERATION**

7.11.1 Ultimately, legislation, regulations and guidance should be judged on whether they make any positive difference for people – in this case, children, young people and their families. This mapping paper provides a detailed analysis that suggests how legislation, regulations and guidance may be helping or hindering the key principle of listening to children.

7.11.2 Its impact on children, young people and their families will be dependent on a range of factors. Do those responsible for implementing the policy know about the requirements relating to children’s views? How do they interpret the legal requirements and guidance? What training have they had? How have their attitudes and practice been formed and informed? How do other

realities such as resources and organisational structures support or work against implementation? These same questions can be asked for children, young people and their families. Do they know what their legal rights and responsibilities are, what formal procedures and opportunities exist? How do their situations, knowledge and personal capacities impact on their experiences and ability to realise their rights and responsibilities? What support and training do they need?

7.11.3 The mapping paper is part of a broader feasibility study, which aims to hear from children and young people about how best to conceptualise and evaluate listening to children under Part I of the Children (Scotland) Act 1995. The analysis here suggests particular avenues of possible exploration with the children and young people, as well as the web of ‘decision-makers’ that have been involved with them. The mapping paper also suggests further routes for exploration: what could be learnt from different practices and knowledge gained in different service and professional areas.

## GLOSSARY

The following Abbreviations have been used within this document:

<b>Name</b>	<b>Abbreviation</b>
<i>Statutes</i>	
Adoption (Scotland) Act 1978	
Age of Legal Capacity (Scotland) Act 1991	ALCA 1991
Children (Scotland) Act 1995	The 1995 Act
<i>Rules</i>	
Children's Hearings (Scotland) Rules 1996	CH Rules
Children's Hearings (Transmission of Information etc.) (Scotland) Regulations 1996	
Rules of the Court of Session, 1994 as amended	RCS
Sheriff Court, Scotland, Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, as amended by the Sheriff Court, Scotland, Act of Sederunt (Family Proceedings in the Sheriff Court) 1996	A.S. 93
Sheriff Court, Scotland, Act of Sederunt (Child Care and Maintenance Rules) 1997	A.S. 97
<i>Regulations</i>	
The Adoption Agencies (Scotland) Regulations 1996	
The Adoption Allowances (Scotland) Regulations 1996	
The Arrangements to Look After Children (Scotland) Regulations 1996	Arrangements Regs
The Emergency Child Protection Measures (Scotland) Regulations 1996	Emergency Regs
The Fostering of Children (Scotland) Regulations 1996	Fostering Regs
The Refuges for Children (Scotland) Regulations 1996	
The Residential Establishments – Child Care (Scotland) Regulations 1996	Residential Regs
The Secure Accommodation (Scotland) Regulations 1996	
<i>Directions</i>	

The Plans for Services for Children Directions 1996	
The Publication of Information about Services for Children Direction 1996	
<i>Guidance</i>	
Scotland's Children – The Children (Scotland) Act 1995 Guidance; The Scottish Office Social Work Services Group, 1997: Vols. 1, 2 and 3	Scottish Office Guidance
<i>Other</i>	
Child assessment order	CAO
Child protection order	CPO
Justice of the Peace	JP
Parental responsibilities order	PRO

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## APPENDIX A: CASE LAW

### BACKGROUND

This paper has been produced as part of a feasibility study, commissioned by the Scottish Executive Justice Department, in relation to aspects of the operation of Part I of the Children (Scotland) Act 1995. It provides an analysis of case law, focusing mostly on Part I of the Act but, as with the Mapping Paper generally, bringing in some relevant matters that have arisen in relation to other Parts. This review of case law was completed in March 2001.

### INTRODUCTION

The cases have been extracted from reports in:

- (a) Current Law
- (b) Scots Law Times
- (c) Scottish Civil Law Reports
- (d) Green's Family Law Reports, and
- (e) Green's Weekly Digest.

The cases discussed below are those in which reference was made to the question of the views of the child, either in passing or as part of the substance of the decision. The analysis does not attempt to take account of every case in which the views of children *should* have been considered. A number of judgements make no mention of this one way or the other. In particular, judgements summarised in GWD do not cover this point, unless it is part of the *ratio decidendi*.

Most of the cases relate to proceedings covered by the 1995 Act or the Adoption (Scotland) Act 1978, as amended by that Act. The analysis addresses a few particularly informative cases dealing with the previous legislation, where reference was made to the views of children. However, in general, it does not rehearse the case law from before implementation of the 1995 Act.

Excluded from the analysis are:

1. English cases;
2. cases relating to the evidence of children; and
3. cases dealing with procedural issues.

Item 1 is excluded as not relevant to the 1995 Act. Item 2 is a matter of evidential law in terms of the Civil Evidence (Scotland) Act 1988: the views of children are not relevant in deciding these matters. The recent case of T v T 2000 SLT 1442 has disposed of this matter satisfactorily for children. Regarding item 3, cases dealing with procedural issues, such as Child Welfare Hearings are included only where the issue of Children's views is also dealt with in the judgement.

## **PART I OF THE 1995 ACT**

### **APPLICATIONS FOR ORDERS UNDER SECTION 11**

*1997*

Henderson v Henderson 1997 FamLR 120. Sheriff Bell at Edinburgh. This was a pre 1995 Act case. The Sheriff made no orders, on the view that a custody order was not necessary, and E (11) was opposed to access, and her wishes were decisive. Sheriff Bell also expressed an opinion that there was no need to sist children as a party to the action and that their views could be taken without a child being formally represented.

McNeill v McNeill 1997 GWD 36-1822. Sheriff Scott at Edinburgh, 16/9/97. Residence and Contact Orders were made. A reporter was involved in the case and L (11) was referred to a solicitor in her own right.

*1998*

Perendes v Sim 1998 SLT 1382. Outer House, Lord Osborne 11/3/98. The father (P) sought access and the case was heard under the pre 1995 legislation. Nevertheless, Lord Osborne stated that the court was required to take the views of the children into account. He held, however, that the mother had clearly influenced these views as a result of her own feelings, and the weight given to the children's views should be limited. The children were aged 11 and younger.

Morgan v Morgan 1998 SCLR 681. Sheriff Principal Risk at Aberdeen, 8 May 1998, in an appeal against a decision by the Sheriff to award a Residence Order and sist the case at the child welfare hearing. The children were 10 and 7. The older child had given confidential information in response to a Form F9.

McGhee v McGhee 1998 FamLR 122. Sheriff Scott at Dumbarton, 1/6/98. Residence and contact orders were granted. The Sheriff had taken evidence from two of the children (15 and 10) outwith the presence of their parents. He clearly considered this evidence of the children's views, though "with care" because of possible parental influence.

Fairbairn v Fairbairn 1998 GWD 23-1149. Sheriff Bell at Edinburgh, 8/6/98. The children were aged 13, 7 and 5. The Sheriff observed that children under 12 could have their views sought and taken into account.

Fourman v Fourman 1998 FamLR 98. Sheriff Morrison at Edinburgh, 11/9/98. This was an application for a Specific Issue Order for the children to be removed to Australia. The children were aged 14, 10 and 6. The 14-year-old became a party minuter to the action, and the Sheriff was happy with this, and felt that being represented enabled her to take part in the proceedings without getting involved in the parental argument. She had lodged an affidavit. The sheriff referred to the views of the other children in his judgement.

McCulloch v Riach 1999 SCLR 159. Sheriff Principal McGuire at Dunfermline, 12/10/98. This was another appeal about whether the Sheriff could make a final order at the Child Welfare Hearing; he had dismissed M's application for section 11 orders. In doing that, the Sheriff had: a

written report by the Curator; a verbal one; and the views of the children expressed to the Curator and another Sheriff the year before. The children were aged 10 and 7. The Sheriff Principal refused the appeal.

1999

Ross v Ross 1999 GWD 19-863. Sheriff Principal Bowen at Glasgow 6/5/99. Another appeal about disposal of a case at the Child Welfare Hearing. The Sheriff refused the father's application for contact. The Sheriff had, among other papers, letters sent by the three elder children and had taken these into account. The appeal was allowed for procedural reasons. Observations were made about confidentiality of the views of children (see below).

Mowatt v Mowatt 1999 GWD 19-864. Sheriff Principal Risk at Aberdeen, 10/5/99. An appeal about procedural orders from the Sheriff was refused. Comment from the Sheriff Principal that contact sought by the defender to the younger child was unlikely to be granted given the child's attitude to it.

White v White 1999 SLT (ShCt) 106. Sheriff Principal Nicholson at Edinburgh, 2/8/99. The father defender sought post adoption contact with the two children, aged 14 and 8. The older child entered the action of a third party and lodged answers in which she said she did not want contact. The defender thereafter sought only contact with the younger child. After proof and interviewing the younger child, the Sheriff allowed contact, but the Sheriff Principal overturned this on appeal because of the Sheriff's approach to the question of who had the onus to demonstrate that an order for contact should or should not be made. There is no mention in the judgement of what the younger child's views were, although the Sheriff had clearly heard them when he interviewed the child.

Dosoo v Dosoo (No 2) 1999 FamLR 130. Sheriff Horsburgh at Edinburgh, 12/10/99. A father sought contact with his three children, aged 15, 13 and 4 years 11 months. By the time the case came to proof, the two older children had indicated they did not want contact, and the father respected this and sought only contact with the younger child. (See Dosoo v Dosoo 1999 SLT (ShCt) 86 regarding confidentiality of these views). After proof, the Sheriff refused contact to the youngest child. There is no discussion of the views of the child.

2000

Grant v Grant 2000 GWD 5-177. Sheriff Principal Risk at Dornoch, 26/1/2000. A Sheriff granted Mrs G a Residence Order in relation to two children aged 10 and 7. A curator had been appointed, who had provided reports on the children including their views and circumstances of the parties. The appeal was about whether the findings in fact were supported by evidence and about the confidentiality of the curator's report. (See below under confidentiality). The appeal was refused.

H v H 2000 FamLR 73. Sheriff Principal Risk at Aberdeen, 6/3/2000. Mrs H sought divorce, and Mr H sought a Contact Order in relation to his stepson, aged 11½ at the proof. The sheriff, *inter alia*, awarded a contact order. Mrs H appealed, and the child asked to be sisted as a party and to lead evidence at the appeal, regarding the contact. He lodged an affidavit stating his opposition to contact, and Mr H withdrew his opposition to the appeal. The Sheriff Principal held that the child should be a party to the proceedings and be allowed to lead evidence, as the

Sheriff had erroneously dispensed with intimation of the application on him, and that there had been no activation of the process for the child to enter the case or express views. The child's evidence was heard by affidavit and, on the basis of that and other evidence, the Sheriff Principal found that contact was not in the child's best interests, given his opposition.

The Sheriff Principal stated that "the Sheriff had not had regard to any views which A might have held or expressed." He also indicated that he did not know whether either party in their submissions had mentioned section 11(7)(b). The Sheriff Principal commented that there had been no examination of "the relevant and, indeed, essential matters which I have had to consider."

M v M 2000 FamLR 84. Outer House, Lord Kingarth, 6/6/2000. An application for specific issue orders to allow Mrs M to remove the children to live with her in the USA. She also sought a reduction in Mr M's contact. Lord Kingarth granted the specific issue orders and a residence order to Mrs M, and a flexible contact order to Mr M. In the course of his judgement, he stated that, with reference to section 11(7)(b), it had been agreed that he would see the children individually in chambers, which he did at the end of the proof.

W v B 2000 GWD 30-1166. Sheriff Millar at Aberdeen, 20/9/2000. W sought various orders regarding his child, aged 6. The Sheriff took the view that the only statements about the child's wishes were hearsay, and tended to support each party's position, so he would not consider them.

Gault v Gault 2000 GWD 40-1474. Sheriff Harris at Aberdeen, 30/11/2000. Mr G sought contact with his children aged 11 and 7. The 11 year old had expressed a clear view against contact and it was not in her interests. The younger child was too young to express a view that it would not be in her interests to make a contact order for her alone.

