

Written evidence to the Justice Committee: Alternative Dispute Resolution

Response from Scottish Women's Aid January 2018

ABOUT

Scottish Women's Aid (SWA) is the lead organisation in Scotland working towards the prevention of domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. SWA is the umbrella organisation for 36 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

1. KEY POINTS

SWA welcomes the opportunity to engage with the Justice Committee's evidence session on Alternative Dispute Resolution ("ADR"), including availability of ADR in Scotland and any barriers to its use.

Firstly, it is important to clarify that SWA does not have an issue with the concept of ADR and mediation in general terms. Our concerns relate specifically to family matters where domestic issue is an issue and how the proposals impact in this area.

ADR is inappropriate when it comes to family actions in the context of domestic abuse, as ADR approaches assume equality in power between its participants, an equality that does not exist in cases of domestic abuse. In this context, therefore, in recognition of the power dynamic imbalance and risk to children, neither pre nor post separation mediation in family matters where domestic abuse is an issue will be appropriate.

However, women experiencing domestic abuse may still be placed in situations where they feel pressured to undergo ADR processes. By its very nature, domestic abuse may be debilitating to the extent that a woman can no longer make choices. We are aware that there will be times where women participate in a mediation process because they are unaware of their right not to; they believe that they will lose custody of their children; they

fear repercussions from the perpetrator or purely because they are not in an empowered state of mind sufficient for them to assert their rights.

There is also the issue that in child contact cases, women can be advised not to disclose domestic abuse, or are afraid to bring this issue before the court, on the grounds that they will be seen as “difficult” or trying to influence the child’s views on the matter. As a result, women who have not previously disclosed abuse may be forced into mediation. Hopefully the mediator would be suitably experienced enough to ascertain that abuse is a factor and then immediately terminate the process but this supposes that the mediator has the knowledge, experience and understanding that mediation is not appropriate because the woman had not made the choice to participate freely. Domestic abuse is by its very nature a hidden crime, and it is dangerous to assume that the subtleties of coercive control can be accurately assessed in one session.

A Sheriff making an order for mediation in a domestic abuse situation is therefore likely to compromise the safety of the woman and her children and make it more difficult for them to escape the abuse.

What is needed is wholesale “system change”, with the current deficiencies rectified so there is a real and cogent understanding of domestic abuse and a clear competence of the issues demonstrated. Until this has been achieved, so women, children and young people experiencing domestic abuse have confidence that the very real risks posed to them by the legal processes themselves have been identified and addressed, we have concerns around raising awareness of the use of ADR among court users and professionals, both within and outwith the courts, and encouraging further use of mediation in family law cases .

- The Children (Scotland) Act 1995 contains a general requirement that contact should be in the best interests of the child and a specific duty on the court in section 11(7A)-(7E) to have regard to the need to protect the child from domestic abuse. Evidence abounds, from women, from children and young people, from service providers, and from solicitors practicing family law, that the intention of the Act has not been met and that the system continues to put children, young people, and their mothers at significant risk.
- Courts should not be encouraged to use “*early negotiation and mediation to promote earlier settlement of cases*”; no steps should be taken to incorporate mediation into legislation or court rules, appoint specialist sheriffs or expand in-court mediation schemes until a full, independent and comprehensive examination of the issue has been undertaken, noting that financial efficacy alone cannot be the driver for the promotion of the “ costs and benefits” to the civil justice system in Scotland from the use of ADR.

- Imposition of any penalty on a “failure” to undertake mediation would place women in an impossible position, compromising their own and their children’s safety and would not accord with the welfare principle and the obligation to act in the child’s best interests.
- There is a greater need for further training and awareness- raising work for Sheriffs hearing family law cases on the dynamics of domestic abuse and the impact of this on women and children in relation to cases involving child welfare, contact and residence.
- Any move to produce a common understanding of the core principles of mediation, through developing a consistent approach to the definition of mediation in training and other educational materials, must by definition, include information on the dynamics of domestic abuse, a clear statement that mediation is not appropriate in these situations and explanation of this position.

We recognise that this is a starting point for more extensive discussions on the promotion of mediation and therefore look forward to engaging with the Committee as discussions on progress.

Commentary

As we have noted above, in civil actions relating to children, by law, the welfare and safety of the child is paramount but the increasing emphasis on mediation often disregards or minimises the presence of domestic abuse. This compounds existing failures to recognise the extent and nature of domestic abuse resulting in unsafe contact arrangements being made that are neither risk -assessed or monitored adequately.

The accepted position across many jurisdictions is that mediation is wholly incompatible with protecting the interests of women, children and young people experiencing domestic abuse¹. Despite this, we are aware that, regrettably, inappropriate referrals occur already; legal and other advisers with poor understanding of domestic abuse have directed women towards the process and women have engaged in mediation at the behest of their lawyer because it has been suggested that if they do not do so, the courts will regard them as unreasonable, obstructive, hostile or “*entrenched in a position*” should they refuse to attend and that this may have implications for the eventual outcome of child related actions.²

❖ ¹ Johnson NE, Saccuzzo DP and Koen WJ (2005). Child Custody Mediation in Cases of Domestic Violence : Empirical Evidence of a Failure to Protect; *Violence Against Women* 2005 11: 1022; Bryan, P. (1992). Killing us softly: Divorce mediation and the politics of power. *Bluff LawReview*, 40, 441-523; Grillo, T. (1991). The mediation alternative: Process dangers for women. *Yale Law Review*, 100, 1545-1581; Hart, B. (1990). Gentle jeopardy: The further endangerment to battered women and children in custody mediation. *Mediation Quarterly*, 8, 326-327.
² Goundry, SA, Peters, Y, Currie, R (1998) :Family Mediation in Canada: Implications for Women’s Equality; A Review of the Literature and Analysis of Data from Four Publicly Funded Canadian Mediation Programs
http://www.oaith.ca/assets/files/Publications/family_mediation_canada.pdf

