



**Public Petition PE1529: Enforcement of
child court orders**

**Submission by Scottish Women's Aid
November 2014**

Foreword

Scottish Women's Aid ("SWA") is the lead organisation in Scotland working towards the prevention of domestic abuse. We play a vital role in campaigning and lobbying for effective responses to domestic abuse.

We provide advice, information, training and publications to members and non-members. Our members are local Women's Aid groups providing specialist services, including safe refuge accommodation, advocacy, information and support to women, children and young people experiencing domestic abuse.

An important aspect of our work is ensuring that women and children with experience of domestic abuse get both the services they need, and an appropriate response and support from, local Women's Aid groups, agencies they are likely to contact and from the civil and criminal justice systems.

SWA welcomes the opportunity to respond to the Petition and would clarify that our comments are made specifically in relation to contact in the context of domestic abuse

Enforcement of contact and link to decisions to award contact

- **Contact and domestic abuse**

The Petition refers to an alleged failure of the system to enforce child contact orders in circumstances where one parent appears to wilfully defy the court instruction facilitating this interaction. However, the failure of the system is that it allows unsafe contact decisions to be made in the first instance. Although it is not a dispute, it is regrettable that domestic abuse continues to be erroneously and inappropriately conflated into the category of "*family disputes*" or "*family breakdown*".

The Children (Scotland) Act 1995 contains a general requirement that contact should be in the best interests of the child and 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.

Unfortunately, we are hearing anecdotally from women who contact us directly, and those using the services of our local member Women's Aid groups, that this is not always being done. In relation to contact, the impact of abuse on women, children and young people is not always taken into account or understood, particularly the trauma and distress this has on children, even when they have not been directly abused or witnessed the abuse on their mother.

Legal professionals and others interacting with families such as Child Welfare Reporters, formerly referred to as Bar Reporters, do not currently receive specific training on domestic abuse and, thus, are not always either effectively assessing the risks and /or reporting the fact that domestic abuse is present to the court; work is underway to address this issue for Child Welfare Reporters but more needs to be done.

Despite the duty the 1995 Act places on the court, abusive men are regularly granted contact with their children. Women who oppose contact (either at the start of the court process or as a result of further abuse) can be seen as “hostile “or “unco-operative”. The views of the child are not always taken or given adequate consideration and children expressing a wish not to have contact can face allegations of having been “coached” by the mother.

Perpetrators of domestic abuse will use child contact as a means of continuing this abuse and as a mechanism to control women, a fact well- documented in extensive research.¹ For the child, contact with the abusive father after separation nullifies the protective consequence of leaving the abuser and maintains the negative effect of living with domestic abuse; this can be as a result of witnessing the abuse of the mother during the contact handover, simply being aware of the mother’s fear and anxiety about contact, or sometimes through abuse directed by the father against the child. Contact often breaks down because women and/or children are further abused. Again, the effects of domestic abuse and the negative impact on children are well-documented (see the list of relevant research at the end of this paper at Appendix 1.)

The safety, quality and benefits of the contact, particularly where there are issues of abuse, must be the starting point in determining whether such contact would be in the best interests of the child and promote their welfare. Until the duty under section 11(7A)-(7E) is consistently and regularly undertaken, inappropriate and unsafe contact orders will continue to be made and abused women will continue to be fearful of undertaking court-ordered contact obligations, due to risks posed to both their own protection and their children’s safety and long-term welfare.

We believe that children should be able to have contact with both parents but only where the contact can be shown to be safe for both the child and the non-abusing parent; is of clear benefit to, and in the best interests of, the child and takes place in a safe and nurturing environment.

Enforcement measures

Firstly, there are clear and established procedures and penalties exist for the courts to deal with enforcement under contempt proceedings. Criminal sanctions are already available but the courts do take into consideration the fact that a punitive approach to the enforcement of contact orders could be to the significant detriment of the children involved. Any change to this approach would put adult rights above the well- being, safety and the rights of children and represent a worrying shift from children’s best interests being paramount in any decision made, to that of parents’ rights to contact.

