

Call for inputs – Custody cases, violence against women and violence against children

Special Rapporteur on violence against women and girls, its causes and consequences

15 December 2022

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to end domestic abuse, playing 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.

SWA welcomes the opportunity to respond to the OHCHR call for views on custody cases, violence against women and children. This paper summarises the current policy background in Scotland, drawing on empirical evidence and previous consultations informed from the expertise within the Women's Aid network.

Policy background

The Domestic Abuse (Scotland) Act 2018 is a landmark piece of legislation that focuses on the behaviour of the perpetrator rather than that of the victim¹. The law recognises coercive control amongst the range of behaviours associated with domestic abuse as well as recognising children and young people as victims of domestic abuse rather than simply witnesses.

Reports of '*parental alienation*' undermine policy progress and dismiss experiences of women and children survivors. 'Parental alienation syndrome' has been removed from the International Classification of Diseases and widely discredited by empirical evidence, yet claims of parental alienation in child custody cases persist.²

Coherence across policy and practice is essential to challenge notions of parental alienation. Further action is needed to embed women and children's rights across *all* policies, practices and laws:

- We welcome Scottish Government's commitment to incorporate the UNCRC along with ambitions to introduce a new Human Rights Bill that will incorporate four UN treaties into Scots Law, including CEDAW³. It is important that the links between women and children's rights are understood to ensure implementation is not progressed in silos.

¹ <https://www.gov.scot/news/domestic-abuse-act-in-force/>

² <https://www.brunel.ac.uk/news-and-events/news/articles/Playing-the-Parental-Alienation-card-Abusive-parents-use-the-system-to-gain-access-to-children>

³ <https://www.gov.scot/news/new-human-rights-bill/>

- There are consistent concerns that children’s views are not considered in family law proceedings⁴. Evidence⁵ suggests that children can feel pushed into contact with an abusive parent despite expressing a clear view against this and contact not being in their best interests. Effective implementation of the Children (Scotland) Act 2020, alongside fully embedding the UNCRC, will be key to ensuring that children's views - at all ages - are sought and taken into account.
- The Domestic Abuse (Scotland) Act signalled an important shift in how domestic abuse is understood in law. Robust and consistent understanding of domestic abuse, including coercive control and its impacts are essential to challenge parental alienation. This also means fulfilling obligations as set out in the Istanbul Convention. In November 2022 the UK became the 37th member state to ratify the Istanbul Convention, particular attention should be paid to Article 31 of the convention which states *‘Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.’*

Notions of parental alienation in child contact and custody cases prevent the realisation of women’s and children’s rights.

Children’s participation rights

Research⁶ highlights that parental alienation can threaten children’s participation rights. Morrison et al (2020) found that where there were allegations of parental alienation alongside a history of domestic abuse, children’s rights were frequently not upheld.

Fully embedding the minimum requirements as set out under the United Nations Convention on the Rights of the Child (UNCRC), was amongst the calls we made in our response to the Children (Scotland) Act 2020. In our response to the Children (Scotland) Act 2020⁷ we advocated for improved access to advocacy and support for children and young people in civil courts. We also supported the calls from civil society organisations to include an explicit presumption within the Children (Scotland) Act 2020 that all children are capable of forming a view. This was reinforced by young survivors’ group *Yello*⁸ that called for greater recognition of the impact domestic abuse can have on children and young people and the need for support within the justice system to ensure their voices are heard.

⁴ Scottish Women’s Aid (2019). Young Expert Group (Yello!) Response to Call for Views on the Children (Scotland) Bill. <http://bitly.ws/xysf>

⁵ Scottish Women’s Aid (2019). Young Expert Group (Yello!) Response to Call for Views on the Children (Scotland) Bill, <http://bitly.ws/xysf>

⁶ 1 Morrison F, Tisdall EKM & Callaghan JEM (2020) Manipulation and Domestic Abuse in Contested Contact - Threats to Children's Participation Rights. Family Court Review, 58 (2), pp. 403-416. <https://doi.org/10.1111/fcre.12479>

⁷ <https://womensaid.scot/wp-content/uploads/2019/11/Scottish-Womens-Aid-response-to-Children-Scotland-Bill-call-for-views-November-2019.pdf>

⁸ Scottish Women’s Aid (2019). Young Expert Group (Yello!) Response to Call for Views on the Children (Scotland) Bill,

“Don’t dismiss us – we experienced it, and we know what we’re talking about. If we feel like we aren’t being listened to, it can make us not want to speak to people or take part in things.” Young Expert Group, Yello

The Children (Scotland) Act 2020 removes the presumption that a child aged 12 or over is of sufficient age and maturity to form a view, as this has historically resulted in children younger than 12 not being asked for their views on the matters that affect them. Article 12 of the UNCRC⁹ states that decision makers must have regard to children’s views while ‘taking into account the child’s age and maturity’. It is important for consistent and transparent practice about how a decision maker assesses a child’s maturity. For children and young people, they have told us that they feel deeply disempowered when they are asked for their views and these are not considered. Women’s Aid workers have shared the detrimental impact of this can have children and young people’s recovery from the abuse they have experienced¹⁰.

A recommendation consistently made by children and young people is having increased access to advocacy and support¹¹. We firmly believe that any concern regarding children sharing views that are not their own (i.e. where there are allegations of parental alienation) would be mitigated by them having access to and establishing trusting relationships with trusted support and advocacy workers. We were pleased to see the inclusion of provision to create to access to advocacy for all children and young people in the justice system within the Children (Scotland) Act 2020, which would strengthen children’s participation rights. The full implementation of the Children (Scotland) Act 2020 alongside the incorporation of the UNCRC is essential to ensure children’s rights, in particular their right to participation and information, are protected in custody cases.

Default assumption in favour of contact from both parents

We know that domestic abuse is a factor in the majority of cases coming through the family courts¹². Between January and November 2022, 728 contacts to the Scotland’s Domestic Abuse and Forced Marriage Helpline reported child contact as a key issue.

Allegations of parental alienation silence victims accounts of domestic abuse and re-traumatise survivors. Research shows that in some cases women may be advised by solicitors to not disclose the domestic abuse they and their children experienced in court because of the risk of being accused of parental alienation by the perpetrator¹³.

⁹ UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12 <https://www.refworld.org/docid/4ae562c52.html>

¹⁰ SWA (2018) Response to the consultation on Part One of the Children (Scotland) Act 1995 <https://womensaid.scot/wp-content/uploads/2018/09/1995-Act.pdf>

¹¹ ¹¹ Scottish Women’s Aid (2019). Young Expert Group (Yello!) Response to Call for Views on the Children (Scotland) Bill. <http://bitly.ws/xysf>

¹² Mackay, K (2012) The Child’s Voice in Contact Disputes: Genuine Participation in Private Law Court Actions. Lambert Academic Publishing. Saarbrücken, Germany.

¹³ Lapierre, S. & Côté, I. (2016). ‘Abused women and the threat of parental alienation: Shelter workers’ perspectives’. Children and Youth Services Review 65, 120–126

The dismissal of domestic abuse is also apparent in the ways that courts often operate from a default assumption in favour of contact from both parents. This default endangers children and mothers experiencing domestic abuse in a number of ways.

It is crucial that we move away from the notion that perpetrators of domestic abuse can be assumed to be good-enough parents unless particularised harm to children is demonstrated. Contact arrangements that go against children's wishes are harmful to the child¹⁴, to the child's relationship with the non-offending parent,¹⁵ and to the child's relationship with the offending parent. Contact orders that are made against children's wishes link to a poor relationship between the child and the father in later life¹⁶. When children wish to have contact with their father but their father does not wish to have contact with them, contact does not happen. However, when children who have experienced domestic abuse express a desire to not have contact with their father who does want contact, we know that they often are disbelieved, and their mothers accused of coaching them to express these views.¹⁷

Edinburgh Women's Aid have been funded by the Legal Education Fund (LEF) to deliver a pilot programme of providing women with free legal services 'in-house' (within the Women's Aid service) from lawyers with extensive experience of domestic abuse cases and the impact this has on women and children. The pilot has provided support and advice to over 150 women, with over half seeking advice about child contact. The learning from the pilot highlights the importance of gender competent legal practices.

¹⁴ SWA (2018) Response to the consultation on Part One of the Children (Scotland) Act 1995, Q.24
<https://womensaid.scot/wp-content/uploads/2018/09/1995-Act.pdf>

¹⁵ Humphreys, C. and Thiara, R. (2015) 'Absent presence: The ongoing impact of men's violence on the mother child relationship', *Child and Family Social Work*, 1-9.

¹⁶ Daly, A. (2018) *Children, Autonomy and the Courts: beyond the right to be heard*. Leiden: Brill | Nijhoff

¹⁷ Harrison, C. (2008). 'Implacably hostile or appropriately protective?: Women managing child contact in the context of domestic violence.' *Violence Against Women*, 14, 381–405; Holt, S. (2011) 'Domestic abuse and child contact: positioning children in the decision making process', *Child Care in Practice*, 17 (4), 327-346.