

## Justice Committee

### Family Law (Scotland) Act 2006

#### Written submission from Scottish Women's Aid

Scottish Women's Aid (SWA) is Scotland's national domestic abuse agency. We are the umbrella organisation for our 37 member groups that provide services directly to women, children, and young people. At the national level, we run the National Domestic Abuse and Forced Marriage Helpline and work with government, police, courts, prosecution, and other partners to end domestic abuse.

SWA welcomes an opportunity to provide written evidence and comment to the Parliament. Our main focus in this document is on the amendment to the Children (Scotland) Act 1995 brought about by section 24 of the Family Law (Scotland) Act 2006.

#### Background

When lawmakers sought to extend the conferring of parental responsibilities and rights (PRRs) on both parents through the in Family Law (Scotland) Bill, SWA had no objection when domestic abuse was not an issue. Our position was that such a change needed a concurrent provision that considered child contact with violent or abusive fathers.

Our aim was to ensure that the inadequacies and risks of the civil legal system which arose from the omission of domestic abuse in the Children (Scotland) Act 1995 were removed and that protection for children be automatically built into the 1995 Act to prevent and minimise the danger to children and their mothers who were experiencing domestic abuse through contact orders that would undoubtedly arise from the extended PRR proposals. We stated that “... *when there has been a history of domestic abuse, the process of establishing contact arrangements can be complex, difficult and in some cases dangerous. Contact arrangements often fail because they are sometimes used by the perpetrator of domestic abuse to continue abuse of the women and/or child (ren).*”

Our wish was that children should be able to have contact with both parents but only a) where the contact can be shown to be safe for both the child and the non-abusing parent b) is in the best interests of the child and c) takes place in a safe and nurturing environment. The Scottish Government recognised the validity of these concerns, which were supported by several other children's rights and family support organisations, and the amendment to section 11 of the 1995 Act was introduced to the Bill, an amendment which was wholeheartedly supported by the then Justice 1 Committee and the Scottish Parliament

#### **Section 24 - Orders under section 11 of Children (Scotland) Act 1995: protection from abuse**

This section introduced new provisions, subsections 7A to 7E into section 11 (7) of the Children (Scotland) Act 1995. The 1995 Act, as amended, now contains a

general requirement that contact should be in the best interests of the child. There is a specific duty on the court in section 11(7A)-(7E) to have regard to the need to protect the child from domestic abuse. This requires the court to take into account the abuse, or risk of any abuse to the child, the effect this abuse would have on the non-abusing parent with care and the capacity of the abusing parent to effectively parent the child.

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.

Despite the duty the 1995 Act places on the court, and the very specific inquiries that the court is required to undertake around the presence or risk of domestic abuse on the child and the non-abusing parent, the impact of abuse on women, children and young people is not always taken into account or understood. Views of children are neither being taken, nor listened to when they are voiced.

The pattern in many courts is the following: Fathers who have been abusive to their partners or ex-partners have made what David Mandel calls “*a parenting choice to be abusive*.”<sup>1</sup> Instead of assessing and addressing the behavior as a parenting choice, social work, child protection, and court systems are looking for the ‘*good-enough father*,’ holding these men to an unacceptably low standard of parenting that could not contrast more with the standard expected of the parent with care of the child or children. Instead, mothers are condemned for their “*failure to protect*” and are judged on their apparent inability to effectively personally police the behaviour of the perpetrator. Women who oppose contact (either at the start of the court process or as a result of further abuse) are deemed “*hostile*” or “*non-compliant*.” Attempts by mothers to protect themselves and their children often result in being cited in contempt for not complying with court orders, even where the child emphatically and clearly states that they do not want to go.

