ANNEX A: RESPONDENT INFORMATION FORM

Please Note this form must be completed and returned with your response.

Are you responding as an individual or an organisation?

☐ Individual
☒ Organisation

Full name or organisation’s name

Clan Childlaw

Phone number

Address

Postcode

Email

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

☐ Scotland
☒ Rest of the UK
☐ Rest of the World

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

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☐ Do not publish response

Information for organisations:

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

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.
If you are responding as an organisation and want to tell us more about your organisation's purpose and its aims and objectives, you can do so here.

Clan Childlaw are lawyers for children and young people. We believe that the law must work better for children and young people in Scotland. Our aim is to improve children and young people's life chances, using our legal skills and expert knowledge to help young people take part in decisions that affect them and by making sure that children’s rights are realised in Scots law.

We are an independent law centre providing free, child-centred legal representation to children and young people. We deliver practice-based learning opportunities and information on child law throughout Scotland. We use our direct experience from work with young people to advance legal change to realise children’s rights.
1. Clan Childlaw are lawyers for children and young people. We believe that the law must work better for children and young people in Scotland. Our aim is to improve children and young people's life chances, using our legal skills and expert knowledge to help young people take part in decisions that affect them and by making sure that children's rights are realised in Scots law.

2. We are an independent law centre providing free, child-centred legal representation to children and young people. We deliver practice-based learning opportunities and information on child law throughout Scotland. We use our direct experience from work with young people to advance legal change to realise children's rights. Clan is part of the Legal Education Foundation's Justice First Fellowship scheme which funds the work of a trainee solicitor (known as a "Justice First Fellow") and allows the trainee to develop and implement a project that advances access to justice. Our Justice First Fellow, Jenna Hall is delivering a project aimed at increasing access to justice for LGBT+ young people in Scotland.

3. We met with a variety of LGBT organisations and organisations working with young people to find out more about the legal issues affecting LGBT+ young people. Through this work, we met with LGBT Youth Scotland and learned more about their focus on improving the legal rights and recognition for trans and non-binary young people in Scotland. Since then we have been supporting LGBT Youth Scotland's youth participation work with the Gender Recognition Youth Commission and the policy team.
4. Clan Childlaw supports the campaign for Equal Recognition and welcomes the proposed reform of the Gender Recognition Act 2004. As lawyers for children and young people, we see first-hand situations where broader change to a law, policy or its implementation would help improve outcomes for children and young people. The current reality for trans young people is that they face barriers to living their lives simply because their documents (such as birth certificates) don’t reflect their realities. We believe that all children and young people should be able to live their lives and access opportunities such as education or employment free from stress and worry about being themselves.

5. Principle 31 of the Yogyakarta Principles (referred to as Yogyakarta) states that everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Any mechanisms chosen for legal gender recognition should be quick, transparent and accessible, in line with the Yogyakarta.

6. Our response to this consultation is limited to commenting on the proposed options for under 16’s, specifically option 2 and option 3. These are the options we have been focused on in our work with LGBT Youth Scotland.

**Under 16’s - Court Process (Option 2)**

7. Option 2 proposed by the Scottish Government would be for Scotland to adopt a court-based process. Under this option, the court action could be raised by the young person if they had legal capacity or by a person or persons with parental rights and responsibilities¹ (PRRs) for them, acting on their behalf.

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¹ Children (Scotland) Act 1995 (1995 Act) s.1; s.2. Parents and people looking after children are expected to do certain things for the children they look after while the children are growing up, such as making sure they are healthy and giving advice and support. These are parental responsibilities. Parental rights enable parents and people looking after children to fulfil these responsibilities.
Current Legal Framework

8. The welfare and protection of children in Scotland is primarily supported by provisions in the Children (Scotland) Act 1995 (1995 Act). It sets out PRRs towards children and the principles followed by the court when making decisions affecting children. The 1995 Act incorporates three key principles of the United Nations Convention on the Rights of the Child (UNCRC): non-discrimination (Article 2), that the child's best interests are the primary consideration (Article 3) and that the views of children should be listened to by people making decisions about them (Article 12).

9. The Scottish Government has not stated whether Option 2 would utilise the existing legal framework or create a new statutory process. It is likely that any reform will involve amendment of the 1995 Act (and the amendment of other legislation). The Scottish Government is currently reviewing the 1995 Act and a public consultation is expected to launch in spring 2018. The tests applied by the court under the existing legislative framework to reach decisions about a child's welfare and best interests would be likely to play a significant role if a court process were adopted for gender recognition.

10. Currently where those with PRRs, typically parents, cannot agree on arrangements for children, one or other of them may apply to the court. Under section 11(2) of the 1995 Act, the court has the power to make:

(a) an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child;

(b) an order—

(i) imposing upon a person (provided he is at least sixteen years of age or is a parent of the child) such responsibilities; and

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2 UNCRC is an international human rights treaty which sets out the rights of children. The Convention has 54 articles that cover the rights and freedoms all children are entitled to and explains how adults and governments must work together to ensure these rights are realised. UNCRC was ratified in the UK in 1991. While this means that the UK must ensure it is implemented, it has not been directly incorporated into UK law.
(ii) giving that person such rights;

(c) an order regulating the arrangements as to—

(i) with whom; or

(ii) if with different persons alternately or periodically, with whom during what periods, a child under the age of sixteen years is to live (any such order being known as a "residence order");

(d) an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living (any such order being known as a "contact order");

(e) an order regulating any specific question which has arisen, or may arise, in connection with parental rights or responsibilities, guardianship or the administration of a child's property (any such order being known as a "specific issue order");

(f) an interdict prohibiting the taking of any step of a kind specified in the interdict in the fulfilment of parental responsibilities or the exercise of parental rights relating to a child or in the administration of a child's property;

(g) an order appointing a judicial factor to manage a child's property or remitting the matter to the Accountant of Court to report on suitable arrangements for the future management of the property; or

(h) an order appointing or removing a person as guardian of the child.
11. In considering how a new court process for determining gender recognition might operate in practice, we have considered how the courts operate in relation to the existing court process for determining issues around a child's life and welfare, for example in disputes over which parent a child should live with, or the amount of contact a child should have with a parent that the child does not live with.