2001

Conn v Conn 2001 GWD 2-80. Sheriff Pollock at Aberdeen, 9/1/2001. Mrs C sought a Residence Order for children aged 7 and 5. The Sheriff said that, given their ages, no particular weight could be attached to the views expressed, except that they had a lot of love for both parents.

## **CONFIDENTIALITY OF CHILDREN'S VIEWS**

Both the Sheriff Court Ordinary Cause Rules 1993 (as amended) and the Child Care and Maintenance Rules 1997, provide for children's views to be treated as confidential by the Sheriff. There are no similar provisions in the Court of Session rules. From the beginning, concern has been expressed by Sheriffs about the appropriateness of holding children's views as confidential, given the normal view that all parties should have access to all information. There are five cases where this appears to have been discussed, although the cases of Dosoo and McGrath are the ones dealing with the matter in greatest depth.

Ross v Ross 1999 GWD 19-863. Sheriff Principal Bowen at Glasgow, 6/5/99. In issuing his decision, Sheriff Principal Bowen observed that Sheriffs required to be sensitive to the intrusion of the confidentiality into the principles of open justice. Care was required to give parties apart from the children an opportunity of expressing their views fully.

Dosoo v Dosoo 1999 SLT (ShCt) 86. Mrs D sought residence and Mr D sought contact for children aged 14, 12 and 4½. The two older boys entered the action as minuters. A report was prepared and the older boys specifically asked that their views be kept confidential. Their views were recorded in appendices to the main report and these were placed in sealed envelopes and not made available to Mr or Mrs D. The father wanted access to the information. The Sheriff held that the issue was contact, that their views about Mr D and contact were set out in their minutes, which Mr D had seen, and that for a child to be able to express views freely he or she had to feel confident about privacy if desired, except in very compelling circumstances.

McGrath v McGrath 1999 SLT (ShCt) 90. Sheriff Principal Bowen at Glasgow, 28/5/99. A father sought increased contact to his child, aged 7. A curator was appointed. At the Child Welfare Hearing, both parents told the Sheriff that they were prepared to leave the decision about increased contact to the child. The curator had spoken to the child, who had asked that her views would not be repeated to her parents. The Sheriff spoke to the curator in private, took into account the child's views, did not reveal them to the parties and indicated that he was not prepared to grant the order sought. The father appealed.

The Sheriff Principal held that the decision had been based not on what the child had told the sheriff, but what had been relayed to him by a third party. It was not the case that the 1995 Act had changed the law, and regard would have to be given to the forthcoming implementation of the Human Rights Act 1998. The matter was remitted to a new Child Welfare Hearing.

Oyenevin v Oyenevin 1999 GWD 38-1836. Sheriff Bell at Edinburgh, 11/11/99. In an application for contact, two children aged 13 and 10 wanted to express their views. A curator prepared a report of these, and the children were anxious that they should not be revealed to their parents. The Sheriff continued the application. He took the view that each party was entitled to know the basis on which the court was dealing with matters and that had to be balanced with the right to express views freely. The cases of Dosoo and McGrath showed irreconcilable approaches. There would need to be further discussion with the curator to find out why the children were anxious about disclosure. The Sheriff expressed an opinion that the welfare of the child was relevant, but was not the paramount consideration in deciding confidentiality. Reporters should take care to tell children that there could be no guarantee of confidentiality.

Grant v Grant 2000 GWD 5-177. Sheriff Principal Risk at Dornoch, 26/1/2000. In refusing an appeal where he held that there was no indication that Mr G had been denied access to the curator's report, the Sheriff Principal reserved his opinion as to whether section 11(7) of the 1995 Act or the UN Convention of the Rights of the Child created a right of confidentiality. If such a right existed, there were difficulties in resolving the conflict between it and the rights of party to disclosure.

## **PART II OF THE 1995 ACT**

### **CHILDREN'S HEARING CASES**

There are no reported cases about the views of children in children's hearing cases. Children's hearings are obliged to consider views in making decisions, and the Sheriff is obliged to consider views when considering substituting his own supervision requirement, or otherwise dealing with an appeal from the hearing. The Sheriff, the Sheriff Principal and the Court of Session are not

required to consider children's views when deciding whether grounds were established or not. However, against the background of consideration of children's views, the provision allowing children to instruct a solicitor has been used in one children's hearing case, R v Grant 2000 FamLR 2. This was decided by an Extra Division on 13/1/2000, on appeal from the Sheriff Principal. The Sheriff Principal had overturned the Sheriff's finding of grounds established. The children concerned were so unhappy with this decision that they sought leave to appeal from the Sheriff Principal and were (reluctantly) allowed such leave. The Division overturned the Sheriff Principal's decision, but the children's views were not something that any of the courts had had to take into account.

Note: The Court of Session judgement of S v Principal Reporter and Lord Advocate was made in August 2001, after the completion of the case law analysis here. As reported on [http://www.childrens-hearings.co.uk/echr\\_judgement.html](http://www.childrens-hearings.co.uk/echr_judgement.html):

“To this end the Court considered that the availability of legal representation is desirable in certain circumstances where it is in the interest of justice, particularly having regard to the discussion of reports and where there may be consideration of secure accommodation. It reached a view that the absence of any right to apply for legal aid (whatever the ground for referral) is incompatible with Article 6 [of the European Convention of Human Rights]. The Scottish Children's Reporter Administration has introduced an interim scheme to make papers available to children. This is recognised as a significant development in line with Convention compliance.”

## **EMERGENCY ORDERS**

Russell v W 1998 FamLR 25. Sheriff Matthews at Glasgow, 26/8/97. This was a full hearing about an Exclusion Order sought by the local authority. The Sheriff granted the Exclusion Order. A curator was appointed and the evidence from her suggested that the 10-year-old daughter wanted to see the “named person” under supervision, although the Sheriff refused contact for other reasons. However there is no doubt that the Sheriff did take account of the views of the 10 year old, although he did not appear to do so in relation to the two younger children aged 6 and 4.

## **PARENTAL RESPONSIBILITIES ORDERS, SECTION S86**

None of the few reported cases on PROs deals with children's views. Appeals have related to procedural matters, including jurisdiction. However, it is worth mentioning City of Glasgow Council v B 2000 SLT 167. This was a decision on 16 July 1998 by Sheriff Peebles at Glasgow, in relation to an application to court following on a section 16 assumption of parental rights – i.e. the old procedure, pre 1995 Act. However, the Sheriff in his judgement makes reference to the child's wishes and clearly took these into account in deciding the welfare issue.

## **ADOPTION**

There are no reported adoption cases dealing with children's views. As with children's hearing proofs, and proofs in relation to PRO applications, a decision whether there are sufficient

grounds to dispense with consent is a matter of evidence only, notwithstanding the terms of section 6 of the 1978 Act – views to be taken account of in “all decisions”.

In City of Edinburgh Council v S 2000 SLT 147, Sheriff Morrison at Edinburgh on 16/8/99 refused to grant a freeing order. One of the factors he took into account was that the older child aged 8½ wished to continue contact with her mother, but the decision was not about taking account of the child’s views. Those views were merely part of the evidence of the whole case.

## CONCLUSION

Almost all the cases about children’s views are concerned with Section 11 applications. That is on the basis of the reported cases, although many of them are dealing with other issues of evidence or procedure, and views are coincidental. Under the proceedings in Part II of the Act, or for adoption, views are not reported as an issue, because the cases are almost always concerned with evidence rather than possible later consideration of views.

In applications for PROs and adoption, a Sheriff is obliged to appoint a curator, and the court rules in turn oblige the curator to seek out whether a child has views, and if so, whether he or she wishes to express them. While the curator also has the job of looking at the case from the point of view of the child’s welfare, which is not the same thing as views, nonetheless the rules make it clear that there is a recognised person who can carry out the task. This is different from proceedings under section 11, where the court may appoint a curator or reporting officer but is not obliged to do so. The appointment of a curator does not always mean that views are taken forward properly, and there are questions as to whether curators always come to grips with these issues. For instance, in City of Edinburgh Council v S 2000 SLT 147, when Sheriff Morrison refused a freeing for adoption, he pointed out that the curator had made no attempt to ascertain the child’s views, at the age of 8. Whether this is actually good practice is questionable, as children of that age will have a view and may well wish to express it.

The most concerning thing about the reports on Section 11 applications is whether, in fact, every Sheriff is actually considering children’s views in every case. The case of H v H 2000 FamLR 73 shows what can happen when (as it would appear) the Sheriff and the solicitors before him appear completely to have overlooked the requirements of section 11(7)(b).

It may be that the Sheriff Court Rules should insist that in making any decision about section 11 cases, part of the interlocutor always states what the Sheriff has done about children’s views – e.g. “I consider the children too young to express a view”; or “I ascertained the children’s views by...”. The Sheriff Principal in H v H said he did not know if either party mentioned children’s views in submissions to the Sheriff. It could well be argued that, even if the parties do not draw this matter to the Sheriff’s attention, the court has a duty to deal with it, and Sheriffs should not overlook it.

## APPENDIX B TABLE BY SECTION OF THE CHILDREN (SCOTLAND) ACT 1995

Sec	Subject	Summary	Rule/Reg	Guidance	Comment
1	Parental Responsibilities	Defines parental responsibilities. Subsection (3): The child or someone acting on the child's behalf has title to sue or to defend any proceedings, as respects parental responsibilities			
2	Parental Rights	Defines parental rights. These largely mirror parental responsibilities. However, S2(3) says "Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below." Subsection (6) refers to "a person... who for the time being has and is exercising" rights of residence or regular contact as regards the child. Where both the child's parents fall into that category, the consent of both is required.			Whilst S6 (see below) could be interpreted as requiring those persons with the right to consent to consult the child, the absolute character of this section detracts from the responsibility to give due weight to the child's views. It is also arguable that the terms of this subsection override the rider to S1 which limits parental responsibility (and therefore rights) to action which is in the interests of the child. The child could apply for a court order under S11 to override the lack of consent. The practical significance of this is discussed in the main mapping paper

<b>Sec</b>	<b>Subject</b>	<b>Summary</b>	<b>Rule/Reg</b>	<b>Guidance</b>	<b>Comment</b>
3	Provisions relating both to parental responsibilities and to parental rights	Sets out the starting point for the allocation of parental responsibilities and rights as regards mothers and married, or unmarried, fathers. Subsection (5) allows those with parental responsibilities and rights to arrange for them to be carried out by someone else on their behalf.			Action taken under subsection (5), although not defined as a “major” decision, might well fall within the scope of S6 as regards having regard to the child’s views.
4	Acquisition of parental rights and responsibilities by natural father	Allows the natural parents to register an agreement conferring parental responsibilities and rights on the unmarried father.		Whilst it is not specifically designated as guidance, the material issued by The Scottish Office as an accompaniment to the form prescribed for this agreement, quotes S6 with regard to the views of the child and adds, “The mother should also pay attention to the child’s views if he or she wishes to express them.... If the child really understands what it is about and doesn’t want the mother to make the agreement, the mother should think very hard about whether it would still be in the child’s interests to make the agreement.	While the Act itself does not specify this as a “major decision” in terms of S6, it appears to be being treated as such in official documentation.

Sec	Subject	Summary	Rule/Reg	Guidance	Comment
5	Care or control of child by person without parental responsibilities or parental rights	Gives some responsibilities and rights to persons with care and control of a child but no formal authority. (1) Someone with responsibility for a child (but no parental responsibilities or rights) may take action to safeguard the child's health, development and welfare; and may give consent to medical treatment for the child but (a) only where the child cannot give consent, and (b) it is not within the carer's knowledge that the parent would refuse consent.			S6(1)(a) requires the views of the child to be taken into account by those exercising responsibility under S5.