On the issue of police involvement, as with other civil issues, unless legislation provides otherwise, the police will not involve themselves in the enforcement of a civil order, such as a contact order, unless there is an indication that a criminal act may be carried out and the safety of the child and/or the parties would be an issue during contact. Similarly, social work would not arbitrarily become involved unless

¹ **Coy, M., Perks, K., Scott, E., Tweedale, R. (2012)** Picking up the Pieces: Domestic Violence and Child Contact. London. Rights of Women.; **MacKay, K (2013)** Hearing children in court disputes between parents; Centre for Research on Families and Relationships; **MacKay, K (2013)**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; **Morrison, F, Tisdall K, Jones f, Reid, A (2013)** Child Contact Proceedings for Children Affected by Domestic Abuse ;A report to Scotland’s Commissioner for Children and Young People

there was a child protection issue and the child's safety was at risk. In the granting of child contact orders and the assessment of the risk to the child and the non-abusing parent that contact may pose, there is certainly a greater role for both social work and the police to be involved in contributing intelligence and information to the court on the efficacy or otherwise of a contact order where domestic abuse is an issue.

- **Non-resident parent and contact**

The Petitioner states that "*...that children are usually used as tools...*" and that "*...it has become increasingly common for the parent with residence to change the contact order and contact times to suit herself.*"

In his oral evidence to the Committee on 30th September, the Petitioner states that "*If the issue is just that the parent with residence wants to change things because it suits their lifestyle or what they are doing for that week or that month, there should be something in place that stops that happening instead of punishing the person who has followed the rules and regulations that were set out by the Government on how to obtain access through the legal system.*"

Parental rights must be considered in the context that these rights are there to facilitate the responsible exercising of parental responsibilities. Unfortunately, it is the experience of women using the services of our local Women's Aid groups that there are non-resident parents who pursue contact for negative reasons, often in circumstances where their continued involvement is not conducive to promoting the child's welfare and, in fact, causes disturbance to the life of the child. Women have advised that this has resulted in a lax and irresponsible approach to contact which is detrimental to the child; this can take the form of unreasonable demands made on the resident parent in order to facilitate the contact; the non-resident parent routinely turning up late, changing arrangements at the last minute, or simply not appearing at all, repeatedly, at the time agreed for contact.

This is not an acceptable way to treat children, especially where the mother and child have already been put through a distressing process by the abuser in order to obtain contact. The child is of little or no interest and the agenda is to continue the abuse and control of the mother, and/or the children, through the children.

If the mother attempts to mitigate the impact of this wholly unacceptable and disruptive pattern of behaviour on the child by not taking them to the contact handover point, or not making them available for contact, then she will be held in contempt for not complying with the court order. She is required to continue to make the child available or take them to the contact point, regardless of how many times previously the abuser has not undertaken their responsibility. She is obliged, under pain of being held in contempt, to force the child to go to contact even where the child emphatically and clearly states that they do not want to go. This is neither in the best interests of the child, nor does it give the views of the child proper consideration.

There is absolutely no legal mechanism for the court to hold the other party in contempt for failing to turn up at the appointed place or time.

The only remedy available to a woman, where her ex-partner is not turning up to have contact with the children, is to return to the court and seek a revocation of the contact order, with the attendant inconvenience and disruption and, possibly, additional costs.

Mediation as an inappropriate option

While mediation may be considered any option for disputed cases, it is wholly inappropriate for child contact cases involving domestic abuse. We would reiterate the point that domestic abuse 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.

Understanding the dynamics of domestic abuse is crucial since this is not always recognised and understood within the confines of policy and practice development. 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.

Cost of enforcement

The petitioner has not acknowledged that enforcement of any civil order, where there is a failure of one party to comply with that order and fulfil their obligation, requires the aggrieved party to return to court. This is not a matter confined to child contact and contact cannot be looked at in isolation in relation to court costs.