12. Where court actions involve decisions about children, the court will fix a special hearing called a Child Welfare Hearing. Child Welfare Hearings are held in private before the Sheriff. Only parties to the action can attend the hearing, however the child may also attend if they wish to. In practice, children are generally discouraged from attending Child Welfare Hearings. However, if they have legal capacity and have a solicitor acting for them, they may wish to have their solicitor make representations on their behalf.

13. It is important to note that children are normally only represented where they wish to do more than just give their views as it is generally thought that the child's interests can be represented by their parents. While these types of hearings tend to be more informal by nature, they are nevertheless formal legal proceedings and court hearings. The Sheriff will hear submissions made by the solicitors representing each party. The Sheriff can make orders at this stage (including interim orders), for example an order that contact should take place between a parent and child. The Sheriff may not make any orders at all at this stage and instead order independent reports, the most common being a child welfare report (completed by an experienced family law solicitor), or other reports such as from the social work department or a child psychologist. The purpose of Child Welfare Hearings is to encourage agreement and a case may have several Child Welfare Hearings. If parties are unable to reach agreement, the Sheriff may set a 'Proof'. This is the stage where the parties are given an opportunity to prove their case. The parties can lead evidence in support of their case and challenge what they dispute about their opponent's arguments. Documents can be put before the court and witnesses can be called to give evidence. Witnesses will be subject to cross-examination.

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3 Act of Sederunt (Sheriff Court Ordinary Cause Rules) (OCR) 1993 No. 1956 (S.223) Schedule 1, Chapter 33.22A
4 ibid Chapter 33.22A(5)
5 1995 Act (n 1) s.11(2)(d)
Welfare Principle

14. In Scotland, all civil actions involving decisions about children and young people follow the welfare principle. That is that the court must regard the welfare of the child involved as its paramount consideration\(^6\). This goes even further than UNCRC Article 3, which states that in court actions involving children; the best interests of the child should be the primary consideration.

15. The Scottish Government considers that any court-based process for gender recognition would focus on the assessment of the child’s welfare. The Scottish Government has indicated in the consultation that it would consider specifying the matters the court would have regard to in determining what was in the child’s best interests. Currently, when considering welfare in relation to section 11 orders, there are particular matters that the court shall have regard to\(^7\). Those matters are—

(a) the need to protect the child from—

(i) any abuse; or

(ii) the risk of any abuse,

which affects, or might affect, the child;

(b) the effect such abuse, or the risk of such abuse, might have on the child;

(c) the ability of a person—

(j) who has carried out abuse which affects or might affect the child; or

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\(^6\) 1995 Act (n 1) s.11(7)(a)
\(^7\) 1995 Act (n 1) s.11(7A); s.11(7B)
(ii) who might carry out such abuse,

to care for, or otherwise meet the needs of, the child; and

(d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has...those responsibilities.

16. Abuse is defined quite broadly and includes violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress, as well as other considerations*. It doesn't have to be directed towards the child, it can be towards the child's carer. It is important to note that as with the considerations under s.11(7B), the court must assess the facts and circumstances and find that the abuse is proven. The court may order a child welfare report or appoint curator ad litem (discussed later). Alternatively, a Proof may be set. For example, if it is alleged that a parent abused their child, there may be a Proof to listen to evidence about the alleged abuse. As mentioned previously, for a Proof, both parties can call witnesses and lodge evidence (such as reports); the court will consider the evidence and make a ruling. Ultimately the child's welfare is the paramount consideration and the court will consider whether the abuse alleged is proven and has a detrimental effect on the quality of care of the child.

17. We would suggest that consideration is given to specifying the matters the court would have regard to in determining what was in the child's best interests and making a decision about gender recognition, for example the risks to or effect on a child that does not have their gender legally recognised.

* 1995 Act (n 1) s.11(7C)
Minimum Intervention Principle

18. In reaching a decision about whether to make a section 11 order, the court must also follow the minimum intervention principle. This means that the court cannot make an order unless it considers that it would be better for the child that the order be made than none should be made at all⁹. Generally, parties to this type of court action are encouraged to reach agreement. For example, where parents are divorcing and cannot agree on where the child should live, they will be encouraged to think about the best interests of the child and negotiate an agreement. The court often encourages alternative dispute resolution methods such as mediation. Under the minimum intervention principle, if an agreement can be reached, there will be no need to regulate PRRs. The exercise of parental rights and responsibilities is a fundamental element of family life protected under Article 8 of the European Convention on Human Rights. The court will only intervene in relation to PRRs if it considers that a s.11 order would be better for the child if no order were to be made.

19. The court must be positively persuaded that making an order is necessary for the child and demonstrates some benefit to the child. Even if an order is made and a person is deprived of a parental responsibility or right, it must be the minimum necessary to give effect to the order. For example, if a parent loses the right to regulate where their child lives, they will retain all other PRRs, unless otherwise stated. It is possible that alternative dispute resolution methods will be encouraged where disputes arise in applying for gender recognition. Involving children and young people in mediation can be very complex and care must be taken to ensure a safe environment that is respectful of their gender identity.

Children’s Views

20. The 1995 Act incorporates the principle of UNCRC Article 12, that children should be given an opportunity to express their views in decisions that affect them. Article 12 states that a child capable of forming his or her own views has the ‘right to express those views freely’ and for those views to be given due weight in accordance with their age and maturity. They shall be provided

⁹ 1995 Act (n 1) s.11(7)(a)
with the opportunity ‘to be heard in any judicial or administrative proceeding’ affecting them. The Scottish Government policy outlined in Getting It Right For Every Child (GIRFEC)\(^{10}\) also places a central emphasis on the right of children and young people to participate in decisions affecting them.