A clear distinction must be made between persons litigating or considering litigation because of a dispute and women, children and young people experiencing domestic abuse who are seeking protective orders, or an order regulating an abuser's opportunity for contact and residence of the children. It must be recognised that the woman and the abuser are not simply having a "*disagreement*" or a "*dispute*"; they have not "*fallen out*" nor do they have a "*problem*" which can be "*sorted out*" or "*easily resolved*" by negotiation. Fathers who have been abusive to their partners or ex-partners have made what David Mandel calls "*a parenting choice to be abusive*³"; the issue is much more serious and determines children's right to live in safety and their protection from abuse.

Domestic abuse is not a matter which can be solved by the parties discussing their respective positions, allowing the other to consider the other's position and reaching an agreed settlement. It is reprehensible to even expect that a woman experiencing domestic abuse should be asked to consider the abuser's position. The very nature of domestic abuse and the abuse of power makes it unsuitable as a practice which involves the parties having to, and sometimes being ordered to, reach an agreement. The abuser may have spent many years ensuring that his partner does not have a voice, and is punished for expressing any opinion contrary to his wishes.

Therefore it is extremely unlikely, and unreasonable to expect, that the woman will be able to overcome years of fear to be able to voice what she wants in the best interests of her own and her child's safety and welfare, in the presence of a man who has silenced, intimidated and coerced her. This inherent power imbalance means that women may be manoeuvred into a position which is not in her best interests and may prejudice both her safety and that of the child; there is also nothing to prevent an abuser forcing/persuading the woman to enter into mediation, simply to continue to perpetrate the abuse and wield power over her. Research shows, and we are informed by the experience of women using local Women's Aid services, that women and children's safety can be jeopardised - women have been assaulted after attending mediation and that the mediation process has had to be halted because of the aggression of the abuser.

Consequently, in this situation, the authority and presence of the court and a Sheriff or judge is the only way to convey to abusers that their behaviour will not be tolerated and that women, children and young people are fully entitled to the intervention of the full weight of the law to protect them and bring about their safety.

However, it is, regrettably, the experience of women using our services, a position reflected in both domestic and international research, that neither the courts nor mediation have served women experiencing domestic abuse well, as a consequence of judiciary and mediators lacking an awareness and understanding of the dynamics and effects of domestic abuse on women and particularly on children relating to contact and residence.

Courts vary widely in their ability and willingness to honour children's right to be heard. Children expressing a wish not to have contact or to have reduced contact (e.g., children may want to see a parent, pet, sibling but not stay overnight) can face allegations of having been "coached" by the mother. Serious consideration has been given to imposing criminal penalties on women already let down by a system that has failed to protect them.⁴ The problem is the failure of implementation and a change of attitudes and practices, an absence of an awareness of the dynamics and impact of domestic abuse, and a lack of positive judicial case management. Whereas other legislative provisions relating to domestic abuse, such as the creation of matrimonial and domestic interdicts, have met with some success, the crucially important provisions within the Children (Scotland) Act 1995 have been markedly misused.

SWA has worked with the Children and Young People's Commissioner Scotland (CYPCS) to examine the faulty functioning of our court system's response to children and young people in the context of contact, as the existing system malfunction simply cannot be allowed to continue. This is especially true in light of the very welcome progress in understanding, awareness and policy reform around domestic abuse, both in Scotland and internationally. In Scotland, this good practice approach is demonstrated through *Equally Safe*, Scotland's VAWG strategy and legislation, including the Domestic Abuse (Scotland) Bill. There is now also a more concrete understanding of the effect of domestic abuse on children, particularly the role of coercive control in this activity and how child contact is used as a vehicle to continue this control and the perpetration of the abuse.⁵ Coupled with these reforms is the sea-change performed in the understanding and enforcement of children's rights, affected through the GIRFEC agenda and the Children and Young People (Scotland) Act 2014, with its focus on the UN Convention of the Rights of the Child. An appropriate response is important in both securing the safety of women, children and young people and as an exercise of their human rights in addition to meeting the State's obligations in this area.⁶

Scottish Women's Aid is a Charity Registered in Scotland: Charity No. SC001099.

⁴ Child Contact Proceedings for Children Affected by Domestic Abuse ; Briefing paper for Scotland's Commissioner for Children and Young People; Fiona Morrison, Kay Tisdall, Fiona Jones and Alison Reid, March 2013; http://www.cypcs.org.uk/downloads/Adult%20Reports/Child_contact_proceedings_March_2013.pdf
The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse; A report to Scotland's Commissioner for Children and Young People ; Dr Kirsteen Mackay; December 2013
<http://www.cypcs.org.uk/ufiles/Views-of-children-and-domestic-abuse.pdf>

⁵ Stark, Professor E, Public Health and Public Administration, Rutgers University, Newark, NJ; (2012) *The Battered Mother's Dilemma: Reframing Child Maltreatment in the Context of Coercive Control.* <http://nau.edu/Centers-Institutes/Family-Violence-Institute/Forms/Workshop-Dr--Stark-The-Battered-Mother-s-Dilemma/>
Stark, E.; *Coercive Control: The Entrapment of Women in Personal Life* (Oxford, 2007)

⁶ Mediation in family cases where domestic abuse is an issue, is specifically highlighted in international instruments from the UN and Council of Europe as being wholly inappropriate and in fact, a procedure that is specifically prohibited.