Sec	Subject	Summary	Rule/Reg	Guidance	Comment
6	Views of children	<p>Requires those exercising parental responsibility or authority under S5 to consult children on major decisions.</p> <p>(1) A person reaching any 'major decision' in fulfilment of parental responsibilities, or as carer under S. 5 (1), or a person who is exercising a parental right or giving consent, must have regard 'so far as is practicable' to the views (if the child wishes to express them) of the child concerned, taking account of the child's age and maturity ...</p> <p>Presumption of sufficient age and maturity at age 12.</p> <p>(2) A transaction entered into in good faith by a third party and a person acting as legal representative of a child cannot be challenged on the ground the child was not consulted or that due regard was not given to the child's views.</p>			<p>A significant and innovative provision, promoting regard for the views of the child. However it lacks weight in terms of enforcement, particularly because of S6(2). Neither does it identify what counts as a "major decision," (apart from in S7 below). It is debatable whether any definition would be helpful. This can be decided only after monitoring of how it has been interpreted.</p>

<b>Sec</b>	<b>Subject</b>	<b>Summary</b>	<b>Rule/Reg</b>	<b>Guidance</b>	<b>Comment</b>
7	Appointment of guardians	Regulates the appointment of testamentary guardians, which is defined as a “major decision” for the purposes of S6 regarding children’s views.			The child’s views are regarded as relevant when the decision to nominate a guardian is made. However, some time might elapse between this nomination and the appointment taking effect on the parent’s death. The child’s views are not required at that stage. The child can have recourse to the court in terms of S11 to have the appointment set aside, but perhaps this is not wholly satisfactory.
8	Revocation and other termination of appointment	Addresses problems which might arise where a number of successive appointments are made with no clear expression of the appointer’s intention. Specifies when appointments terminate.			Refers back to S7, and therefore embraces S6 as regards the views of the child to the extent that these are relevant in relation to the matters regulated, some of which are formal and for the avoidance of doubt.

<b>Sec</b>	<b>Subject</b>	<b>Summary</b>	<b>Rule/Reg</b>	<b>Guidance</b>	<b>Comment</b>
9	Safeguarding of child's property	Deals with situations in which property is due to be transferred to a parent to administer as the child's legal representative. Specifies monetary limits above which recourse may or must be made to the Accountant of Court, who may direct that the property be administered by himself, or by the child's parents or guardians (with the option of adding conditions), or who may apply to the court for appointment of a judicial factor.			S6 would apply to the actions of those exercising parental responsibility. Query – whether this would apply to the Accountant of Court's decision to apply for appointment of a judicial factor, or the court's decision to appoint one? The appointment of a judicial factor is regulated by S11(2)(g) "in the relevant circumstances", i.e., where application is made by persons specified in subsection (3), or, "that although no such application has been made, the court.. considers it should make such an order." Query, whether that is broad enough to embrace appointment of a judicial factor in terms of S9(5)(a) or 13(2)(a). If it is, then S11 (see below) would require account to be taken of children's views as appropriate.
10	Obligations and rights of person administering child's property	Obliges such a person to act with reasonable prudence, to account for his or her actions, etc., and restricts liability where money used for child's welfare			Query whether the S6 duty to take account of the views of the child applies to the Accountant of Court or the judicial factor? The definition of "legal representative" in S15(5) may well indicate that it does.

11	Court orders relating to parental responsibilities etc.	<p>Identifies orders the Court of Session or sheriff court might make as regards parental responsibilities and rights.</p> <p>(7) (b) In considering whether or not to make any order, the court (taking account of the child's age and maturity) shall so far as is practicable give the child an opportunity to indicate whether the child wishes to express a view. If the child does, the child should be given an opportunity to express his/ her views and the court must have regard to the child's views</p> <p>(9) clarifies that this provision does not require the child to be legally represented, in the proceedings, if he does not want to be</p> <p>(10) presumption a child 12 years of age or more is of sufficient age and maturity to form a view</p>	<p>Sheriff Court A.S.93<sup>4</sup>:</p> <p>Rule 13. 1: A person not called as a defender or third party may apply by Minute to enter process (this applies to child in family action).</p> <p>Rule 33. 7 h: Notice in Form 9 must be sent to child, where section 11 order sought or, under 33.7 (7), pursuer should crave dispensation with intimation on child.</p> <p>Rule 33.20: where child has expressed view (can be in various ways), sheriff or someone appointed by the sheriff must record views and the sheriff may decide they should be kept confidential.</p> <p>Rule 33.22A (5): all parties and child who has expressed wish to attend, must attend child welfare hearing.</p> <p>Rule 33.19 prohibits the sheriff from granting an order affecting any child who has indicated the wish to express views, unless the child had had the opportunity to express them, and the sheriff has given due weight to them.</p>		<p>The Rules seek to respect the requirement re the child's views by requiring intimation in a special form, by allowing a procedure for the child's views to be kept confidential, and by allowing the child who wishes to express views to attend the Child Welfare Hearing. Rule 33.22A(5) is strangely worded as regards the Child Welfare Hearing, mixing obligations with expressions of desire. Query – the meaning of “party” in this context; it appears to legally restrict the provision to a child who is party to the proceedings, although in practice this may not be the case. The sheriff's power to dispense with intimation on the child has the potential to undermine the requirements regarding the child's views. See main mapping paper for discussion.</p>
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<sup>4</sup> See last page of this Appendix for guide to abbreviations used.

11	Continued		<p>Rule 33.26 extends this requirement to the sheriff's decision to issue a decree in respect of a joint minute by the parties. Court of Session RCS 49.8(1)(h) requires warrant to intimate to any child for whom a S11 order is concluded. Form 49.8-N sent instead of summons. Service/intimation may be dispensed with on application (r49.8(8)) The Court shall order intimation to any child for whom it is considering a S11 order in a divorce action, unless intimation has already been done or it decides to dispense and/or the child is considered too young (r49.15(2)). An "interested party" may lodge a minute for leave to be sisted as a party (r.49.16). Where a child had returned Form 49.8-N or otherwise indicated a wish to express a view, no order shall be granted unless an opportunity has been given for the child's views to be obtained or heard (r.49.20(1)).</p>		<p>There is no provision in the Court of Session Rules for the views of the child to be kept confidential.</p>
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11	Continued		<p>The court is to order “appropriate” steps to ascertain the child’s views, and “due weight” is to be given to them (rr.49.20(2) and (3)) .</p> <p>Court reporter may be appointed, but no specific mention of ascertaining views (r49.22).</p> <p>Re joint minutes – no decree until child’s views expressed (r49.27)</p> <p>Post-decree S11 applications, no mention of intimation to children. R. 49.20 will apply, but query whether r48.8(1)(h) does. Is this an “action” in terms of r.49.8(1)(h)?</p>		
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12	Restrictions on decrees for divorce, separation or annulment affecting children	Requires the court to consider the arrangements for children, and decide whether to exercise its power to make orders under S11 or S54 (refer to the Children's Reporter). If a court decides that: (a) the exercise of such powers may be appropriate; (b) it is not in a position to exercise them without further consideration; and (c) there are exceptional circumstances leading it to delay grant of decree until it is in a position to exercise those powers, it "shall postpone its decision on the granting of the decree in the action" until it is in a position to exercise them.	A.S. 93, Rule 33.15(2) addresses the situation in which a sheriff is considering whether to make a S11 order by virtue of S12. It requires the sheriff to order intimation on the child, unless the child has already received intimation, or the sheriff considers the child is not of sufficient age or maturity to express his views. He may also dispense with intimation where he considers it would be appropriate to do so, or postpone intimation		Two grounds are given for the sheriff's dispensation with the obligation to intimate on the child: one relates to "appropriateness" (which is the same as Rule 33.7(7), discussed re S11 above), the other relates to the child's age and maturity with regard to the expressions of views. Re the S54 referral, there is no specific requirement to take account of the child's views. See discussion in main mapping paper.
13	Awards of damages to children	Sets out the options open to a court when a sum of money becomes payable to or for a child in court proceedings. This includes the appointment of a judicial factor, or payment to the sheriff clerk, accountant of court or parent or guardian of the child, or to the child directly.			There is no requirement to take account of the views of the child. Norrie (1998) notes that this is "surprising." <sup>5</sup>

<sup>5</sup> Norrie K McK, Children (Scotland) Act 1995, Revised Edition. W Green/Sweet & Maxwell, Edinburgh: 1998, p. 41.

14	Jurisdiction and choice of law in relation to certain matters	Largely formal issues of jurisdiction and choice of law. However, Subsection (4) says that, even if the Scottish courts are required to take cognisance of the law of another jurisdiction in relation to orders to which S11(1) applies, nothing in that law shall affect the application of S11(7), i.e., the three fundamental principles of the 1995 Act, including the provisions relating to the views of the child.			This is an important safeguard for children with international links whose cases are before the Scottish courts.
15	Interpretation of Part I	Defines “child,” “parent” and other significant terms. S15(5) limits the authority of the child’s “legal representatives” (the child’s parents in most situations) to the administration of property, or to circumstances in which the child him or herself is incapable of acting or consenting. Nevertheless, allows the legal representative to sue or defend in civil proceedings relating to a competent child, where that child so agrees.”			Acknowledges the growing autonomy of the child, and allows the competent child appropriate options as regards legal representation.

16	Welfare of child and consideration of his views	<p>Identifies three basic principles to be respected by courts and children's hearings in specified matters: paramountcy of child's welfare, consideration of child's views, and no unnecessary orders.</p> <p>S16(1) sets out the welfare principle.</p> <p>S16(2) says: "In the circumstances mentioned in subsection (4) below, a children's hearing or as the case may be a sheriff, taking account of the age and maturity of the child concerned, shall so far as practicable - (a) give him an opportunity to indicate whether he wishes to express his views; (b) if he does so wish, give him an opportunity to express them; and (c) have regard to such views as he may express; and without prejudice to the generality of this subsection a child of twelve years of age shall be presumed to be of sufficient age and maturity to form a view."</p> <p>S16(5) allows a children's hearing or court to depart from the principle of the paramountcy of the child's welfare where necessary to protect the public from serious harm.</p>	<p>A.S. 97 rr.3.2 - 3.5 prescribe the forms for applications in matters covered by S16(4); authorise the sheriff to dispense with the child's attendance at the hearing of the application, and with service on the child if, taking account of the age and maturity of the child, he is satisfied that it would be inappropriate to order service on the child; order that part of the application be not served on the child; and set out procedures for ascertainment of the child's views, where the child has expressed a wish to do so. The sheriff may direct that the views of the child be kept confidential.</p> <p>Rule 3.5 gives the sheriff discretion as to how to ascertain the views of the child, and sets out a number of illustrative examples, which are discussed in the main mapping paper. Rule 3.15 sets out modes of service.</p>		<p>While S16(1) applies the <i>welfare</i> principle to "any" decision of a court or children's hearing (subject to the "serious public harm" exception in S16(5)), S16(2) requires the views of the child to be taken into account only in specified circumstances. The relationship between the welfare and views of the child is discussed in the main mapping paper. Within this Appendix, the summary column relating to each section will indicate whether S16(2) applies. Sometimes an absence of application of S16(2) is redressed by a Rule or Regulation which does require ascertainment of the child's views, or guidance that suggests that this would be appropriate. Where this is the case, it is indicated in the appropriate columns.</p> <p>The Rules of Court appear to dilute the strength of the Act with regard to the child's views, by making participation more optional. Thus, the S16(2) obligation to take account of the child's views, is reflected in AS3.2 by the word "may." The power to dispense with intimation on the child in AS3.3 uses the criterion of appropriateness; while S16(2) refers to the more restrictive criterion of practicability. It should be noted that S68(4)(b) gives the child a right to attend the hearing of the application for establishment of grounds of referral, See also the comment re S68 concerning the sheriff's power to exclude a child due to the nature of the evidence.</p>
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17	Duty of local authority to child looked-after by them	<p>Defines “looked-after” children, and sets out the duties of the local authority towards them. S17(3) says: "Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the views of - (a) the child..." S17(4) says: In making any such decision a local authority shall have regard so far as practicable - (a) to the views (if he wishes to express them) of the child concerned, taking account of his age and maturity....." S17(5): “If, for the purpose of protecting members of the public from serious harm (whether or not physical harm) a local authority consider it necessary to exercise, in a manner which (but for this paragraph) would not be consistent with their duties under this section, their powers with respect to a child whom they are looking after, they may do so.”</p>	<p>The Arrangements Regs:</p> <ul style="list-style-type: none"> <li>▪ Schedule 2 Part II (6) requires the local authority’s care plan to address "arrangements for involving those persons and the child in decision-making".</li> <li>▪ Reg 5 (3): in regard to placement congruent with religious persuasion "having ascertained so far as practicable the views of the child having regard to his age and maturity .."</li> <li>▪ Reg. 5 (4) , regarding placement for more than one child in family, has the same requirement to consult children as in Reg. 5 (3)</li> </ul>	<p>The Scottish Office guidance (Vol. 2, Ch. 1) refers to the need to take account of the views of looked-after children in a number of contexts. It sometimes speaks of “feelings” or “wishes” rather than views:</p> <ul style="list-style-type: none"> <li>▪ monitoring of care plan: record feelings and wishes after each visit. See child and carer(s) alone as well as together. (Para 76)</li> <li>▪ case records should make it easy to find out the views of children and parents re any decision. Should distinguish between siblings. (Para 127)</li> <li>▪ good practice involves sharing information with looked-after children, even where they do not have a legal right of access to their records. (Para 129/30)</li> <li>▪ local authorities should discover a child’s wishes about contact with parents and other family members. If a child is resistant to contact, the local authority should help the child clarify his or her views. If a child still insists on terminating or restricting contact, the local authority should consider doing so; although the decision should not ultimately rest with the child. (Para 44)</li> </ul>	<p>This is another general section which is relevant to some specific decisions re, e.g., Ss 72 and 73. It is referred to in the discussion of these sections. This section contains no presumption about the age of twelve.</p> <p>The emphasis on the views of the child must be set within the context of S17(1)(a), which obliges the local authority to safeguard and promote the child’s welfare as its paramount concern.</p> <p>What counts as a ‘decision’ rather than a routine matter?</p> <p>Any difference between “reasonably practicable” as regards the duty to ascertain views, and “as far as practicable” when “having regard” to them?</p> <p>Does it make any difference to use the term ‘wishes’ (in guidance) versus ‘views’? The emigration guidance refers to “opinion.”</p> <p>The Arrangements Reg 6 requires that the care plan be agreed with the parent if reasonably practicable. No requirement for children to agree, although Regs 4 and 5 refer to the child’s views in relation to the making of the plan.</p>
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17	Continued	<p>S17(6): "looked-after child" means a child:</p> <p>(a) for whom accommodation is provided under s25;</p> <p>(b) subject to a supervision requirement</p> <p>(c) for whom a local authority has responsibilities in terms of various orders, authorisations or warrants made under this Act; or</p> <p>(d) for whom a local authority has responsibilities in terms of cross-border arrangements with other parts of the UK.</p>		<ul style="list-style-type: none"> <li>▪ local authorities who are satisfied that a particular placement is no longer in the child's best interests, should make arrangements to end it. Considerations in reaching such a decision include "the views of the child and his or her parents." (Para 116)</li> <li>▪ "Before a child who is looked-after emigrates, the local authority should satisfy itself that ... the child, if he or she is old enough to form an opinion, wishes to emigrate." (Para 157)</li> <li>▪ local authorities considering the placement of siblings, should try to ensure that they are placed together, unless this would not be in the best interests of one or more of them. "The views of each child should be ascertained, as far as is possible given their age and understanding." (Para 19)</li> </ul>	<p>Re S17(5): while the equivalent provision for courts and children's hearings in S16(5) exempts these bodies only from application of the principle of paramountcy, the s17(5) exemption applies also to the views of the child.</p> <p>Re S17(6): Note broad range of children included as looked-after. Some children subject to legal orders and authorisations are omitted from this definition and therefore do not benefit from the provisions of S. 17, see text below re Ss 55, 57 and 61.</p>
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	Fostering	This issue has been placed here because it follows on logically from S17. It is addressed in regulations rather than the provisions of the Act.	The Arrangements Regs set out the requirements for care plans, review of children's cases, record keeping and the monitoring and termination of placements. The Fostering Regs provide for approval and regulation of foster carers and the making and regulation of foster placements.	<p>Considerable references within Vol 2, Ch 3 of the Scottish Office guidance, e.g.</p> <ul style="list-style-type: none"> <li>▪ Social workers should involve foster carers' own children in preparation process. (Para 23)</li> <li>▪ particular attention should be paid to children with disabilities and communications needs. (Para 85)</li> <li>▪ The more mature the child, the more fully the child will be able to enter into discussions about plans and proposals. Need for information, explanations and reassurance, especially for younger children. Children should not feel the burden of decision-making. (Para 89)</li> <li>▪ when an allegation against a foster carer is being investigated, decisions about whether a child should remain in the foster home during the investigation should take account of welfare and safety considerations and the views of the child. (Para 67)</li> </ul>	<p>The Fostering Regs do not have a specific focus on the views of the child, but must be interpreted against the background of S17 and also the care plan requirements of the Arrangements Regs. The guidance recognises the need for the views of the foster carer's children to be taken into account during the preparation process. Should this not be an ongoing process, subject to review? The guidance appropriately recognises the communication needs of disabled children. Perhaps there should be a more general and explicit commitment to this as regards all children.</p>
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	Residential Care	This issue has been placed here because it follows on logically from S17. It is addressed in regulations rather than the provisions of the Act.	<p>The Residential Regs:</p> <ul style="list-style-type: none"> <li>▪ Reg 5 requires residential establishments registered under Act to have statement of functions and objectives.</li> <li>▪ Reg 17: when a local authority places child in a residential establishment, it should provide the person in charge with "any other information which the local authority considers relevant to the placement including information about the child's wishes and feelings about the placement, so far as this is appropriate having regard to his age and maturity"</li> </ul>	<p>Scottish Office guidance, Vol 2, Ch. 4:</p> <ul style="list-style-type: none"> <li>▪ Children and their parents should be given a clear statement of their rights and responsibilities. They should have a confidential means of making complaints. They should be involved in decisions affecting them and the running of the home. (Para 23)</li> <li>▪ The home should convey to children the practical arrangements for them to exercise their rights and responsibilities – notably rights to be involved in decisions about their own lives and the running of the home and access to independent advocates. Staff should foster a culture in which children are encouraged to express their views. (Para 24)</li> <li>▪ Complaints procedure should be easily understood and readily accessible to the children and staff. It should include provision for children to gain access, e.g., through a private telephone, to a person independent of the establishment. (Para 25)</li> <li>▪ Children can also be happier about food when they are consulted about the menu. (Para 28)</li> <li>▪ Children should have some choice of leisure and recreation. (Para 29)</li> <li>▪ Personal records should include the views of the child and his or her parents about the placement. (Para 51)</li> <li>▪ External management should visit the establishment to talk with and listen to children, parents and staff. (Para 56)</li> </ul>	<p>The Residential Regs refer to "wishes and feelings" rather than "views."</p> <p>Reg 17 requires written information about some matters, but only "information" about the child's wishes and feelings.; they do not have to be written down.</p>
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	Residential Care - continued		<ul style="list-style-type: none"> <li>▪ Reg 14 "The managers in consultation with the person in charge should, so far as is practicable and having regard to the child's wishes and feelings, arrange that every child accommodated in the establishment is able to attend such religious services and to receive such religious instruction as may be appropriate to the child's religious persuasion"</li> </ul>		
18	Duty of persons with parental responsibilities to notify change of address to local authority looking after child	As per title			Not relevant

19	Local authority plans for services for children	Requires periodic publication by the local authority of plans for “relevant services” for children, preceded by a process of consultation. (5) In preparing any plan, or carrying out any review ... a local authority shall consult ... (b) such voluntary organisations as appear to the authority – (i) to represent the interests of persons who use or are likely to use relevant services in that area; or ... (f) such other persons as the Secretary of State may direct.		Scottish Office Guidance, Vol 1, Ch. 2: <ul style="list-style-type: none"> <li>Children and families currently using the services should be consulted. (Para 22)</li> <li>Before consulting on content, local authorities "may wish to consult first on ... the means of taking views of children and their families" (Para 23)</li> </ul>	No requirement in law to consult directly with children and young people. Must consult with voluntary organisations that represent interests – not necessarily self-advocacy. Could be dominance of welfare interests rather than children’s views. Secretary of State has not directed that children and young people be consulted. However, guidance places greater emphasis on direct consultation with children and young people. The Scottish Executive has issued a Child Strategy Statement encouraging departments to consult children and young people on proposed policy developments.
20	Publication of information about services for children	As per title			Not relevant
21	Co-operation between authorities	As per title			Not relevant
22	Promotion of welfare of children in need	Requires local authorities to safeguard and promote the welfare of children in need (defined in S 93) by provision of a range and level of services for such children and/or their families		Scottish Office guidance Vol 1, Ch. 1, para 22 states: “in arranging services to meet the assessed needs of individual children and their families ... local authorities should ... listen to children and take account of their views”. However, para 16 does not require the child’s views to be ascertained as part of the assessment on the basis of which the services are arranged. Scottish Office Guidance Vol 1, Ch. 6, para 29 points out that children ‘in need’ may use the statutory local authority complaints procedures.	No requirement in law to give ‘due regard’ to children’s views “Child” is defined as up to age 18. It is questionable whether the availability of complaints procedures is adequate compensation for lack of the opportunity to express views on assessment of need.

23	Children affected by disability	<p>Defines 'disability.'</p> <p>Identifies the aims of services for disabled children and those children adversely affected by the disability of any person in the child's family. Obliges local authorities to assess such a child, or the other disabled person within the family, on the request of the child's parent or guardian.</p>		<p>Scottish Office guidance, Vol 1, Ch. 6:</p> <ul style="list-style-type: none"> <li>▪ "The plan and agreement should take account of the child's view and note any areas of disagreement between the social work department, the family or other agencies" (Para 18)</li> <li>▪ "When undertaking assessment of children affected by disability, workers should listen to the child or young person and respect his or her views ... give time and privacy to help them talk about their situation and worries." (Para 21)</li> <li>▪ "Achieving partnerships with parents and children in the planning and delivery of services to children requires that ... they should be given help to express their views and wishes ... professionals and other workers should listen to and take account of parents' and children's views." (Para 23)</li> <li>▪ "It may not always be appropriate to have parents or other family members act as a means of communication between professionals and children and young people." Applies to children with complex needs or communication difficulties. Refers to availability of aids to communication. (Para 24)</li> <li>▪ An extensive discussion on balancing child's right to state their views with the danger of overburdening children. (Paras 24-27)</li> <li>▪ Advocacy for children and families ... is one of the functions of the social worker. In addition, a child and family may want an independent person. (Para 28)</li> </ul>	<p>No requirement in law to give 'due regard' to children's views</p> <p>Child's parent or guardian may request assessment – the child has no legal right to do so.</p> <p>Guidance pays substantial attention to consultation with children, with some gaps</p>
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23	Continued			<ul style="list-style-type: none"> <li>▪ A Special Educational Needs assessment should take into account the views and wishes of the child and his or her parents. (Para 47)</li> </ul>	
24	Assessment of ability of carers to provide care for disabled children	Duty on local authority to carry out an assessment if a carer so requests.			<p>No requirement in law to give 'due regard' to children's views.</p> <p>Where a child is the carer, some might query The right of a child (under age 16) to request such an assessment: a question of the legal competency of the child.</p>

25	Provision of accommodation for children, etc.	<p>Sets out the duty of a local authority to provide accommodation for a child in certain circumstances, and a power to do so in other cases.</p> <p>(5) Before providing a child with accommodation under this section, a local authority shall have regard, so far as practicable, to his views (if he wishes to express them), taking account of his age and maturity; and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity...</p> <p>(6) and (7) prohibit the provision of accommodation against the wishes of anyone with parental responsibility who is willing and able to provide suitable accommodation. If there is a residence order, this right is restricted to the person named in the order. A young person aged 16 or over can give their own agreement, even if the parents object.</p>		Scottish Office guidance, Vol 1, Ch. 4, merely reinforces the Act.	<p>This provision includes the age of 12 presumption.</p> <p>Up to the age of 16, a parent's ability and wish to provide accommodation would override the child's wish to be accommodated. A child in a difficult situation might qualify for safe refuge (S 38), or another route of emergency intervention or compulsory care might be considered in appropriate cases. Norrie (1996) regrets that this provision concentrates on the age of 16 rather than the gradualist approach to competence of the Age of Legal Capacity (Scotland) Act 1991 (ALCA 91).</p> <p>"Accommodated" children are included within the definition of "looked-after" in S17(6), so subsequent decisions would also need to take account of the child's views.</p>
26	Manner of provision of accommodation to child looked-after by local authority	Sets out placement options within the UK.			As this refers to looked-after children, S. 17 will require the local authority to have regard to the child's views.