21. In keeping with UNCRC Article 12 and GIRFEC, where decisions concern children, the courts have a positive obligation to hear their views\(^{11}\). Currently, where the court has been asked to make decisions in relation to PRRs, the court must, taking account of the child’s age and maturity, take two steps. Firstly, the court must give the child an opportunity to indicate whether they wish to express their views\(^{12}\) and secondly, to give them an opportunity to express those views\(^{13}\). Subsequently, they must have regard to those views\(^{14}\). A child aged 12 or more shall be ‘presumed to be of sufficient age and maturity to form a view’\(^{15}\).

22. Although the court has an obligation to listen to their views and can make decisions affecting them, children are not usually involved in the court process or are parties to the action like their parents. A child should receive intimation of an application for s.11 orders to notify them that an important decision is going to be made by the court and to explain how their views can be expressed. However, having regard for the presumption that a child of 12 or more has sufficient age and maturity to form a view, many solicitors will ask that notification is dispensed with for children younger than 12. The age and maturity of the child will not of itself operate necessarily as a barrier to the child expressing a view. The presumption that a child aged 12 and over is of sufficient age and maturity to form a view does not operate as a bar to a younger child having capacity to express a view. The test that the courts will apply to the question of the age and maturity of a child whose views are being considered is one of ‘practicability’ and ‘appropriateness’\(^{16}\). The Sheriff ultimately has discretion to dispense with intimation. Even if a child

\(^{10}\) Scottish Government, ‘Getting it right for every child (GIRFEC)’ (Scottish Government, 2017) <http://www.gov.scot/Topics/People/Young-People/gettingitright> accessed 1 February 2018
\(^{11}\) Where a child has returned a Form F9 to the court or has indicated a wish to express their views, a Sheriff cannot make an order without the child having the opportunity express their views and have them heard by the court; OCR (n 3) Chapter 33.19
\(^{12}\) 1995 Act (n 1) s.11(7)(b)(i)
\(^{13}\) 1995 Act (n 1) s.11(7)(b)(ii)
\(^{14}\) 1995 Act (n 1) s.11(7)(b)(iii)
\(^{15}\) 1995 Act (n 1) s.11(10)
\(^{16}\) The test is derived from the Inner House decision in Shields v Shields 2002 S.C. 246, the leading Scottish authority on the question of ascertaining a child’s views and its modification in the decision of S v S 2012 Fam. L.R. 3. In applying the test, the approach of the courts is that age and maturity will be a factor in deciding whether it is appropriate to seek views, if there is a risk of further distress or lasting harm by seeking those views. It will also assess whether given a child’s age or maturity, some methods of seeking views may be more appropriate. The courts will also decide the weight that should be attached to a child’s views, depending on their age and maturity.
is asked for their views, a child will not be notified of the various stages of the court action or informed of what is discussed in hearings, unless communicated to them by their parents or other adults involved. This is not ideal as it is dependent on their parents’ own understanding and may not be the most independent and accurate way to be informed.

23. It is possible for a child to become involved in the court process as a third party minuter. This means the child would then be a party to the action and able to participate. A common example would be where mum applies for a s.11 residence order. Dad opposes and wants the child to live with him. The child is usually given a form F9, a written means for children to express their views about contact and where they would like to live. However, the child may wish to seek independent legal advice to help them give their views to the court. The child decides that they wish to be involved directly. In practice, this happens very rarely because of the difficulty involved. There is generally a reluctance to involve children directly in court proceedings. The court would require to be persuaded that the child needs legal representation to represent their own position and influence the decision-making. Up until this point, it will be assumed that the child’s interests can be represented by their parents. The Scottish Legal Aid Board (SLAB) would also require to be persuaded it is necessary for the child to have legal representation and if they do not think this is necessary they may not grant legal aid. It can be difficult to get legal aid for a child, and particularly difficult for the child to get legal advice and representation, in cases under the current system. It is likely that many children would have difficulty obtaining legal aid if a court process were adopted for gender recognition (see paragraphs 38-44 regarding legal aid).

24. Under the current system, children do not normally play an active part in the court process. In our experience, arguments have to be particularly persuasive to obtain legal aid and become a part of the court process beyond giving their views.

25. The practicalities of the current court system are an important consideration when looking at how a new court process would work for gender recognition, particularly for children under the age of 12.

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17 The child would apply by Minute to enter the process; OCR (n 3) Chapter 13.1(1)
18 1995 Act (n 1), s.11(2)(c)
19 OCR (n 3) Chapter 33.7(h)
20 The Scottish Legal Aid Board manages the legal aid system in Scotland
26. A child with legal capacity may also raise a court action under section 11\textsuperscript{21} where those with PRRs disagree. However, raising a court action is often seen as a last resort, and reaching agreement is always encouraged, particularly concerning children and young people. It can have a negative impact on family relationships, particularly where the child is seen as ‘going against’ the wishes of one or both parents. Effectively the child would be suing their parent. If the child is still living at home, or having contact with the parent, the court route may not be appropriate.

**Court Action Raised by Young Person**

27. Under this option, a child with legal capacity could initiate the court proceedings\textsuperscript{22}. However, there are aspects of the process which can make it difficult for children and young people to be involved in court actions.

28. The formality of the Sheriff courts is a factor to consider. Security measures are commonplace in most courts in Scotland, with entrance barriers, metal detectors, bag searches and security officers. This may be intimidating to young people. Sheriff courts are busy places, with solicitors and clients waiting in the corridors until their case is called before the Sheriff. Within the courtroom, it is of course a formal setting and will be largely unfamiliar for most young people. Most young people will not have knowledge or experience of the legal system, or it will be fairly limited. This means they could be hearing legal terms like ‘Sheriff’ for the first time. That is why it is crucial that a young person receives legal advice at an early stage to gain an understanding of the process and explore the issues.

