

Briefing for the Citizen Participation and Public Petitions Committee on [petition PE2163](#): Develop guidance on child contact domestic abuse, lodged by Alistair Scott

Overview

Civil law, which includes family law, governs relationships between individuals and helps resolve disputes, through the civil courts if necessary. It does not criminalise behaviour: that role belongs to **criminal law**, which deals with prosecuting offences defined as crimes.

Sometimes, a person's actions may be relevant under both civil and criminal law. Very broadly, the petitioner wants guidance to be created to manage one situation where such an overlap might occur.

Criminal law: domestic abuse

The petitioner refers to the [Domestic Abuse \(Scotland\) Act 2018](#) ('the 2018 Act'). Part 1 of the 2018 Act created a new offence of domestic abuse against a partner or ex-partner. The aim was to help enable the effective prosecution of behaviour, taking place over a period of time, which is physically and/or psychologically abusive – including coercive and controlling behaviour. It provided that the new offence may be aggravated where a child is involved (e.g. where the child is cared for by the victim of domestic abuse).

The creation of the new offence was not intended to wholly replace the use of other more general offences in the prosecution of domestic abuse (e.g. assault or threatening and abusive behaviour). Those offences are still used in conjunction with the domestic abuse aggravator provided for in section 1 of the [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#).

Family law: child contact cases

Separately, Part 1 of the [Children \(Scotland\) Act 1995](#) ('the 1995 Act') makes provision for the resolution of disputes between parents through the civil courts.

First, Part 1 of the 1995 Act provides for a range of parental responsibilities and rights ('PRRs') in respect of all children (under 16s) living in Scotland.

For example, PRRs include the right to have the child live with a person having PRRs (**residence**). Furthermore, where the child does not live with that person, there is both the right and the responsibility to have **contact** with that child. Child contact is the petitioner's particular area of interest.

Section 11 of the 1995 Act gives the civil court various powers to decide an issue in a dispute about PRRs, including about residence and contact.

Section 11 says the court should follow certain key principles when making decisions. The welfare of the child is the paramount consideration, that is, the most important and overriding one. The child must be given an opportunity to express their views. The court must consider, although not necessarily follow, any views expressed by the child.

[The Family Law \(Scotland\) Act 2006](#) ('the 2006 Act') also amended section 11 of the 1995 Act to require the courts to have regard in particular to:

- the need to protect the child from actual or possible abuse
- the effects of such abuse on children
- the ability of the abuser to care for the child
- the effects of abuse on a person's capacity to fulfil PRRs.

Abuse is defined as including abuse of a person other than the child. Accordingly, the situation where one parent is abusing (or has abused) the other, that is, domestic abuse, is included.

The 2006 Act also amended the 1995 Act to require the courts, when considering whether to make an order which would require **relevant persons** to co-operate with each other, to consider whether it would be appropriate to make the order. Relevant persons are parents or other individuals with PRRs.

The [Children \(Scotland\) Act 2020](#) (not yet in force) restates, and adds to, the statutory factors the court must consider when deciding an individual case about PRRs. In particular, it says the court should look at the impact of any court orders on the child's relationships with a) their parents; and b) other important people in the child's life.

The general principles in the legislation have also been developed by the decisions of the courts over the years (**case law**). Accordingly, for example, in the context of what constitutes the welfare of the child, the courts will consider individual factors not explicitly set out in legislation.

Court procedure, practice notes and training

The detailed court procedure to be followed in civil cases, including family cases, is generally set out in **court rules**. The [Court of Session](#) makes these rules in a form of secondary legislation known as 'Acts of Sederunt'. The [Scottish Civil Justice Council](#) has a key role in drafting rules for the Court of Session to consider.

[Sheriffs principal](#), senior judges in the local sheriff courts, and [the Lord President](#), the head of the Scottish judiciary, can issue **practice notes**. [These](#)

[can be found on the website of the Scottish Courts and Tribunal Service](#). Sometimes practice notes are issued affecting all sheriff courts in Scotland.

The [Judicial Institute for Scotland](#) provides education for Scottish judges.

False allegations of criminality

Finally, as the petitioner refers to ‘malicious allegations’, it may be relevant to note the existence of both criminal law and civil law dealing with a false allegation of criminality. The separate [SPICe briefing](#) for petition [PE2047](#) provides some information in this area.

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