27	Day care for pre-school and other children	Local authorities are obliged to make provision for day care, out of school care and holiday care for 'children in need' and empowered to provide it for other children. Facilities can be provided for those caring for children in day care or those who accompany them.		Refer back to guidance on S. 22.	There is no requirement to consult children about the provision of these services.
28	Removal of power to arrange for emigration of children	As per title			Not relevant

29	After-care	<p>Sets out local authority duties and powers in relation to advice and assistance for certain young people formerly looked-after by them. Obliges the local authority (but only if the young person consents) to notify another local authority when a young person receiving after-care by the first authority proposes to move into the area of another local authority.</p> <p>Note also S17(2), which requires the local authority to prepare looked-after children for the time when they leave care.</p>	<p>The Arrangements Regs, Reg 4 require that a care plan include the arrangements which need to be made for the time when the child will no longer be looked-after by the local authority.</p>	<p>Scottish Office guidance, Vol 2, Ch. 7:</p> <ul style="list-style-type: none"> <li>▪ "It is a consistent theme of the Act that children and young people should have the opportunity to express their views whenever decisions are being taken about their lives. They should be involved in planning aftercare. They should receive information about their rights and about the resources and services available, so that they can play a real part in planning and make informed decisions about their future." (Para 19)</li> <li>▪ Young people should have the opportunity to contribute to the development and review of plans for aftercare services. Interagency, throughcare and aftercare panels should include young people's groups. (Para 23)</li> <li>▪ Re The Arrangements Reg 4, : "The young person should be fully involved in the plans for their future and able to make their views clearly known ... They may give messages that are confused and contradictory and they may need time to consider issues about their future." (Para 27)</li> <li>▪ Re specialist aftercare services, "A keyworker ... to co-ordinate services... could be drawn from a number of different agencies which are directly involved in assisting the young person and wherever possible the young person should have a say in determining who this co-ordinator might be." "Co-ordinating should involve ... reviewing needs and plans in consultation with the young person." (Para 53)</li> </ul>	<p>No requirement in law to give 'due regard' to children's views once a young person is no longer looked-after by the local authority. However, the young person can control the passing on of information about him or her to another local authority area.</p> <p>The requirement in guidance to involve young people in planning for services, applies to the group rather than the individual.</p> <p>Children generally do not have a choice of social worker. It is interesting that guidance emphasises the need to give young people a say in who should be their keyworker for aftercare.</p> <p>As with fostering, here is another specific requirement in guidance about the communication needs of disabled children, which perhaps requires more comprehensive attention.</p>
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29	Continued			<ul style="list-style-type: none"> <li>▪ Re young people with special needs, "The local authority needs to take any steps necessary to ensure that the views of these young people about their needs, and the ways in which these can be met, are taken into account. This may necessitate the use of skilled communicators and communication support, for example, text telephones or interpreters for those with a hearing impairment." (Para 35)</li> </ul>	
30	Financial assistance towards expenses of education or training and removal of power to guarantee indentures etc.	A more focused after-care power to give grants related to education or training expenses or employment, including associated accommodation and maintenance.			This would normally be at the young person's request
31	Review of case of child looked-after by local authority	Empowers the Secretary of State to set out timescales for review by local authorities of cases of children looked-after by them.	Timescales are set out in the Arrangements Reg. 9. The process of the review is addressed by Reg. 8 which, in its referral back to Regs 4 and 5, requires account to be taken of the views of the child.	Scottish Office guidance, Vol 2, Ch. 1 includes extensive consideration of the need to ensure that reviews facilitate the expression of views by children. Parents', carers' and children's views should be taken into account, for example re: preparation, format, choice of venue, attendance list, involvement of children's rights officers, special arrangements for disabled children, ethnic minorities, and younger children. (Paras 80 – 115)	Guidance contains a very detailed analysis of issues related to children's participation.

32	Removal of child from residential establishment	Gives the local authority powers and duties to remove the child where placed in terms of Chapter 1 and 4 of Part II, but not Chapters 2 and 3 (placement in accordance with a children's hearing supervision requirement or in implementation of a child protection provision).	The Arrangements Reg. 19 obliges the local authority to make arrangements to terminate a placement when it is no longer in a child's interests to remain.	Scottish Office guidance, Vol 2, Ch 1 advises the local authority to take the views of the child into account when reaching a decision to terminate a placement. (Para 116)	Whilst the guidance advises that the child's views be taken into account, this would be in any event a requirement, so far as is practicable, because of S. 17 (4). However, S32 does not qualify the duty of the local authority to remove a child if requested to do so, therefore, although they might seek the child's views, their capacity to take them into account would be curtailed by their duty under S32(b).
33	Effect of orders etc. made in different parts of the United Kingdom	Empowers the Secretary of State to make regulations to cover cross-border transfers of children subject to child care and protection orders within the different UK jurisdictions	Children (Reciprocal Enforcement of Prescribed Orders etc. (England and Wales and Northern Ireland) (Scotland) Regulations 1996 (SI 1996 No. 3267)		Not relevant
34	Registration and Inspection of certain residential grant-aided and independent schools etc.	Introduces compulsory registration with the local authority for residential or other establishments and residential schools providing personal care and support as part of their functions. Continues voluntary registration for non-residential schools where the provision of such personal care and support is not a substantial part of their functions. Extends powers of entry by persons authorised by the local authority.			Not relevant

35	Welfare of children in accommodation provided for purposes of school attendance	Places a duty on managers of schools where residential accommodation is provided for pupils, to “safeguard and promote the welfare of the child or young person while he is so accommodated.” HMI are to include within their inspections consideration of whether this duty is fulfilled.		HM Inspectors of Schools, National Briefing Document, Nov. 1999, says the views of all pupils in residence must be surveyed through questionnaires and selected interviews.	No requirement in law that children’s views be considered in the course of inspection, but this is given high priority in guidance for HMIs.
36	Welfare of certain children in hospitals and nursing homes etc.	Hospitals or nursing homes are required to notify the local authority if the child has not had, or is likely not to have, parental contact for a period of three months. The local authority must enquire as to the child’s welfare and consider whether to exercise any functions under the 1995 Act.		Scottish Office guidance, Vol 1, Ch 1, para 72 expands on this statutory provision.	No specific reference is made to the views of the child. However this may be appropriate for such a protective trigger mechanism. The extent to which the local authority would be required to have regard to the views of the child in its subsequent action would be determined by the other provisions of this Act.
37	Modifications of provisions of Children Act 1989 regarding disqualification from registration as child minder etc.	As per title			Not relevant

38	Short-term refuges for children at risk of harm	Allows the local authority to designate places of refuge for children who appear to be at risk of harm. Entry is dependent upon a child requesting refuge.	The Refuges for Children (Scotland) regulations 1996: Reg 8: requires written notifications to inform specified parties of the fact that the child is being provided with refuge, but not the location.	Scottish Office guidance, Vol 1, Ch 8: <ul style="list-style-type: none"> <li>▪ Explores how to identify that a child is asking for refuge, even if not using that word, including taking account of the views and wishes of the child, and consideration of alternatives. (Para 22)</li> <li>▪ "The local authority should take into account the views and wishes of the child ... when deciding whether to inform a responsible person, the child's family or any other party of the location of the place of refuge." (Para 16).</li> </ul>	Safe refuges are a child-initiated service. Regulations do not specify that children's views should be taken into account beyond this. Guidance gives greater weight to the child's views. Note: children in refuges are not 'looked-after' merely on that account, and thus have no specific rights to have their views heard in subsequent decisions on assessment etc., although they may fall within other provisions, depending upon what is under consideration.
39	Formation of children's panels and children's hearings	As per title			Not relevant
40	Qualification and employment of Reporters	As per title			Not relevant

41	Safeguarding child's interests in proceedings	S16 principle re views does not apply to the decision to appoint a safeguarder "to safeguard the interests of the child in the proceedings."	CH r.14 sets out general duties of safeguarders. A.S. 97, rr. 3.6-3.10: Safeguarder has powers and duties of a curator ad litem re the child. Subject to A.S. 97 r.3.5(1)(a) [sheriff's power to order such steps as he considers necessary to ascertain the views of the child], A.S. 97 r. 3.8(c) says a safeguarder should "determine whether the child wishes to express his views in relation to the application and, if so, where the child so wishes transmit his views to the sheriff." A.S. 97, r.3.9 allows the safeguarder to appear personally in the proceedings or instruct an advocate or solicitor to appear on his behalf. Any such advocate or solicitor acting for the safeguarder, shall not act also as advocate or solicitor for the child in the proceedings.		Why should the child be excluded from the decision whether to appoint a safeguarder? CH Rules do not refer to any role of the Safeguarder re the child's views. A.S. 97 shows a clear concern to facilitate expression of the child's views to the sheriff, and envisages a role for the safeguarder. Its clear distinction between the perspectives of the Safeguarder's agent and the child's agent demonstrates an awareness of the difference between representing interests and views, and the possibility of conflict. It is possible that this awareness has not been fully translated into expectations of the Safeguarder her/himself and the child's perceptions of her/him.
42	Power of Secretary of State to make Rules governing procedure at children's hearings etc.	S16 does not apply to the Secretary of State. Rules may cover provision of information to children, and the right of the child to a representative.	Children's Hearing (Transmission of Information etc. (Sc) Regs 1996 (SI 1996 No. 3260; CH Rules.		It could be argued that children should be involved in the consultation process about the content of the regulations.

43	Privacy of proceedings at and right to attend children's hearing	Power of children's hearing to exclude newspaper or news agency representatives, to avoid distress to the child and to facilitate expression of child's views. S16 does not apply as regards taking account of the child's views in making this decision. The Chairman <i>may</i> later explain to the excluded person(s) the substance of what has taken place.			It is arguable that non-application of S16 re views is understandable, given that the decision to exclude will be informed by a suspicion that the circumstances are not conducive to expression of the child's views. However, the chairman is not obliged to take the child's views into account when deciding whether to explain to the excluded persons the substance of what took place.
44	Prohibition of publication of proceedings at children's hearing	S 16 principle re views of child does not apply.			It is interesting to speculate on whether there might be circumstances in which a child would be able to make a good case for lifting the prohibition, and whether it should be possible for this to happen at the child's instigation (although ultimately based on an assessment of the child's interests).
45	Attendance of child and relevant person at children's hearing	Child has a right to attend, as well as an obligation; only the latter may be dispensed with. Warrant may be issued to secure attendance: in terms of S45(4), where it is considered that the child is unlikely to attend; in terms of S45(5) where the child has failed to attend. No requirement to ascertain child's views re these warrants.	CH Rules 15 and 26 require the hearing to take account of the child's views, so far as practicable, when considering whether to grant warrants under S45(4) or (5).		This is an example of a situation in which the failure of S45 to require consideration of the child's views was redressed by inserting the requirement into the CH Rules.

46	Power to exclude relevant person from children's hearing	Applies to "relevant persons" and their representatives. Designed to avoid distress to the child and to facilitate expression of child's views. Chairman <i>must</i> later explain to the excluded person(s) the substance of what has taken place. S16(2) re the child's views does not apply to the decision to exclude. It is not possible to exclude the child's representative.			As with S43, it is arguable that non-application of S16 re views is understandable, given that the decision to exclude will be informed by a suspicion that the circumstances are not conducive to expression of the child's views. There is concern that the Chairman's <i>duty</i> to convey to the excluded persons the substance of what has taken place (as opposed to a <i>power</i> to do so in S43) may dissuade children from expressing views. While it may seem inappropriate to have a provision allowing exclusion of the child's representative, it is of interest that the children's hearing has no authority to test the legitimacy of the child's representative equivalent of that of a sheriff. See comments on Ss 68 and 91.
47	Presumption and determination of age	The children's hearing can proceed only if the child declares that he is a "child" for the purpose of the hearing, or the hearing so determine.			This is a declaration of fact by the child rather than an expression of views.
48	Transfer of case to another children's hearing	No requirement to take account of child's views.			Might there be circumstances in which the child's view was relevant?
49	Referral or remission to children's hearing where child guilty of an offence	Repealed by Criminal Procedure (Consequential Provisions) (Sc) Act 1995 (c.40), s.6 and Sched.5. Replaced by Criminal Procedure (Sc) Act 1995, s.49.			Repealed
50	Treatment of child's case on remission by court	Procedural re referral from criminal court.			Not relevant

51	Appeals against decision of children's hearing or sheriff	Child has right to appeal. Sheriff <i>may</i> hear evidence from the parties. S16 re child's views applies to disposal of appeal against a decision of a children's hearing. Child may initiate appeal on point of law or irregularity to Sheriff Principal or Court of Session. Child may apply for suspension of the supervision requirement pending appeal, but S16 re child's views does not apply to consideration of any such application, whether initiated by the child or relevant person.	Because S16 applies re the child's views, AS 97, rr3.3 to 3.5 apply. These include the possibility of the sheriff marking the child's views as "confidential" and making them unavailable to the parties. A.S. 97, rr. 3.53-3.61: Arrangements for appeal by child and intimation on child (which may be dispensed with). Rights of parties to be heard and to receive further reports ordered by sheriff. Sheriff may exclude child if presence would be contrary to child's interests; safeguarder, relevant person and child's representative may remain. Sheriff may exclude relevant person and representative to facilitate expression of views by child or prevent significant distress, but must later explain to relevant person the substance of what has taken place.		How real is the child's right to appeal, when the child does not have a right to receive the information made available to the hearing members and the relevant persons? See comments re S65. Is there an incongruity between the confidentiality provisions and the requirement to tell the relevant persons the substance of what has been said in their absence? Anomalous that the child's views do not require to be taken into account as regards consideration of whether to suspend operation of a supervision requirement, pending appeal. Question: whether the right and obligation to attend under S45 applies to hearings to consider such applications for suspension? S45 applies the right/obligation to "all stages of the hearing."
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51	Continued		<p>Child to be sent the decision and any note of reasons; notified of arrangements for any appeal to the Sheriff Principal, and invited to comment on draft stated case.</p> <p>CH Rule 23: Reporter to give child notice of arrangements for hearing application for suspension of supervision requirement pending appeal.</p> <p>Children's hearing must hear the applicant and representative. If the child is not the applicant, there is no duty to consider the child's views.</p>		
52	Children requiring compulsory measures of supervision	Sets out grounds for referral to a children's hearing.			Not relevant
53	Provision of information to the Principal Reporter	<p>Duty of local authority and police, and power of others, to refer relevant information to the Reporter.</p> <p>No requirement to take account of the child's views.</p> <p>Child may also refer to Reporter.</p>			S53 sets out duties and powers regarding investigation of concerns about a child and referral to the Reporter. It is arguable that it would be inappropriate to include reference to the child's views in the context of these triggers relating to the child's protection and welfare.

54	Reference to the Principal Reporter by court	Courts dealing with relevant matters can refer to the Reporter with a finding that a ground of referral has been established in their own proceedings. S16 does not apply re the child's views (although Norrie points out that this does not stop the court from ascertaining them if this would enhance the child's welfare, in respect of which S 16 does apply). S16 does not apply to action by Reporter on receipt of information.	A.S. 97, rr.3.3.-3.5 re the child's views do not apply as S16(2) does not apply to the court's decision under S.54.		It is arguable that it would be inappropriate to include reference to the child's views in the context of this procedure relating to the child's protection and welfare. Norrie's observation does raise the point about the extent to which any decision based on the welfare principle can ignore the ascertainable views of a child. cf. the relationship between Articles 3 and 12 of the UN Convention on the Rights of the Child. [See main mapping paper.]
55	Child assessment orders	Allows a sheriff to make a child assessment order (CAO) on the application of a local authority. S16 applies re views to the making of a CAO. S 90 preserves child's right to refuse examination if competent in terms of S2(4) of ALCA 1991. Child's views would also require to be taken into account re directions re contact.	A.S. 97 r. 3.4 refers to Form 26 as the form of notice to the child of the making of an application for a CAO, inviting the child to express views, and offering options as the ways in which such views might be presented. Rr. 3.25 - 3.28 give further detail as to procedure.	Scottish Office guidance, Vol. 1, Ch.7, para. 16 refers to the S16 requirement that the sheriff considering an application must take account of the child's views. Para. 28 refers to the local authority's duty to take account of the child's views in terms of S17(4) where implementation of the CAO involves the child becoming "looked-after" by them. S29 reminds the local authority of their responsibility to ensure the child is aware of rights under ALCA 1991 and has sufficient information to make informed choices about consent to the assessment.	A situation could arise in which a child subject to a CAO was resident away from home, but not with the local authority. The child would not be "looked-after" in terms of S17(6), and there would be no clear responsibility on anyone to take account of the child's views on general matters. It could be argued against this that Ss5 and 6 would require any individual to take the child's views into account.
56	Initial investigation by the Principal Reporter	Specifies the action to be taken by the Reporter on receiving a referral from any source. S16 does not apply to Reporters. No requirement to take account of child's views.			This may be appropriate, although one might consider that the child's views could be an influential and helpful factor in some cases.

57	Child protection orders	Allows a sheriff to make a child protection order (CPO) on the application of any person. S16 re views applies to the variation or discharge of a CPO, but not to its <i>making</i> .	A.S. 97, r.3.4 refers to Form 27 as the form of notice to the child of an application to vary or set aside a CPO, inviting the child to express views and offering options as to how this may be done. rr.3.5 also sets out options for the sheriff. r. 3.33 gives further detail as to procedure. Paragraph (3) says: "Without prejudice to rule 3.5, any person on whom service is made may appear or be represented at the hearing of the application."	Scottish Office guidance, Vol. 1, Ch. 7, para. 41 says that, before deciding to apply for a CPO, the local authority should, as far as practicable, consider, "the ascertainable wishes and feelings of the child, having regard to the child's age and understanding." Paragraph 63 refers to the local authority's duty to have regard to the views of those children subject to CPOs who are "looked-after" by them. Paragraph 50 refers to the situation in which the child is not "looked-after," and suggests to local authorities that they may be able to offer help in safeguarding the child's welfare.	This is an example of a situation in which neither the Act nor the Rules require the child's views to be taken into account, regarding the decision to <i>make</i> a CPO, but guidance suggests this would be appropriate where practicable. As re the CAO (see S55 above), there remains a question about the views of children not formally "looked-after.", but Ss. 5 and 6, may apply.
58	Directions in relation to contact and exercise of parental responsibilities and parental rights	Allows a sheriff to make directions regarding various matters, to accompany a CPO; includes medical examination and treatment. S16 does not apply re views. S90 allows competent child to refuse medical examination or treatment.		Scottish Office guidance, Vol. 1, Ch. 7, para. 47 refers to children's rights re consent in terms of ALCA 1991.	It seems strange that Directions are not specifically covered by S16(2). See Norrie's comments re S77, arguing that the three overarching principles apply because they apply to S76 to which S77 is ancillary. Could the same reasoning apply here, or is the S58 direction more distinct than a S77 condition? Also, see S59 comment, below.

59	Initial hearing of case of child subject to child protection order	Regulates the hearing, which must normally be held on the Second Working Day after the child's removal or prevention from being removed. S16 re views does not apply to the Reporter's responsibilities. S16 does not apply to hearing's decision whether to continue the CPO or to continue or vary the Order or any S58 direction accompanying it.	CH rr. 15 and 26 require the hearing to seek the views of the child, so far as practicable re continuation of the Order. Rule 26 also requires the child's views to be taken into account re continuation of any accompanying S58 direction.	Scottish Office guidance, Vol. 1, Ch. 7, para. 53, restates the statutory position.	This is an example of a situation in which the failure of the Act to require consideration of the views of the child is remedied by provisions in the CH Rules and Rules of Court.
60	Duration, recall or variation of child protection order	A CPO automatically lapses if no attempt to implement within 24 hours, or application to Sheriff not considered timeously. S16 does not apply to Reporter's decisions re liberation of child or decision not to take to a hearing. Child can apply for variation or discharge of CPO. S16 does not apply to Reporter's decision to call advice hearing (S60(10)), but S16(4)(a)(iii) applies the S16 views requirement to the advice hearing itself. S16 re views <i>does</i> apply to Sheriff's decision to vary or discharge a CPO.	CH r.15 restates the S16 duty re the S60(10) advice hearing.	Scottish Office guidance, Vol.I Ch. 7, para. 52 restates the legal position that the Reporter may, "having regard to the welfare of the child, return the child to his or her family.." No reference to the views of the child. Paras. 54-58 restate the statutory position re the advice hearing, variation and recall.	It might be advisable for the Reporter to take the views of the child into account before deciding upon liberation. The question is whether this and other decisions of the Reporter should be subject to a statutory requirement to take account of the child's views where practicable. The same might apply to the decision to take the matter to a hearing.

61	Emergency protection of children where child protection order not available	Allows any person to apply to a JP to authorise emergency protection measures where it is not practicable for a sheriff to consider an application for a CPO. Police constables can execute emergency protection measures on their own authority, if the criteria are satisfied. S16 re views does not apply to JPs or constables, nor to the Reporter's decision to liberate the child from the place of safety. If a child is in local authority accommodation, he or she is "looked-after" in terms of S17(6), therefore S17(4) requires the local authority to take account of the child's views.	The Emergency Regs: Reg 13: "As early as is consistent with the protection and welfare of the child, the specified person, taking or having taken emergency protection measures, shall taking account of the age and maturity of the child - (a) inform the child of the reasons for the emergency protection measures being taken or having been taken, and of any further steps which may be taken with respect to him under the Act or under these Regulations; and (b) so far as practicable, give the child an opportunity to express his views, and have regard to any views as may be expressed before continuing with emergency protection measures or taking any such further steps."	Scottish Office guidance, Vol.1, Ch.7, para.93 refers to the Regulations re views of the child.	The Regulations do not refer to any presumption about the age of twelve. As re S 60, there is no duty on the Reporter to take account of the child's views re the decision to liberate the child from the place of safety.
62	Regulations in respect of emergency child protection measures	Authorises the Secretary of State to make regulations No specific reference to views of child.	The Emergency Regs		It could be argued that children should be involved in the consultation process about the content of the regulations.

63	Review of case of child arrested by police	Sets out Reporter's responsibilities where informed by police that no charges will be made against a child whom they have detained in a place of safety. S16(2) does not apply to Reporter's decision re liberating child or holding a hearing. S16(2) does not apply to issue of CH warrant under S63(5).	CH Rules 15 and 26 require the hearing to take account of the child's views re the granting of a S63(5) warrant.		Same observations as re Ss60 and 61 re liberation of the child from the place of safety. The Act's failure to require consideration of the views of the child re the warrant is remedied by the CH Rules.
64	Business meeting preparatory to children's hearing	Business meeting of children's panel members may be called by Reporter to deal with procedural matters and receive advice on some practical arrangements relating to a future children's hearing. Reporter must notify child of right to make views known. These would be presented to the meeting by the Reporter. Child has no right to attend.	CH r. 4. Principal Reporter must notify child of: the arrangements for a business meeting; the business to be transacted; relevant documents or information; the child's entitlement to make views known to the Principal Reporter; and the Reporter's duty to present such views to the meeting. If the child gives views orally, the Reporter must record them in writing. The business meeting must consider such views before reaching any decision.		Child is in the same position as adult re the business meeting. Does the Reporter give to the child <i>all</i> of the information given to the adults, as Rule 4 seems to suggest?

65	Referral to, and proceedings at, children's hearing	Reporter's duty to refer to hearing if conditions fulfilled. Child's views not relevant. Hearing will not proceed to consideration of the case if child does not accept the grounds for referral or is incapable of understanding them, in which case the Reporter will make application to the sheriff for a finding as to whether the grounds for referral are established.	CH r.5 obliges the Reporter to give to the "relevant persons" and specified others any information made available to the members of the children's hearing. The child has no right to receive such information. CH r. 20 obliges the chairman of the hearing to explain to the child the substance of relevant information before them, unless this would be detrimental to the child's interests. Rule 6, which obliges the Reporter to notify the child inter alia of his right to attend the hearing, also obliges the Reporter to advise the child that any information he or she provides for the hearing will have to be shared with the "relevant persons." Rule 11 allows the child to be accompanied by a "representative." Rules 15 and 26 restate the duty to take account of views re S69(4) and (7), and impose a duty to take account of the child's views re the S69(3) residential requirement for the purpose of assessment.		Similar observations as before re the relevance of the child's views to the Reporter's decisions where these are based partly on assessments of the child's welfare needs. There is a concern that the requirement to share information given by the child with the "relevant person(s)" will inhibit children from expressing their views freely. It is also significant that children have no right to receive the information provided to members of the hearing, while their parents or "relevant persons" do have such a right. While one might argue that some such material might have to be withheld out of regard for the child's age and immaturity, and possibly the confidentiality of others, the current provisions appear to disadvantage the child both as regards receipt of information supplied by others, and as regards the lack of respect for confidentiality as regards information supplied by the child him or herself.
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66	Warrant to keep child where children's hearing unable to dispose of case	Allows the children's hearing to issue warrants to find and keep a child and bring him/her before a children's hearing. S16 re views applies to the decision to grant a warrant under S66(1) or to continue it under S66(5). It does not explicitly apply to a secure condition under S66(6). The mature child's rights to withhold consent to medical examination or treatment authorised by a condition attached to the warrant, are safeguarded by S66(4). No requirement to ascertain child's views about non-disclosure of his whereabouts where this is authorised by the hearing.	CH rr. 15 and 26 restate the duty to take account of the child's views re the S66(1) warrant and its continuation under S66(5).		Surprising that S16(2) does not apply specifically to the attachment of a secure condition or to non-disclosure of the child's whereabouts.
67	Warrant for further detention of a child	Allows a sheriff to grant a warrant where the children's hearing's authority to detain the child has expired. S16 requires the sheriff to consider the child's views about whether to grant the warrant. It does not explicitly require consideration of his views about any secure condition or non-disclosure of his whereabouts. Neither does it explicitly safeguard the child's right to withhold consent to medical examination or treatment. However, the last point is covered by S 90.	A.S. 97, r.3.4 refers to Form 30 for the form of notice to the child of an application for further detention. The form invites the child's views and offers options for presentation of these. Rules 3.41 - 3.43 give further detail as to the procedure.		Surprising that S16(2) does not apply specifically to the attachment of a secure condition or to non-disclosure of the child's whereabouts.

68	Application to sheriff to establish grounds of referral	<p>Where a child or relevant person has not accepted the grounds of referral, or the child is too young to understand, application can be made to the sheriff to establish the grounds for referral.</p> <p>Child has a right and obligation to attend; the latter may be dispensed with. The child may be represented either by a legal representative or someone not so qualified. Sheriff may decide to dispense with hearing of evidence and deem grounds established where (a) both child and relevant persons accept the grounds, or (b) the relevant person accepts the grounds and the application is based on the child's lack of understanding. No requirement to take account of any views of the child. No requirement to take account of child's views re issue of a S68(10) order to keep the child in a place of safety, whether with or without a secure condition.</p> <p>In general, there is no requirement to take account of the views of the child as part of the process of determining whether grounds are established.</p>	<p>A.S. 97, r.3.4 refers to Form 31 re notice to the child of an application to the sheriff for a finding re the grounds of referral. This invites the child's views and offers options for their presentation.</p> <p>A.S. 97, r. 3.47(4) allows the child to give evidence and call witnesses where the ground for referral is S52(2)(i). Rule 3.47(5) allows the sheriff to exclude the child due to the nature of the evidence; in which case, the safeguarder and relevant person or representative of the child may remain. Rule 3.47(6) allows the sheriff to exclude any person, including the relevant person, while the child is giving evidence, in order to obtain the views of the child, or prevent significant distress to the child. Any excluded relevant person who is not legally represented, must be informed by the sheriff of the substance of the child's evidence.</p>		<p>Could there be a situation in which the child is deemed unable to understand the explanation of the grounds, but the child's views might still be relevant? Anomalous that sheriff does not need to consider the views of the child re continued detention in a place of safety, especially where a secure condition is attached. Rule 3.47(5) seems to apply to all grounds, allowing the sheriff to exclude the child even in a case based on commission of an offence by child. Would it be possible for the "representative" permitted to remain on exclusion of the child to be him/herself a child? Cf. comments re Ss 49 and 61 re testing the legitimacy of representatives.</p> <p>It might be argued that the determination of whether the grounds are established is a factual matter, open to influence by the child's evidence, rather than the child's views.</p>
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68	Continued		Unless intimation was dispensed with, the child is to be sent a copy of the sheriff's decision and any note of reasons.		
69	Continuation or disposal of referral by children's hearing	S16 requires consideration of the child's views when the hearing are considering whether to make a supervision requirement. There is no requirement to consider views with regard to imposition of a S69(3) residential requirement for the purpose of assessment, but there is a requirement to take account of views if imposing a warrant, either in connection with that residential requirement (S69(4)) or in terms of S69(7) where a hearing is continued. S69(9) safeguards the child's rights with regard to medical consent in connection with conditions attached to these warrants. No requirement to take account of child's views re non-disclosure of whereabouts or re imposition of a secure condition.	CH Rule 15(2)(c) requires the hearing to take account of the views of the child as regards the decision to make a S69(3) requirement.		The Act does not require children's views to be taken into account re imposition of a S69(3) residential requirement for assessment; but the CH Rules remedy this omission. Anomalous that child's views not required re non-disclosure of whereabouts or imposition of a secure condition.

70	Disposal of referral by a children's hearing: supervision requirements, including residence in secure accommodation	S16 requires the child's views to be taken into account as regards the decision to make a supervision requirement. There is no specific requirement to take account of the child's views as regards attachment of any conditions, although Norrie considers that this is an integral part and therefore S16 does apply re views. Safeguards child's rights re medical consent in face of any relevant condition. No requirement to take account of child's views re: non-disclosure of where residing; the hearing setting a date for review; or the imposition of an authorisation to keep in secure accommodation.	CH r.15 restates the duty to take account of the child's views re the making of a supervision requirement. Rule 21 requires the Reporter to give written notification to the child of his or her right to appeal against the decision of the hearing in terms of S51.		Anomalous that no requirement to take account of children's views re: non-disclosure of where residing; the hearing setting a date for review; or the imposition of an authorisation to keep in secure accommodation.
71	Duties of local authority with respect to supervision requirements	As per title			Not relevant
72	Transfer of child subject to supervision requirement in case of necessity	The "urgent necessity" could relate either to the child in question or to other children resident in the same place. As children subject to supervision requirements are "looked-after," S17(3) and (4) apply, requiring the local authority, "so far as practicable," to ascertain the views of the child and take them into account.			S17 requires consideration of the views of the "looked-after" child re all decisions.

73	Duration and review of supervision requirement	<p>The local authority has a <i>duty</i> to seek a review when they are satisfied that certain circumstances pertain. Because the child is "looked-after" and therefore S17 applies, the local authority must "so far as practicable" seek the views of the child and take them into account as part of its process of "satisfying" itself. The child may also initiate a review at three month intervals. S16 requires the hearing to take the child's views into account in the process of review. No requirement to ascertain child's view re non-disclosure of address. S73(12), referring to voluntary supervision on termination of a requirement, allows such supervision or guidance "as the child is willing to accept." S16 requires the hearing to take account of the child's views when drawing up a report under S73(13) for a court considering an application for adoption, freeing for adoption, or a S86 parental responsibilities order; or for a local authority considering placing a child for adoption. The court is required to consider the report before making any such order.</p>	<p>CH r.15 restates the duty to take account of the child's views when the requirement is being reviewed, and also the duty re the S73(13) reports.</p>		<p>Anomalous that no requirement to take account of child's view re non-disclosure of whereabouts.</p>
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74	Further provisions as respects children subject to supervision requirements	Power to Secretary of State to make regulations.	Children's Hearings (Transmission of Information etc.) (Scotland) Regulations 1996 (SI 1996 No. 3260)		It could be argued that children should be involved in the consultation process about the content of the regulations.
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75	Powers of Secretary of State with respect to secure accommodation	Power to Secretary of State to make regulations re secure accommodation.	Secure Accommodation (Sc) Regulations 1996. Regs. 6-9 set out procedure for moving temporarily into secure accommodation: a child subject to supervision with no secure condition; a "looked-after" child not subject to supervision; or a child subject to a warrant with no secure condition. No reference to child's views; but as they are "looked-after", S17(4) and (5) would require this, so far as practicable. A children's hearing would normally follow within 72 hours. Reg. 15 says reviews of the use of secure for children detained under criminal provisions should, where practicable, take into account the views of the child. CH rr.15 and 26, require the hearing to take account of the child's views when considering whether to "issue a warrant under the 1996 Regulations." This refers to the Secure Accommodation (Sc) Regulations 1996.	Scottish Office guidance, Vol.2, Ch. 6 restates the position set out in the Act and Regulations. It expands upon the issues of the general rights and responsibilities of children detained in secure conditions.	The reference to the issue of "a warrant under 1996 Regulations" is problematic. Whilst Reg. 9 of the 1996 Regulations refers to a number of warrants issued under the Children (Sc) Act 1995 (and reference is made to other orders under the Criminal Procedure (Sc) Act 1995 which are not called "warrants"), no warrants are actually issued under the 1996 Regulations. It is submitted that this provision may have been designed to fill the lacunae referred to in summaries of Ss66 - 70 re the lack of a duty to take account of children's views re the attachment of secure conditions. At a more general level, it could be argued that children should be involved in the consultation process about the content of the regulations, especially as the Act does not specifically require the child's views to be taken into account about the imposition of a secure condition.
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76	Exclusion orders	Allows the sheriff, on application of a local authority, to make an order excluding from a child's family home, a named person who is, or is likely to be, the source of significant harm to the child. S16 requires the sheriff to take into account the child's views, "so far as practicable," when considering whether to make, vary or discharge an exclusion order or interim exclusion order.	A.S. 97, r.3.4 refers to Form 28 for the form of notice to the child of an application for an exclusion order. The form invites the child's views and offers options for presentation of these. Form 29 applies similarly to an application to vary or recall an exclusion order. Rule 3.37 includes the child amongst the persons on whom the making of an order shall be served.	Scottish Office guidance, Vol.1, Ch. 7, para.62 restates the statutory position re the child's views and adds: "The means of taking the views of the child are for the sheriff to determine in accordance with the Rules of Court." Para. 74 refers to the A.S. 1997 requirement that a copy of the application be served on the child, unless the sheriff decides otherwise. Local authorities are obliged to advise child of rights and provide the necessary documentation. They should explain to the child the implications of the procedures and arrange any counselling the child may require. "It will be for the child to consider the route which he or she wishes to choose for intimating views to the court." Para. 75 refers to the provision of A.S. 1997 that a copy of the Order must be served on the child.	It seems anomalous that the child must be informed of the making of an exclusion order, but not necessarily of the grant or refusal of an application for variation or recall. See comment re S79 below.
77	Effect of, and orders, etc. ancillary to, exclusion order	S 16(2) does not specifically apply.			Although S16 refers only to the making, variation or discharge of an exclusion order, Norrie argues that this must include the conditions attached thereto, and therefore the child's views would require to be ascertained, so far as practicable, regarding the matters covered by S77.
78	Powers of arrest etc. in relation to exclusion order	No specific reference to the views of the child.			It is arguable that this provision also is embraced in the general considerations about the making, variation or discharge of the order under S76, and that therefore S16 applies re the child's views. However, if so, it would, it is submitted, probably be in a very general way. It would seem rather oppressive to ask a child explicitly whether a power of arrest should be attached.

79	Duration, variation and recall of exclusion order	S16 requires the child's views to be taken into account when applications for variation or recall are being considered. However, the child is not included in the list of persons who can make the application.	A.S 97, r. 3.40 gives the sheriff discretion as to the persons on whom intimation of the granting or refusing of an application for variation or recall shall be served.	Vol. 1, Ch.7, para. 73 restates the statutory position. Para. 75 says, "Subject to the age and maturity of the child, the child's views have to be sought." Para. 81 says, "The local authority should regularly review the need for exclusion to continue, taking into account the views of the child...."	Anomalous that the child cannot apply for variation or discharge of the exclusion order. See comment re S76 above.
80	Exclusion orders: supplementary provisions	Power to Secretary of State to make regulations re functions of local authorities.			It could be argued that children should be involved in the consultation process about the content of the regulations.
81	Offences in connection with orders etc. for protection of children	Those obstructing the implementation of a CPO or emergency protection measure are guilty of an offence. Child's views not referred to in this section, but may have been ascertained in connection with the orders/authorisations with whose obstruction these offences are concerned: S57 CPO; S61(1) authorisation; S61(5) action by police constable.			Absence of specific reference to views of child may be understandable.

82	Recovery of certain fugitive children	Children who abscond from a place of safety, residential establishment where they are required to reside, or from the control of a person conducting them to such a place, or from a person who has control over them by virtue of a supervision requirement, may be arrested without warrant and returned. Child's views not referred to in this section, but may have been ascertained in connection with the orders/authorisations requiring that they reside in the specified places, etc.			In the light of research about the reasons for children absconding, it might well be advisable to include some requirement that the child be given an opportunity to discuss their reasons, in case there is abuse or neglect in the placement.
83	Harbouring	It is an offence to induce a child to abscond from a situation addressed by S82, or to harbour such a child or prevent him/her from returning. Child's views not referred to in this section, but may have been ascertained in connection with the orders/authorisations requiring that they reside in the specified places (as above - S82).			The concerns expressed re S82 re the absence of an opportunity to express views/discuss reasons are addressed to some extent by the S38 provisions about refuges, which protect those operating refuges from the harbouring provisions. However, there are other concerns about the limited scope of S38 and the extent of its implementation that detrimentally affect its impact.
84	Implementation of authorisations, etc.	Procedural			Not relevant

85	Application for review of establishment of grounds of referral	<p>Application may be made by the child or relevant person for a review of the establishment of the grounds of referral, where significant new evidence is available. The sheriff may terminate the supervision requirement immediately, or from a specified date.</p> <p>S16 does not apply re views of the child, therefore there is no specific requirement to take them into account when such an application is being considered. The child has no right to attend the rehearing and is under no obligation to do so. The child is entitled to resist compliance with any voluntary supervision or guidance ordered by the sheriff, following termination of the requirement, if he is of sufficient age and maturity to understand what is being offered.</p>	<p>A.S. 97 rr.3.63 and 3.64. Rule 3.63: "Subject to the provisions of rule 3.4 (service on child), after the issue of the warrant to cite, the applicant shall forthwith give notice of the application by serving a copy and the warrant on the persons named in rule 3.62." The list in rule 3.62 includes <i>inter alia</i> the applicant and his representative and any other party to the application.</p>		<p>The absence of a right of the child to attend the rehearing or to express views is concerning in respect that the sheriff may terminate the supervision requirement, and temporarily vary it if the date of termination is postponed. Rule 3.63 refers to Rule 3.4 (intimation of the decision shall be sent to the child, unless service dispensed with) ; but this applies only to situations in which S16(2) of the Act requires ascertainment of the child's views. This is not the case with S85. This provision is therefore confusing.</p>
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86	Parental Responsibilities order: general	A sheriff, on the application of a local authority, can make an order transferring parental responsibilities and rights to the local authority. Section 16 re the child's views applies to the making, variation or discharge of a parental responsibilities order. (5) Sheriff may vary or discharge PRO on application of, inter alia, the child. Failing other interventions, the order lasts until age 18.	A.S. 97rr. 2.37 – 244 apply. 2.41 gives the sheriff discretion re modes of ascertaining the child's views, where the child has indicated a wish to do so. In such a case, the sheriff shall not make a PRO unless the views if the child have been obtained or heard. Where recorded in writing, the views of the child may be marked "confidential."	Scottish Office guidance, Vol. 3, Ch. 2 Reiterates the statutory requirements. Para. 4 refers to need to help children with disabilities to express their views. Para. 30 says that, if a child considers that a PRO should be varied or discharged, the local authority should help the child to contact a solicitor, even if the authority is of a different view.	The views of the child are an integral part of the procedure. Although the provisions generally apply only where a child has indicated a wish to express a view, the provisions of S 87 below and associated rules provide further safeguards. Strangely, the child does not have a right to attend the hearing of the application.
87	Further provision as respects parental responsibilities orders	Sets out powers and duties of the local authority consequent on the making of the order. Authorises the making of rules with regard to the appointment of curators ad litem and reporting officers	A. S. 97; Rule 2. 39 Provides for appointment of curator and reporting officer. Curator has duty to ascertain whether child wishes to express a view and to ascertain that view.		Note that the main focus of the curator's role is the need to safeguard the interests of the child. See comments on Ss 41 and 54 above re the relationship of views and interests.
88	Parental contact	The child is to be "allowed" reasonable contact with family, etc. A sheriff can make an order re contact when making a PRO or subsequently, on his or her own initiative, or in response to an application by a child, or other authority or person.			The whole provision is framed from the point of view of the child, rather than the parents. S16 re views does not specifically apply, but this may be regarded as ancillary to S86, to which it does apply. The actions of local authorities would be covered by S17 as regards taking account of the child's views.

89	Offences in relation to parental responsibilities orders	Prescribes offences relating to the harbouring, concealment, etc. of a child subject to a PRO.			S16 does not apply re views. The apparent harshness of this provision is softened by the S38 refuge provision which protects the managers of the refuge from charges of harbouring. See S38 comments re this. See also comments re Ss 82 and 83.
90	Consent of child to certain procedures	Clarifies that Nothing in Part II shall prejudice section 2 (4) of the Age of Legal Capacity (Scotland) Act 1991.			Protects rights of competent child to consent or refuse consent to medical examination or treatment, even in the face of orders, warrants, etc., made under Part II of the Children (Sc) Act 1995.
91	Procedural rules in relation to certain applications etc.	Procedural matters and rule-making powers. (4) allows rules to provide that a person may be represented before the sheriff, in proceedings relating to Part II of the Act, by someone who is neither an advocate or solicitor.	A.S. 97, r.3.21 allows non-legal representation by persons authorised by the party. The representative must, throughout the proceedings, satisfy the sheriff that he is a suitable person to represent the party and that he is authorised to do so.		This rule gives the sheriff more supervision of the legitimacy of the child's representative than the equivalent provision (CH Rule 11) in the children's hearing system. See comments on Ss 46 and 68.
92	Legal aid in respect of certain proceedings	Amends S29 of the Legal Aid (Sc) Act 1986.			Note: financial circumstances are not considered when proceeding before sheriff on appeal against granting of a children's hearing of a warrant to find and keep a child in a place of safety. Otherwise, financial circumstances will be taken into account. Clearly, the available of legal aid will often be a critical factor in determining whether the child's voice will be heard.
93	Interpretation of Part II	Defines important terms. Such as "child" and "relevant person."			Not directly relevant.

94	Approval of adoption society for specific services	Amends provisions of the Adoption (Sc) Act 1978.			Not relevant
95	Welfare of child paramount consideration	Substitutes Section 6 of the Adoption (Sc) Act 1978. In reaching any decision relating to the adoption of a child, a court or adoption agency shall have regard so far as is practicable to the child's views (if the child wishes to express them) taking account of the child's age and maturity. Presumption of sufficient maturity at age 12.	<p>Sheriff Court: A. S. 97: Freeing for adoption: R 2.8 (2)(c) curator to witness consent of child over 12. (d) ascertain views if child wishes to express them.</p> <p>R. 2.9 (1)(b) sheriff not to make order until has views of child who wants to express them. (2) views may be kept confidential.</p> <p>Revocation: Same rules as for freeing, found in 2.17 (1) and (2).</p> <p>Appointment of curator is discretionary.</p> <p>Adoption: R. 2 26(2)(b) curator witness consent of child over 12.</p> <p>R. 2.26(2)(u) ascertain whether child wishes to express view and get view.</p> <p>R. 2.27 (1)(b) sheriff must hear child's views and (2) views may be kept confidential.</p> <p>Court of Session: RCS Chapter 67: similar provisions, except that appointment of curator is discretionary.</p>		<p>The 1978 Act did require some account to be taken of the child's views. The new provision is more specific and includes the age 12 presumption.</p> <p>The appointment of a curator is mandatory in the Sheriff Court and discretionary in the Court of Session. If no curator is appointed, the views of the child do not form such an integral part of the proceedings. The Court of Session Rules do not allow for the child's views to be kept confidential.</p>

95	Continued		Re freeings revocations and adoptions, any curator appointed must ascertain whether the child wishes to express a view and, by implication, must seek to obtain that view. "Consent" of child must be sought by reporting officer and "confirmed" by curator. Curator to consider whether child should be present at the hearing. Re adoption, any curator is further required to ascertain the wishes and feelings of the child.		
96	Duty of adoption agency to consider alternatives to adoption	Introduces a new Section 6A into the Adoption (Sc) Act 1978.			Children's views are covered by other provisions
97	Adoption by person married to natural parent	Amends various sections of the Adoption (Sc) Act 1978. Aim to avoid the need to formally extinguish the natural rights of a birth parent prior to the making of an adoption order in favour of that parent and someone else.			Children's views would be covered by Section 95.
98	Further amendments of the 1978 Act; and interpretation Part III	Gives effect to Schedule 2 of the Act which contains other amendments to the Adoption (Sc) Act 1978.			Not relevant

99	Registration of births by persons who are themselves children	Authorises, and retrospectively ratifies, registration of births by parents under 16. Authorises the making of statutory declarations, requests, etc. by parents under 16 if they have a general understanding of the nature of the act. Presumption of such understanding at age 12.			Inserted to avoid any difficulties consequent upon the raising of the age of legal capacity to 16 (albeit with some exceptions) by ALCA 1991.
100	Inquiries into matters affecting children	New section inserted into Social Work (Sc) Act 1968.			Not relevant
101	Panel for curators <i>ad litem</i> , reporting officers and safeguarders	Rule making power for Secretary of State.			Not relevant
102	Removal of duty to report on operation of Children Act 1975	The 1975 Act had required a report to be submitted on its operation every five years.			Not directly relevant
103	Interpretation, rules, regulations and Parliamentary control	As per title			Not relevant
104	Financial provision	As per title			Not relevant
105	Extent, short title, minor and consequential amendments, repeals and commencement	As per title			Not relevant

Sch 4	Minor and Consequential Amendments: (53) Age of Legal Capacity (Scotland) Act 1991	Introduces S2(4A) into ALCA 1991 to the effect that: “A person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding.” New S2(4B) applies this criterion also to the ability to sue or defend in any civil proceedings New S2(4C) : “Subsections (4A) and (4B) above are without prejudice to any question of legal capacity arising in connection with any criminal matter.”			Clarifies legal capacity of children to instruct solicitor and engage in civil proceedings. It is of interest that it contemplates a different approach to capacity in criminal proceedings. Perhaps the justification for this should be explored.
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