29. Where a young person has legal capacity, they can instruct a solicitor to raise the court action. However, many young people do not know that they can get their own lawyer or indeed how to do so. Young people are often heavily dependent on their parents or other adults to facilitate and would find it difficult to get to a solicitor’s office without the assistance of an adult. We are acutely aware of the difficulties that young people experience in trying to meet with a solicitor. This is why we deliver an outreach service. We meet with children and young people in places where they feel comfortable meeting in, such as in school. However, such a service is rare in the legal profession and a solicitor’s office is considered the norm for client meetings.

\textsuperscript{21} 1995 Act (n 1) s.11(5)
\textsuperscript{22} ibid
30. The length of court actions and delays can be a cause of significant stress for young people. The process can be delayed for a variety of reasons such as to allow the completion of expert reports or for legal aid to be granted. Getting time off school/college/work etc to meet their solicitor and attend lots of different court dates over a lengthy period can be a lot of stress on top of the other pressures in their lives.

Capacity

31. Under the Age of Legal Capacity (Scotland) Act 1991 (1991 Act) section 2(4A), 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...a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding’. This presumption may be rebutted if it is evident that the child does not have such an understanding.

32. It is for the solicitor meeting with the child to assess whether they have a general understanding of what it means to instruct a solicitor. There are no set guidelines or rules as to how a solicitor should assess capacity, but it is generally assessed through observations of their understanding and responses during client interviews.

33. That is not to say that a child under the age of 12 will not have capacity but it will require careful assessment. There can be an assumption that younger children do not have capacity to instruct their own solicitor. This is broadly younger children aged 8 and under. An important consideration is that the availability of solicitors with experience representing children and young people in Scotland and practising child law is generally quite low. Coupled with this is a general reluctance of solicitors to represent children under 12.

34. It is important to mention that capacity is generally regarded as fluid. Where a child may have sufficient understanding to instruct a solicitor about one matter, if there are further developments, they may not have capacity to give further instructions. An example of this would be where a child has capacity to instruct a solicitor to raise an action for a specific issue such as applying for a passport but may not be able to give instructions for complex financial decisions. A solicitor can reassess capacity at any time. In practice, a solicitor will reassess capacity if they feel that the
child’s capacity or understanding is reduced due to stress or the matter becoming more complex or difficult.

35. While there are no set guidelines or rules in place surrounding how a solicitor should assess capacity, solicitors are governed by professional guidelines and rules under The Law Society of Scotland and the Scottish Legal Aid Board (where applicable). The Law Society of Scotland Practice Rules 2011 Rule B.15 states: ‘...a solicitor must (a) have instructions from his or her client and (b) be satisfied when taking instructions, that his or her client has the capacity to give instructions to relation to that matter.’

36. Every solicitor and firm wishing to provide children’s legal assistance (that is legal aid concerning matters relating to the Children’s Hearings (Scotland) Act 2011) must be part of the Children’s Legal Assistance Register governed by the Scottish Legal Aid Board (SLAB). To become a registered solicitor or firm, they must sign up to a Code of Practice, which sets out the standard requirements they must meet as providers. Under the Code of Practice, they must ‘be able to recognise the capacity of a child to give instructions’ and any application for legal aid can ‘only be made where the solicitor is satisfied himself that they have sufficient capacity’.

37. Generally, where a solicitor is applying for any type of legal aid on behalf of a child under the age of 12 from the Scottish Legal Aid Board, the solicitor must justify how it is satisfied the child has capacity to instruct. If SLAB is not satisfied with the explanation, then it has administrative discretion to refuse legal aid.

Legal Aid

38. A possible limitation on raising a court action is the availability of legal aid. Given the complex nature of court actions, an adult with PRRs or a child raising an action would benefit from legal advice. There are court fees and expenses involved so it is important to think about how the young

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24 Ibid Part 4.2.3
25 Ibid Part 4.4.2.2
person or adult with PRRs will be able to pay for this e.g. through legal aid or privately. Adults are financially assessed for civil legal aid based on their own resources.\textsuperscript{26}

39. The Civil Legal Aid (Scotland) Regulations 2002 (the 2002 Regulations), as amended by the Civil Legal Aid (Scotland) Amendment Regulations 2010, set out how children's financial eligibility for civil legal aid is assessed. Regulation 11A of the 2002 Regulations state that the resources of any person who owes an obligation of aliment to a child applicant are to be treated as part of the child's own resources unless it would be 'unjust or inequitable' to do so. The obligation of aliment applies to a father or mother or to a person who has accepted the child as a child of his family (e.g. step-parent) under the Family Law (Scotland) Act 1985.\textsuperscript{27} If the child's solicitor is of the view that it would be unjust or inequitable to include such a person's resources in the financial assessment, then they must provide SLAB with a detailed explanation as to why. SLAB sets out some general principles and guidelines\textsuperscript{28} to assist solicitors in establishing situations where it would be considered unjust or inequitable, but it is not an exhaustive or definitive list. An example is where a parent is seeking a different outcome to the proceedings than the child and therefore their resources should be discounted.\textsuperscript{29}

40. SLAB must also assess whether the applicant has probable cause\textsuperscript{30} (i.e. a legal basis for raising the action), whether it is reasonable to make legal aid available\textsuperscript{31} (i.e. that it would be an appropriate use of public funds) and whether the case has merit\textsuperscript{32}. Detailed information and evidence must be provided to demonstrate each of these considerations. If it is not satisfied with the information given, it has discretion to refuse the application.