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.<sup>2</sup>

SWA’s view is that Section 11(7A-E) is good law and *could* be a powerful tool in protecting women and children at risk of domestic abuse. The problem is the failure of implementation that has resulted from institutional reluctance to change discriminatory attitudes and practices, an absence of an awareness of the dynamics and impact of domestic abuse, and a lack of adequate and positive judicial case

<sup>1</sup> <http://endingviolence.com/2016/01/the-invisibility-of-the-domestic-violence-perpetrator-as-parent/>

<sup>2</sup> 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](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>

management. Whereas other provisions of the Act relating to domestic abuse, such as the creation of matrimonial and domestic interdicts, have met with some success, this crucially important provision has been markedly misused.

SWA has been working with Scotland's Children and Young People's Commissioner (CYPCC) 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, over the last decade since the passing of the Bill in 2006. Indeed, the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence specifically refers, in Articles 31 and 45 to States' obligations in protecting women and children from abuse perpetrated through child contact and residence.<sup>3,4</sup>

In Scotland, this good practice approach is demonstrated through *Equally Safe*, Scotland's VAWG strategy, the Abusive Behaviour and Sexual Harm (Scotland) Bill currently before the Scottish Parliament, and the Scottish Government consultation on a new offence of domestic abuse which proposes, for the first time in Scots law, to encompass controlling and coercive behaviours within a criminal offence. 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.<sup>5</sup>

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.<sup>6</sup>

### Extension of PRRs

Finally, in relation to the extension of PRRs under the Act and the crisis around child contact and domestic abuse, it is appropriate to note that parental rights must be considered in the context that these rights are there to facilitate the accountable exercise of parental responsibilities. Unfortunately, as we have outlined above, it is

<sup>3</sup><https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046031c>

<sup>4</sup> Thiara, R.K. and Harrison C., University of Warwick, *Safe not sorry: Supporting the campaign for safer child contact* (Bristol: Women's Aid, 2016), <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/01/FINAL-Safe-not-sorry-FOR-WEB-JAN-2016.pdf>

<sup>4</sup> "Nineteen Child Homicides; What must change so children are put first in child contact arrangements and the family courts-  
<https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2016/01/Child-First-Nineteen-Child-Homicides-Report.pdf>

<sup>5</sup> 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/>

<sup>5</sup> Stark, E.; *Coercive Control: The Entrapment of Women in Personal Life* (Oxford, 2007)

<sup>6</sup> On this note, we would emphasize that an increased focus in mediation as an option for "disputed" cases, it is wholly inappropriate for child contact cases involving domestic abuse, which continues to be erroneously and inappropriately conflated into the category of "family disputes" or "family breakdown" and, thus, an issue that can be "resolved" through mediation. Mediation in family cases where domestic abuse is an issue, particularly any issue relating to children, 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.

the experience of women and children using the services of our local Women's Aid groups that this is often not the case.

There is no evidence that fathers' "rights" are intrinsically discriminated against in child contact proceedings. A blanket and risk-averse approach to shared parenting which does not consider domestic abuse is not in the best interests of the child. Nor does such an approach give the views of the child proper consideration, as required by law and the proper exercise of their human rights.

There is no presumption of shared parenting in legislation in England and Wales; this was rejected by the recent Family Law Review, a view supported by the Ministry of Justice.<sup>7</sup> A presumption introduced in Australia in 2006 was subsequently abandoned, and the law amended, after an in-depth review of the original provisions revealed their failure to both consider the child's best interests and to protect women and children who had experienced domestic abuse. Other research also supports the position against a presumption of shared parenting on the same grounds.<sup>8</sup>

### **Conclusion**

SWA welcome this enquiry and anticipate the increased safety and enjoyment of their human rights that children, young people, and women will experience as we take reform of existing practice forward in Scotland.

Scottish Women's Aid  
10 February 2016

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<sup>7</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/177097/CM-8273.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/177097/CM-8273.pdf)

<sup>8</sup> <http://www.oneplusone.org.uk/wp-content/uploads/2012/03/firm-foundations-report.pdf>; Shared residence: a review of recent research evidence: Professor E Trinder: *Child and Family Law Quarterly*, Vol 22, No 4, 2010; Caring for children after parental separation: would legislation for shared parenting time help children? University of Oxford (2011) [http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children\)OXLAP%20FPB%207.pdf](http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf)