

Submission to Equalities, Human Rights and Civil Justice Committee: Non-implementation of Acts of the Scottish Parliament

Response from Scottish Women's Aid

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to end domestic abuse and plays a vital role in campaigning for effective responses to domestic abuse. SWA is the umbrella organisation for local Women's Aid organisations across Scotland, each providing 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, follow-on support and temporary refuge accommodation. We also run Scotland's Domestic Abuse and Forced Marriage Helpline, taking over 1000 calls, WhatsApp messages, and texts (24h/365) every month.

SWA welcomes the opportunity to submit comments to the Committee on our concerns around delays to the implementation of both the Children (Scotland) Act 2020 and the Domestic Abuse (Protection) (Scotland) Act 2021.

General comments on non-implementation of legislation

As well as our comments below on these two specific Acts, we would like to make some general comments about the issue of non-implementation of legislation within Scotland. As demonstrated by the need for this piece of work by the Committee, key changes and improvements in protection that have been promised to women, children and young people experiencing domestic abuse across Scotland have not been implemented. This has a significant impact not only on confidence in the Scottish Parliament and Government, but on wider public trust around achieving legislative reform to improve responses to domestic abuse and gender-based violence.

SWA worked hard with officials and parliamentarians on both Acts. Implementation offers substantial progress on Scotland's commitment to children and to adult survivors of domestic abuse. Indeed, elements of the Children (Scotland) Act 2020 would become international best practice. Our speculation is that the lack of an allocation process linked to passage of new legislation is a critical barrier to timely and robust implementation.

The Children (Scotland) Act 2020

The 2020 Act sets out a range of changes predominantly to the 1995 Act to bring the law further into line with children's rights under the United Nations Convention on the Rights of the Child (UNCRC).

Child welfare reporters

The lack of any mechanism governing the regulation, training and registration of child welfare reporters (CWR) has long been a source of considerable harm to survivors of domestic abuse.

The Children and Young People's Commissioner conducted important research in 2013 on the treatment of children's views in child contact and residence cases where there is domestic abuse which highlighted the influence of CWRs on the outcome of cases.¹ Despite their significant power, court reporters did not receive specific training on the causes, nature, dynamics of domestic abuse and the impact of domestic abuse on children - or on best practice for communicating with children and reporting their views and experiences. The report therefore identified an urgent need for training for CWRs on

¹ <https://www.cypcs.org.uk/resources/views-of-children-in-private-law-child-contact-disputes-where-there-is-a-history-of-domestic-abuse/>

domestic abuse and its impacts on children. The report also called for processes to ensure children could understand why the CWR was meeting with them, receive feedback after sharing their views and take action if they were not happy with the outcome.

When the 2020 Act was introduced, the situation had not changed. The relevant provisions in the 2020 Act introducing a register and commensurate regulatory regime for CWRs were much welcomed. Regrettably, women, children and young people continue to report appalling practices and a singular lack of understanding of domestic abuse on the part of CWRs. These practices contradict the founding tenets of the welfare principle in the Children (Scotland) Act 1995 and are a clear abuse of children's Article 2, 3 and 8 rights under the European Convention on Human Rights (ECHR).

We are aware that the Scottish Government has consulted on the various registers envisaged under the 2020 Act² and that there has been no objection to the CWR proposals. Further, we understand that the necessary SSIs commencing the relevant 2020 Act section came into force in October 2021.

The delay in implementing these changes means that children's views continue to be systematically overlooked, ignored and contravened. Child contact decisions that endanger women and children and violate their human rights continue to be made.

There is action that the Scottish Government could take while we await full implementation of the Act:

- Implement mandatory training for existing CWRs on the dynamics of domestic abuse, children's rights and best practice for working with children. This training programme must be accompanied by thorough evaluation, monitoring the impact of training on practice to ensure its effectiveness.
- Introduce consistent quality assurance for CWRs' reports to ensure that children's views are being adequately captured, and that decisions/recommendations within reports are evidenced and fully justified. This could be modelled on the existing practice framework for Safeguarders.

Children's views

The Children (Scotland) 1995 Act contains a presumption that only children aged 12 and over are of sufficient age and maturity to give their views on issues relating to Parental Responsibilities and Rights, which includes to the court and CWRs in actions relating to contact and residence. This was replaced in the 2020 Act with the presumption that, except in exceptional circumstances, all children have capacity to give their views, while retaining a degree of judicial discretion in this regard. Failure to commence these provisions is denying children under 12 their legal right to influence matters concerning their future safety and wellbeing.

The failure to commence sections 18 and 20 is not in line with the intentions or provisions of the UNCRC. Section 18 (*Duty to consider child's best interests when allowing access to information*) provides that when the court has to decide whether a person should have access to anything in which private information relating to a child is recorded, it must regard the best interests of that child as a primary consideration. Section 20 (*Explanation of decisions to the child*) places an obligation on the courts to explain their decisions to children in a way they will understand.

² Registers of child welfare reporters, curators ad litem and of solicitors who may be appointed when an individual has been prohibited from conducting their case themselves - Scottish Government consultations - Citizen Space; <https://www.gov.scot/publications/registers-child-welfare-reporters-curators-ad-litem-solicitors-appointed-individual-prohibited-conducting-case-consultation-analysis/pages/3/>

Section 22 (*Failure to obey order*) is also an important protection for mothers experiencing domestic abuse and their children, when mothers fear the impact on their children of sending them to contact - a bind mothers living with post-separation abuse tell us about repeatedly through our Helpline and in feedback from services. Section 22 imposes a duty on the court to investigate why a parent has failed to follow a court order, and the court must give the child concerned an opportunity to express their views and have regard to them. Given women's experiences in being "threatened" with contempt of court proceedings by abusers and by sheriffs, failure to commence this section is acting against the protection of children and their mothers.

Child advocacy services

As we have detailed above, the 2020 Act introduces the concept that all children may be capable of providing their views in some manner and therefore should be given an opportunity to do so in a way that best accommodates them.

This element is particularly important to us at SWA. Our 2016 Power Up/Power Down project with the Children and Young People's Commissioner for Scotland worked together with children and young people aged 6-17 to improve the experiences of children in family court contact proceedings in cases of domestic abuse.³

Key points made by the children and young people included:

- Children see what is happening at home, even if they don't understand it.
- Having a say is **really important**. The sheriff needs to know what the children think – no matter the age of child.
- Forms are difficult – other methods like talking face to face, playing, drawing, using video or voice recording, can be more useful.
- The children need to know what all the adults are there for.
- Children need to know what is happening: when, why and what is coming next. They need to know why decisions have been made – and to be told directly or through a trusted adult.
- Cultural differences are important to think about.

And particularly important in relation to advocacy and roles of professionals:

- Trust and understanding are the most important things.
- Opening up to someone you already have a relationship with is much better than meeting someone as a one-off.
- The children's Support Worker was the most important character. Children felt she should have been brought in from the start.
- Importantly, the children and young people identified the qualities of a 'super listener' (pictured below and available to view on the Power Up/Power Down webpage).⁴

³ [Power Up / Power Down | Scottish Women's Aid](#)

⁴ [Power Up / Power Down | Scottish Women's Aid](#)

Are you a Super Listener?



Children and young people, and the mothers who so often put themselves at risk to protect their children, need implementation now, not when someone deems their safety “affordable”.

Alternative dispute resolution

The priority for Scottish Government should be implementing the improvements to child welfare reports and advocacy services, as outlined above.

Domestic Abuse Protection (Scotland) Act 2021

Many years before the 2021 Act, Scottish Women’s Aid (SWA) identified the need for legislative changes to address domestic abuse as the major cause of women’s homelessness, and repeat homelessness, in Scotland. These legislative changes included “emergency barring orders” (EBOs), in the form of Domestic Abuse Protection Notices and Orders (DAPNS and DAPOs), introduced in Part 1 of the 2021 Act, and the new process in Part 2 of the Act enabling social landlords to take court action against perpetrators to end their interest in a tenancy/joint tenancy and transfer it to the victim-survivor.

SWA’s 2017 research report on domestic abuse and homelessness⁵⁵ called on the Scottish Government to introduce legislation protecting women and children through a mechanism temporarily removing perpetrators from households to prevent further harassment or abuse, with appropriate conditions placed on them, thus providing women with the space and appropriate support to consider their future options.

As well as supporting the intent of the Scottish Government’s Equally Safe Strategy, this remedy, which is preventative as well as protective, is necessary to comply with state obligations to prevent violence against women and protect their Article 2, 3 and 8 rights under the ECHR. The human rights of women, children and young people experiencing domestic

⁵⁵ **Change. Justice. Fairness-** <https://womensaid.scot/wp-content/uploads/2017/07/Change-Justice-Fairness.pdf>

abuse, particularly their rights to a private and family life under Article 8, have long taken second place to those of perpetrators.

Further, providing integrated support and protection measures would meet the requirements and obligations of the Council of Europe Convention on Combating Violence Against Women and Domestic Violence (known as the Istanbul Convention), particularly Article 52, which indicates that parties to the Convention should have provisions for EBOs, thus fulfilling these obligations and supporting ECHR rights with due diligence.⁶

While the Domestic Abuse (Scotland) Act 2018 brought many much-needed reforms, and protection, it left gaps which we hoped the DAPNs/DAPOs would address through providing police with an immediate, short-term power designed to remove the perpetrators of domestic abuse from the family home. This should allow victims to remain in their home, rather than fleeing in search of safety and security, and was a pathway to a robust civil, criminal or civil/criminal response. It represented a paradigm shift in approaches to protecting women and children experiencing domestic abuse and offering them options that included barring a perpetrator from the home - as opposed to women and children being forced to leave their home and move to refuge, or temporary accommodation and the homelessness system.

Discussions around implementation have referred *to significant work likely to be required to develop suitable procedures*, and the need for new procedural mechanisms and court rules. Timescales on hearing applications for DAPOs were said to be *challenging*, as was the timing and process around how the views of children would be taken, and additional powers for police around enforcing DAPNs. In relation to the latter, a considerable volume of consultation has already been undertaken to ascertain the views of children and young people,⁷ who have been very clear that a trusted, domestic abuse-competent person was needed, and that their Women's Aid Children's Support Workers would be such a person.

A major issue appears to be costs and projected demand for the number of DAPO applications. In relation to demand, Police Scotland voiced concerns around numbers of DAPNs they would be called upon to make and then convert to DAPOs. SWA contended that numbers set out in the Financial Memorandum were not accurate, primarily basing demand on an extrapolation of numbers under the Scheme then in place in England and Wales, coupled with the fact that the police were, at that time, also not fully using their powers of investigative liberation to deal with cases in the first instance where there was a lack of sufficiency of evidence.

We were clear that the existing criminal response to the investigation and prosecution of domestic abuse with police powers of arrest, investigative liberation, liberation on undertaking and remand was to be the first response, and that we were looking for a solution tailored to the requirements of Scots law. We did not want to replicate the DVPN/DVPO model in England and Wales as evidence showed that these were neither designed nor delivered in ways that significantly improved women's choices about staying or leaving the family home.

By their own admission, Police Scotland conceded that they should have been using investigative liberation much more; this importantly provided an additional window of opportunity to gather further evidence in support of a case that might not otherwise be reported to the Fiscal, or where the evidence was not sufficiently robust to support a prosecution. This would support more cases being dealt with under criminal procedure and also more referrals to the Fiscal.

⁶ <https://rm.coe.int/convention-istanbul-article-52/168073e0e7>. Emergency barring orders in situations of domestic violence: Article 52 of the Istanbul Convention (2017)

⁷ **Power up power down - a summary of feedback** from children and young people; **Yello** –written evidence on the 2020 Act can be found [here](#). Yello was also the expert advisor group for a 5-country European project called [Improving Justice in Child Contact](#); **Everyday heroes** - [Justice report](#)

Indeed, in their oral evidence to the Bill Committee, Police Scotland stated “*We view the Bill as providing an exceptional tool for use in exceptional circumstances, but it should not constitute the routine response... It would be fair to say that we have not previously used the existing powers to their full extent on domestic abuse, but that is hopefully changing now. The circumstances in which the police would envisage issuing a notice then subsequently applying for an order would be when someone has reported domestic abuse and we have removed the perpetrator from the address in order to facilitate investigation, but we had insufficient evidence to charge them and had to release them, even though we had assessed that there was still a significant risk in the home to the person and any children, so we were required to take steps to continue to protect them.*”

The question of “thresholds” has also arisen. Some other jurisdictions require a threshold imposing a certain level of severity of physical violence or imminent “threat” of physical violence, severe or otherwise. We unequivocally rejected this approach, which ignores the abundant evidence that coercive and controlling behaviours are significant markers for lethality. That the imposition of the immediate and interim EBO was necessary for the protection of a person should be a sufficient test for the court to extend the EBO. Indeed, Police Scotland stated the proposed emergency powers would “...*address an identified gap where there is an insufficiency of evidence to criminally charge the perpetrator of domestic abuse and ongoing risk of abuse by them is identified... It has also previously been acknowledged by us that DAPN’s as emergency orders would address an identified gap where there is an insufficiency of evidence to criminally charge the perpetrator of domestic abuse and ongoing risk of abuse by them is identified. Where such risk is identified, immediate actions are necessary to increase protective measures and provide productive respite in order for a victim to consider options and legal remedy.*”⁸

We also challenge the initial costings in the Financial Memorandum and the apparent ongoing substantial projected increase in costs. In terms of applying for the DAPOs, a simplified procedure could be created for this and to address the, seemingly, procedural and practical challenges in obtaining views of Person A and B and presenting these to the sheriff under the proposed timescales and rights of audience for the parties.

The second part of the Act firstly created a new ground for recovery of possession by a landlord where the sole tenant had been abusive of a partner or ex-partner and allowed the landlord to enter into a new tenancy with the victim of the abusive behaviour. Where the abuser holds a joint tenancy with a victim, Part 2 also allows a landlord to apply for an order terminating that joint tenant’s interest. We are routinely asked by survivors when this legislation will be in place. They are desperate to be protected in their own homes and have a safe and secure tenancy.

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⁸ https://yourviews.parliament.scot/session-5/domestic-abuse-protection-bill/consultation/view_respondent?uuld=769110209