41. Another situation within SLAB's administrative discretion is where a dispute arises between a child and parents. SLAB may refuse legal aid on the basis that parties should explore alternative dispute resolution such as mediation as a first resort before court action. It is also possible that if a 15-year-old applies and there is opposition from those with PRRs, SLAB may not find that it is an appropriate use of public funds when the young person could apply themselves at 16 (if the age required to apply for gender recognition is lowered from 18 to 16).

\textsuperscript{26} Legal Aid (Scotland) Act 1986, s.15
\textsuperscript{27} Family Law (Scotland) Act 1985, s.1(1)
\textsuperscript{28} Scottish Legal Aid Board, 'Civil Legal Assistance Handbook' Part 4, Chapter 2.16 (Scottish Legal Aid Board, 2016) <https://www.slab.org.uk/handbooks/Civil%20Handbook/wwhelp/wwimpl/js/html/wwhelp.html#ref=Civil%20Legal%20Assistance%20Handbook%20front%20page%20for%20restructure.html> accessed 10 January 2018
\textsuperscript{29} Ibid
\textsuperscript{30} Ibid, Part 4 Chapter 3
\textsuperscript{31} Ibid
\textsuperscript{32} Ibid, Part 4 Chapter 4
42. As lawyers for children and young people, we know from experience that getting a lawyer and the logistical aspects of attending court are often barriers for children and young people. The emotional impact of a court process can be magnified and affect family relationships. It is important to be aware of these issues if a court process is adopted.

43. We would suggest consideration is given to how the need to fund applications to court and fund legal advice and representation in court might make the process of obtaining gender recognition less accessible to children and young people, and their families.

44. If a court process were adopted for gender recognition, there are situations where legal aid may be refused. The simplest situation would be where children wish to apply through the court process themselves and neither parent opposes. SLAB will take the parent’s resources into account and if they are not deemed financially eligible, legal aid will be refused. This means the cost will have to be met privately. It is possible that a child will be eligible for some legal aid depending on their resources of their parents. Contributions for the remaining costs would require to be met privately.

Court Action raised by an Adult with Parental Rights and Responsibilities

45. A person with PRRs has the right to act as their child’s legal representative. Where an adult with PRRs raised the action, the child’s views would require to be considered by the court.

46. As mentioned previously (paragraphs 20-22), a child aged 12 or more shall be ‘presumed to be of sufficient age and maturity to form a view’. That is not to say that a child under 12 years old will not be afforded the opportunity to give their views, but it would greatly depend on the circumstances. The weight attached to a child’s views and the extent to which these views will guide the decision is ultimately a decision for the court. However, depending on the age of the child, their views may be a key factor for the court. A child may lack the capacity to instruct their own solicitor but still be able to express views. Ultimately it is adults that make decisions about the capacity of children to give their views. The participative right for a child to express a view must be balanced against other considerations, such as welfare.

33 1995 Act (n 1), s.1(1)(d); s.2(1)(d)  
34 1995 Act (n 1) s.11(10)
47. The Sheriff has several methods at his/her disposal to capture a child’s views. The Sheriff may for example:

- order the preparation of a report by instructing a child welfare reporter;\(^{35}\)
- appoint a **curator ad litem**\(^{36}\). A *curator* is a person who will assess the views of the child and make recommendations to the court in a report. A *curator* is independent and is appointed to act in the best interests of the child. They will meet with the child and all parties to listen to their views on what is best for the child. However, they will not necessarily follow the views of the child and will form their own view;
- speak to the child directly and privately in chambers, however this is relatively rare.

48. It is unknown whether other methods of obtaining a child’s views will be introduced – such as in the case of s.11 contact/residence actions, where the Form F9\(^{37}\) is used or the ‘All About Me’ form used in Children’s Hearings to allow children to express their views to the panel members. However, arguably it may be relatively difficult to produce a useful form capable of capturing a young person’s views on legally recognising their gender.

49. It is important to note that children’s views to the court are also not automatically confidential\(^{38}\). Article 6 of the European Convention on Human Rights entitles parties to a fair hearing. This usually involves full disclosure of all the evidence the court has considered in reaching its decision. For example, if a child gives their views in a child welfare report, this may be disclosed. A child can request that their views are kept confidential, however the decision lies with the Sheriff and is made on the basis that the child’s welfare is paramount\(^{39}\). The interests of the other parties involved must be balanced against the real possibility of significant harm to the child.

50. Another feature of the current court process that is important to be aware of is that children have no right to feedback. Children can express their views but are very rarely be given any feedback on

\(^{35}\) OCR (n 3) Chapter 33.21, as amended by rule 4, Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Child Welfare Reporters) 2015/312

\(^{36}\) OCR (n 3) Chapter 33.16, Age of Legal Capacity (Scotland) Act 1991 s.1(3)(f)(ii).

\(^{37}\) The Scottish Civil Justice Council Family Law Committee (FLC) has undertaken a review on the form F9 and it is soon to be updated to be more child-friendly.

\(^{38}\) OCR (n 3) Chapter 33.20. If the Sheriff speaks to the child directly or appoints a person to hear their views, the views will be recorded in writing. The Sheriff may order that such views are sealed in an envelope marked confidential and will not be recorded in the inventory of process which is available to all parties. This means that the parties cannot read the views of the child, they will be available to the Sheriff only.

\(^{39}\) 1995 Act (n 1) s.11(7)(a)
how their views fed into the decision making, unless the Sheriff makes a written decision and includes the child.

51. We would suggest that consideration is given to the current methods used by the courts to obtain a child’s views and what this would mean for a gender recognition process.

52. If a Sheriff does instruct independent reports, there may still be a reliance on medical opinions. In many contact/residence disputes, reports by child psychologists and expert medical opinions are often ordered by the Sheriff and by parties. The medicalisation of legal gender recognition may still be present in this process as the Sheriff has a wide range of powers to assess a child’s welfare.

53. Principle 31 of the Yogyakarta states that gender identity should be self-defined and not subject to eligibility criteria, such as medical or psychological interventions, psycho-medical diagnosis or any other third party opinion. Principle 32 of the Yogyakarta also states that everyone, including children, have a right to self-determination. If the process is opened to 16 and 17 year olds under the new proposals, there could effectively be two systems, one where one young person can self-declare but another young person is still subject to medicalisation.

54. Where an adult with PRRs raises the action, it is important to consider that a child’s views are not automatically confidential. In cases where an adult with PRRs disagrees and opposes the action, they may have access to the views expressed.

55. It can also be difficult for young people to understand and accept that although the decision made is about them and significantly affects them, they cannot get an explanation of why and how the decision was made. If a court process is introduced for gender recognition, it is important that young people are given an explanation of the decision in child-friendly way.

56. It is important to recognise that where a child raises a court action to facilitate gender recognition that may be challenged by adults with PRRs if they disagree with the application. Similarly, if a person raises the action on behalf of a child, another adult with PRRs (for example a grandparent, or other parent) may challenge. Since the court regards the child’s welfare as the paramount concern, the views of those with PRRs are relevant. For example, if mum, whom child lives with and who looks after them disagrees with the application.
Under 16’s - Parental Application (Option 3)

57. Option 3 proposed by the Scottish Government would be to allow an application to be made on behalf of a person under 16 by someone with PRRs for them, taking into account the child’s views. Typically, this would be the child’s parents. The Scottish Government is proposing that all parents with PRRs (or everyone with PRRs) would be required to apply.

Views

58. The Scottish Government considers seeking legal recognition of gender a major decision. Where an adult with PRRs is reaching a major decision that involves the fulfilment or exercise of PRRs, they are under a duty to take the child’s views and the views of others with PRRs into account\(^{42}\). As previously mentioned, a child of 12 or more is presumed to be of sufficient age and maturity to form a view\(^{41}\).

59. Where a child is Looked After the local authority may be involved in the application process. The 1995 Act imposes certain duties on the local authority in relation to ascertaining the child’s views. Before making any decision about the child, the local authority is obliged, as far as is reasonably practicable, to ascertain the views of the child, their parents; any person who is not a parent but has PRRs; and any other person whose views the authority considers to be relevant\(^{42}\). When making any such decision, the local authority must have regard to the views of any person described above, including the views of the child, taking into account their age and maturity, and to the child’s ‘religious persuasion, racial origin and cultural and linguistic background’\(^{43}\). However, there is no presumption here that a child aged 12 and over is of sufficient age and maturity to form a view.

\(^{40}\) 1995 Act (n 1) s.6(1)
\(^{41}\) 1995 Act (n 1) s.11(10)
\(^{42}\) 1995 Act (n 1) s.17(3)
\(^{43}\) 1995 Act (n 1) s.17(4)
60. If only parents with PRRs are required to apply, a person who has PRRs but is not their parent would not be required to be involved. However, parents would be under a duty to take the views of everyone with PRRs into account. If the application required everyone with PRRs for the child, not just parents, a local authority with PRRs would require to be involved in the application process. This option could also involve people such as kinship carers and foster carers (with PRRs). The Scottish Government has suggested that there may be restrictions on those with limited PRRs.

61. It may be helpful to consider a common arrangement such as kinship care and the difficulties that may arise under parental application for gender recognition. A kinship carer can be a family member such as a grandparent an aunt or uncle or may simply be a family friend. A kinship carer looks after children where their parents are unable to do so. A kinship care arrangement can be a formal or informal arrangement.

62. For example, a grandmother has a residence order for her grandson. Her grandson’s parents can still have PRRs for him, but they lose the PRR to regulate where he lives. With a residence order, the grandmother has the right to regulate where he stays and has PRRs to enable her to make day-to-day decisions about her grandson. The residence order will last until her grandson turns 16, as thereafter he is old enough under the law to decide where he lives. Her grandson identifies as male and uses him/he pronouns. He is 13 years old and has had no contact with his mum and dad since he came to live with his grandmother three years ago. However, under the law, his mum and dad still have PRRs. He would like to have his gender legally recognised and his grandmother would like to help him do that.

63. If the Scottish Government decides that all parents with PRRs would have to apply, rather than everyone with PRRs, then there are considerations. His grandmother has PRRs, but she is not his parent, so she would not be permitted to apply. If under this option, all those with PRRs are required to apply, then his grandmother would be able to be part of the application. However, his parents would still be required to consent. PRRs do not disappear if a person is not exercising them. Given that he has had no contact with his parents in three years, he is in a difficult position.

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44 1995 Act (n 1) s.6(1)
45 This means a child has been placed in a kinship care arrangement by the local authority and they will be Looked After.
46 This means that a child is not Looked After and can mean it is a completely private arrangement or there may be a section 11 order (1995 Act) in place.
47 1995 Act (n 1) s.11(2)(c)
48 1995 Act (n 1) s.2(7)
Even if their whereabouts are known and he were to re-establish contact to ask for their consent, which is an arguably an unfair onus to put on a child, there is no guarantee that they will consent.

64. A straightforward way of ensuring that the relevant views are considered is to intimate the application on everyone who is required to consent, notifying them of the application and giving them an opportunity to express a view. If anyone wishes to object, they can do so at that stage. If the person does not respond within a specified time limit, there can be a court process to allow for their dispensation and for the application to proceed. This will eliminate possible arguments further down the line from a person who argues that they were not consulted about the decision.

65. The Scottish Government state that where a relevant adult with PRRs cannot be found, a court order could be sought under existing arrangements. Normally, where the whereabouts of a adult with PRRs is not known, attempts will be made to notify them i.e. contacting them at their last known address, place of work etc and notifying next-of-kin. The court will consider if all reasonable steps have been taken to find and notify them. If the court considers all reasonable steps have been taken, it would be in the child’s best interests and it would be better to make an order than not, the court can make an order.

