

Scottish Women's Aid submission of 4 April 2023

PE1968/E: Restrict perpetrators of domestic abuse from using family court proceedings to continue tormenting victims

Joint response from [Scottish Women's Aid](#), and Dr Fiona Morrison and Professor Kay Tisdall (of the [Childhood and Youth Studies Research Group](#) at Moray House School of Education and Sport, University of Edinburgh), to the Citizen Participation and Public Petitions Committee in relation to PE1968: Restrict perpetrators of domestic abuse from using family court proceedings to continue tormenting their victims

1. Lack of progress made in implementing the Children (Scotland) Act 2020 and improving compliance with the UNCRC

The Children (Scotland) Act 2020 aims to better protect both children's protection and participation rights in the current legal framework for family law. However, progress in its implementation has stalled. Evidence from Scotland¹ and elsewhere demonstrates that allegations and concerns of domestic abuse underlie many, if not the majority of, disputed contact cases that reach courts.² Family law systems and procedures need to be able to deal with allegations of domestic abuse and work to eradicate barriers to implementing children's participation rights.

There is an urgent need to implement the system of child advocacy that was intended to be enacted through the Children (Scotland) Act 2020. The UN Committee on the Rights of the Child's General Comment No. 12³ requires, when implementing children's participation rights, to ensure: preparation for the child; an enabling and encouraging environment for the hearing; assessing the capacity of the child, so as to guide the weight to be given to these views in the decision; feedback to the child on the outcome and how the child's views were considered.

¹ Scottish Government. 2019 [Family Justice Modernisation Strategy](#)

² CAF/CASS & Women's Aid. 2017 [Allegations of domestic abuse in child contact cases](#); Mackay, K. 2013 [The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse](#), Scotland's Commissioner for Children and Young People.

³ United Nations Committee on the Rights of the Child (2009) *General Comment No. 12, The right of the child to be heard*, <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

Without an accessible system of advocacy available to children it is unclear how these rights are being met⁴.

General Comment No. 12 is clear that all children should be presumed to have the capacity to express views. It is the duty of the relevant individuals to enable children to express their views in the most suitable way to them. Such issues were duly considered in the Children (Scotland) Act 2020, in the wording of Section 1. **We are concerned that the absence of an advocacy infrastructure, means that younger children are routinely disenfranchised from their rights as set out under the UNCRC. We have further concern that the rights of specific groups of children (e.g. children with learning difficulties) are also at risk.** There is an urgent need to consider how mechanisms can be developed to accommodate these groups of children who are the main constituents of family courts.

Contrary to the UN Committee on the Rights of the Child's General Comment Number 5,⁵ there is no clear or accessible way for children to complain or seek remedy about court decisions and practices about child contact. While there is an existing legal process for appeals it is not accessible to children. **This needs to be addressed for law and practice to be compliant with the UNCRC.**

Contrary to Article 11 of the Istanbul Convention, no routine data is available on courts practices and outcomes in relation to disputed contact in Scotland. Data needs to be collected and made available to monitor the following: decisions made by court; the nature of cases (e.g., where there are allegations of domestic abuse); how children's participation rights were implemented; children's experiences of the process (including their participation rights). **Without robust disaggregated data on courts practices it is not possible to monitor the implementation of children's rights in this context.**

⁴ Morrison, F, Tisdall, E. K. M., Warburton, J., Reid, A., & Jones, F. (2020a). Children's Participation In Family. Actions-Probing Compliance With Children's Rights Research Report.

<https://dspace.stir.ac.uk/bitstream/1893/31100/1/Childrens%20Participation%20in%20Family%20Actions.pdf>

⁵ UN Committee, Committee on the Rights of the Child, General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child*, 2003.

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en

2. The urgent need to ensure that we have domestic abuse competent courts

In spite of legislative changes that were introduced as part of the Domestic Abuse (Scotland) Bill, research⁶ shows that awareness of the dynamics of domestic abuse within civil proceedings remains limited. International research shows that child contact and legal proceedings can become a focal point for post- separation abuse.⁷ We are concerned that women are advised against raising domestic abuse in child contact proceedings and that domestic abuse is not adequately addressed through court proceedings with negative consequences for women's and children's rights to protection. There is **a clear need for improved understandings of domestic abuse as a pattern of behaviour that impacts both women and children**, and the ways contact proceedings can be used by perpetrators to prolong their abuse.

Work is required to **harmonise the ways in which domestic abuse is addressed across criminal, civil and public law**. A recent study⁸ illustrated the persistent disconnect between civil and criminal proceedings, noting that the outcomes of a domestic abuse within criminal proceeding will rarely inform the decisions of child contact. This undermines the safety and protection of women and children, often in favour of maintaining contact with the abusive parent. Recent Scottish research has pointed to gaps in criminal law, including less rigorous implementation of protective orders (non- harassment orders) for adult and child victims of domestic abuse in criminal proceedings so that such orders do not 'interfere' with child contact.⁹ There are further and significant concerns about the adequacy of legal aid provision and the implications this has for effective legal representation of non-abusing parents and children during contested child contact.¹⁰ These raise significant concern about children's and women's rights to protection.

⁶ <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Executive-Summary-11.01.23.pdf>

⁷ Birchall, J. and Choudhry, S. 2022. 'I was punished for telling the truth': how allegations of parental alienation are used to silence, sideline and disempower survivors of domestic abuse in family law proceedings. *Journal of Gender-Based Violence*, 6(1), pp.115-131. See Hunter, R., Barnett, A., Kaganas, F. and Choudhry, S. eds. 2020. *Domestic Abuse and Child Contact: International Experience*. Routledge. Holt, S. 2017. Domestic Violence and the Paradox of Post-Separation Mothering, *The British Journal of Social Work*, 44(7) 2049–2067; Morrison, F., 2015. 'All over now?' 'The ongoing relational consequences of domestic abuse through children's contact arrangements. *Child Abuse Review*, 24(4), pp.274-284; Hardesty, J. L., Haselschwerdt, M. L., & Johnson, M. P. 2012. Domestic violence and child custody. In K. Kuehnle & L. Drozd (Eds.), *Parenting plan evaluations: Applied research for the family court* (pp. 442–475). Oxford University Press

⁸ <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Executive-Summary-11.01.23.pdf>

⁹ See Houghton, C., Morrison, F., Warrington, C. and Tisdall, EKM. (2023). Domestic Abuse Court Experiences Research: the perspectives of victims and witnesses in Scotland. Scottish Government; McPherson, R. 2022. Unintended Consequences Of non-harassment Orders: Child Contact decision-making, *Journal of Social Welfare and Family Law*, DOI: 10.1080/09649069.2022.2136714

¹⁰ <https://www.scottishlegal.com/articles/legal-aid-crisis-hitting-scotlands-most-deprived-families>