66. Another possibility is requiring the child’s views to be expressly stated in the application. However, this may or may not be appropriate given the sensitivities around obtaining the views of young children.

67. The Scottish Government state that the question of how best to ensure the child’s views have been sought and considered before an application is made will require careful consideration. While there is an obligation, there is no mechanism for ensuring that a child has been consulted about their views. Similarly, there is no mechanism for ensuring that any other person who has PRRs for the child has been consulted. Given that it is a major decision to make, it is likely there will have to be some mechanism for ensuring all relevant persons have been consulted.

68. The difficulty with requiring all parents with PRRs (or everyone with PRRs) to apply is the different relationships that exist in children’s lives. The designation of option 3 as ‘parental application’ should also be reconsidered in light of this. Many children are Looked After by a local authority, and in many instances a local authority could have PRRs for a young person under a permanence order. Many young people have very little or no contact with parents that have PRRs. Some children and

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49 OCR Chapter (n 3) 33.4, 33.7.
young people don’t live with their parents and instead live with other people who hold PRRs for them, such as grandparents. Parental application may not be accessible to all children.

**Disputes**

69. The Scottish Government state that where all the people who require to be involved in the application do not agree, a court order could be sought under current arrangements. The Sheriff Court or the Court of Session has the power to make an order in relation to PRRs. The court could then make a decision based on the child’s welfare. This would follow the principles and considerations previously mentioned under ‘Current Legal Framework’ (see paragraphs 8 – 26). In summary, the court would consider:

- the child’s welfare as the paramount consideration;
- the minimum intervention principle; and
- the child’s views.

**Looked After Children**

70. The Scottish Government reported that 15,317 children were looked after in 2015/2016. Children who are ‘Looked After’ can be either ‘Looked After at home’ for example still living with their parents or ‘Looked After away from home’ living with foster or kinship carers, or in a residential or secure unit. Residential and secure care would require an assessment to ensure inclusiveness for children obtaining gender recognition. The role (if any) of the Children’s Hearings system would also require assessment and training.

71. The reality for Looked After children is that they typically attend formal meetings and are subject to formal processes that non-care experienced young people do not experience. Many do not have

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50 1995 Act (n 1) s.11
51 1995 Act (n 1) s.11(1)
53 Where the child is subject to a Supervision Requirement under the Children’s Hearings system but with no condition of residence. The child can continue to live in the family home.
54 Where the child is subject to a Supervision Requirement under the Children’s Hearings system but with a condition of residence; or the local authority are providing accommodation under s.25 of the 1995 Act (voluntary agreement); or is placed by the local authority, which has a permanence order (Adoption and Children (Scotland) Act 2007 s.80).
traditional support systems. Looked after children have different professionals supporting them, whether that is a social worker, a key worker at a residential unit, or a Throughcare/Aftercare worker to help them transition out of care. In short, a lot of different adults are involved in making decisions that affect them. These key relationships can have a profound effect on a young person’s life, particularly if traditional family relationships are absent. However, often social workers change, or there are multiple placement moves and a young person may find themselves trying to build a relationship with someone new. Every effort should be made to support the development and maintenance of the positive relationships in the life of a child trying to obtain legal gender recognition.

72. Inconsistent documentation has been highlighted by many trans young people as a barrier to living their lives. Unfortunately, many care experienced young people struggle to access basic documentation such as a birth certificates. They may have experienced a lot of traumatising events in their lives and do not know a great deal about their natural parents or birth. Our experience is that many young people do not feel that they have the understanding of the process or procedures involved or the support to request their information and documents. Although they have a right to the information and documents, the cost, delays and procedures involved can be a significant barrier. We would suggest that the process must take account of these difficulties and barriers faced by Looked After children.

Duties

73. Looked After children have a right to have a say in and take part in all decisions and meetings affecting their care. The views of the child are paramount throughout a child’s time in care and the local authority is under various duties to take account of those views. This begins with consulting a child (taking account of their age and maturity) about their ‘Child’s Plan’\(^{55}\). This is a plan which local authorities must have for all Looked After children, regardless of legal status or where they live\(^{56}\). It involves an assessment of the child’s needs, how they can be met, and proposals for safeguarding and promoting the child’s welfare\(^{57}\). As discussed, the local authority must also consult with a child before making any major decisions affecting them\(^{58}\).

\(^{55}\) Children and Young People (Scotland) Act 2014 (2014 Act) s.33. A Child’s Plan is available for any child who has a wellbeing need, not just Looked After children.
\(^{56}\) Looked After Children (Scotland) Regulations 2009/210 (2009 Regulations) regulation 5
\(^{57}\) ibid regulation 4
\(^{58}\) 1995 Act (n 1) s.17(3); s.17(4)
74. Children Looked After at home have regular Looked After Children (LAC Reviews)\textsuperscript{59}. If Looked After and accommodated, such children have regular Looked After and Accommodated Reviews\textsuperscript{60}. The purpose of these regular reviews is to ensure that the child's needs are being met and assess the child's progress and development. The local authority is required to consider the child's views (taking into account their age and maturity) as well as others involved in their lives e.g. parents, those with PRRs, foster carers etc\textsuperscript{61}. Children are encouraged to participate in their Reviews, but the local authority can facilitate ways for a child to express their views without having to actually attend the Review\textsuperscript{62}. These Reviews are often an important forum to express views. Looked After children with compulsory supervision requirements under the Children's Hearings (Scotland) Act 2011, will have at least an annual review to express their views\textsuperscript{63}. However, unless provided for by a change in legislation, the Children's Hearing system will not have the power to make an order deciding on gender recognition.

75. The Children and Young People (Scotland) Act 2014 (the 2014 Act) has conferred new statutory duties on a range of publicly funded organisations and services such as local authorities that are now known as 'corporate parents'\textsuperscript{64}. Under these duties, corporate parents are responsible for safeguarding and promoting the welfare of Looked After children and care leavers\textsuperscript{65}. Corporate parents are responsible for working together to achieve this\textsuperscript{66}.

76. Section 58 of the 2014 Act provides that it is the duty of every corporate parent, in so far as consistent with the proper exercise of its other functions:

(a) to be alert to matters which, or which might, adversely affect the wellbeing of children and young people to whom this Part applies,

\textsuperscript{59} 2009 Regulations (n 56) regulation 44
\textsuperscript{60} 2009 Regulations (n 56) regulation 45
\textsuperscript{61} ibid
\textsuperscript{63} Children’s Hearings (Scotland) Act 2011 s.83(7)
\textsuperscript{64} 2014 Act (n 55) Schedule 4
\textsuperscript{65} ibid s.57
\textsuperscript{66} ibid s.60
(b) to assess the needs of those children and young people for services and support it provides,

(c) to promote the interests of those children and young people,

(d) to seek to provide those children and young people with opportunities to participate in activities designed to promote their wellbeing,

(e) to take such action as it considers appropriate to help those children and young people—

(k) to access opportunities, it provides in pursuance of paragraph (d), and

(ii) to make use of services, and access support, which it provides, and

(f) to take such other action as it considers appropriate for the purposes of improving the way in which it exercises its functions in relation to those children and young people.

77. This section is intended to help mitigate the difficulties that care experienced young people have in accessing opportunities such as education and employment and services. Any changes to the 2004 Act would require appropriate training, guidance and policy to ensure that corporate parents are able to meet the needs of children and young people wishing to have their gender legally recognised.

Permanence Order

78. Where a Looked After child is not likely ever to return home, a local authority may apply to the Sheriff Court for a permanence order (PO). A PO will remove the right to regulate where the child lives from the parents and give that right to the local authority. Parents may retain some of their

67 Adoption and Children (Scotland) Act 2007 (2007 Act) s.80
68 ibid s.81 (1)(b)
PRRs (usually contact) under the order or they may lose them all\(^{69}\). A permanence order can be flexible and respond to the child's needs and circumstances. The person or persons with whom the child is to live, for example foster carers, may gain some PRRs together with the local authority\(^{70}\). A PO cannot be made in respect of a child 12 or over without their consent\(^{71}\). The child will be given an opportunity to express a view\(^{72}\). There are instances where a person can apply to vary a PO but there are strict requirements\(^{73}\).

79. There will be children for whom permanence is planned for by the local authority or in process, but a PO has not yet been granted by the court. Until a PO has been granted, legally, PRRs will remain with the parents, regardless of what the local authority plans for the child. A possible scenario is where a Looked After child asks their social worker to help them apply for gender recognition. It is discussed at the child's next LAAC review and the child's parents refuse to provide consent. Even if the decision of the LAAC review is that gender recognition is in the best interests of the child and withholding consent is unreasonable, the local authority do not have the power to make the application. A local authority cannot raise an action under section 11 of the 1995 Act\(^{74}\). It may be possible for a foster carer to raise a court action. However, consideration would need to be given to how the foster carer would pay for the costs associated with this. It would still be open for a child with legal capacity to raise a court action.

80. A child under a permanence order is still a Looked After child. If they were previously on Supervision Requirements in the Children's Hearing system, this will be brought to an end by the order\(^{75}\). If a child on a PO approaches their social worker and asks if the local authority can support an application for legal gender recognition, there would need to be a process for decision-making.

81. The Scottish Government state that a court order can be sought under existing arrangements where there are disagreements. A difficult situation could arise where a younger child under a PO and without legal capacity requests that the local authority apply for gender recognition. The local authority may disagree and refuse to consent to the application. The child's

\(^{69}\) ibid s.82. Ancillary provisions will specify any arrangements for contact and whether PRRs are extinguished or retained.

\(^{70}\) ibid. This would be set out in the ancillary provisions of the permanence order.

\(^{71}\) ibid s.84(1)

\(^{72}\) ibid s.84(5)

\(^{73}\) ibid s.92. This applies to the variation of ancillary provisions in a permanence order only.

\(^{74}\) 1995 Act (n 1) s.11(5)

\(^{75}\) 2007 Act (n 67) s.89
foster carer has some PRRs under the PO to make day-to-day decisions about the child. However, the main decision making remains with the local authority. The child does not have the legal capacity to raise a court action. A foster carer may have some PRRs under the PO and could raise the action on their behalf. However again, the cost involved would need to be met.

82. Whether legal gender recognition can be applied for through a court process or by parental application, it must be accessible to all children and young people, including those Looked After or care experienced. It is important to take account of the different legal statuses of Looked After children and what this may mean in terms of support and accessibility of the parental application process. The lived experiences of Looked After children are diverse and a child’s pathway through care varies greatly. The intersectional identity between being trans and care experienced is an important consideration for how any process for under 16’s would work.

83. The Scottish Government has stated that how the process would work if a local authority had PRRs for the child would require careful consideration. Children subject to permanence orders will still have LAAC reviews but they do not have an independent forum such as a Children’s Hearing to discuss issues affecting their care. Any decision-making process developed by the local authority to decide whether to apply for legal gender recognition for a child will require the duty to take account of the child’s views. However, there remains the need for a child to have recourse to a legal forum such as the courts to apply for gender recognition, particularly if there is disagreement.

No PRRs

84. There are situations where no one has PRRs for a child, for example unaccompanied minors, or where those with PRRs are recently deceased. Where a child does not have anyone alive or traceable with PRRs, it will be essential that someone obtains PRRs. This may be a local authority under a PO76, or a person applying for PRRs under section 1177 or obtaining an adoption order78. Gender recognition could then be applied for, but this is likely to be a lengthy process.

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76 2007 Act (n 67)
77 1995 Act (n 1) s.11(2)(b)
78 2007 Act (n 67) s.29, s.30
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