Where an application for contact is made by a perpetrator of domestic abuse, and the woman, as the resident parent, attempts to protect themselves and their children by defending the action, she may, herself, incur costs. Civil legal aid may be available but perhaps subject to payment of a contribution, or woman may have to pay privately. For women paying solicitor’s fees and case expenses privately, this cost is compounded by additional expense incurred where abusers deliberately manipulate the process, as the mother may also have to bear the burden of repeated Child Welfare Hearings and perhaps a Proof, if the sheriff orders that to resolve the issue.

As we have stated above, where a non-resident parent repeatedly fails to undertake their responsibilities, the only remedy available to a woman is to return to the court to seek a revocation of the contact order, thus possibly incurring additional costs beyond those relating to the initial action.

We would also make the point that where a woman experiencing domestic abuse obtains an interdict, unless that interdict has been deemed by the court to be a “domestic abuse interdict” under the Domestic Abuse (Scotland) Act 2011 whereby breach is a criminal offence, the only remedy open to women in enforcing the interdict and addressing the breach is to return to court to pursue an action for breach, again, with possible financial implications.

In relation to costs, it is also an issue that women experiencing domestic abuse are required to pay to obtain a civil protective order, essentially to protect them and their children from the abusive, criminal behaviour of the perpetrator, regardless as to whether the costs are met privately or through civil legal aid.

Shared Parenting

The Petitioner states that “...*routine and constant contact with both parents which has been proven to have beneficial impacts with children instead of feeling unwanted or unloved.*” This position has not, in fact, “been proven” and we would again point out to the Committee that:-

- 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.²
- 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.³

We note the intention of the Committee to combine this Petition with consideration of Petition PE1528, (child court reform and a proposal that a 50/50 split should be the starting point for child contact) and PE1513 (on equal rights for married fathers). Taking these solely from a “fathers’ rights” perspective and a starting position that these “rights” have been somehow transgressed ignores the wider issues outlined above and the fact that the protection and wellbeing of children and non-abusing parents should, in fact, be the foundation underpinning any discussions on child court reform.

It should also be noted that a “*child centred*” view is not a position that “*favours*” children over parents. In taking this approach, successive governments have, in fact, been correctly fulfilling their obligations in meeting the legal rights of children and enforcing protections afforded them in law, as set out in the Children (Scotland) Act 1995, and international obligations such as European Convention on Human Rights and the 1989 United Nations Convention on the Rights of the Child.

Conclusion

We would urge the Scottish Parliament to call on the Scottish Government to ensure that the procedures and legislation in place for the consideration of domestic abuse in relation to child contact are adhered to and that this issue is given full, appropriate and informed consideration by all parties to the matter including the court, family law solicitors, Child Welfare Reporters.

Further, in order to ensure that decisions about contact adequately include and reflect the voice and views of the child, there is a strong case for providing better and earlier access to child advocacy services and appropriate legal representation for children.

The procedures that the Petitioner proposes are not compatible with the best interests of the child and do not take into consideration the, often, very complex circumstances which may lead a resident parent to a position of failing to comply with a court order, when they may have legitimate reasons for believing it is not in their child’s best interests to do so. In attempting to combat an alleged injustice, care must be taken not to open the door for many more.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/177097/CM-8273.pdf

³ <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)

Appendix

- **M.L. Beeble et al (2007).**: Abusive Men's Use of Children to Control Their Partners and Ex-Partners : *European Psychologist* 2007; Vol. 12(1):54–61
- **Fleury, R. et al. (2000).** "When ending the relationship does not end the violence". *Violence Against Women* 6 (12) 1363-1383
- **Humphreys, C., Houghton, C. and Ellis, J. (2008).** Literature review: better outcomes for children and young people experiencing domestic abuse - directions for good practice. Edinburgh: The Scottish Government
- **Hester, M and Westmarland, N (2005)** Home Office Research Study 290; Tackling Domestic Violence: effective interventions and approaches; Home Office Research, Development and Statistics Directorate; February 2005
- **Hester, M., Pearson, C. and Harwin, N. (2007).** Making an impact: a reader. 2nd Edition. London: Jessica Kingsley Publishers
- **Humphreys, C. and Stanley, N. (eds.) (2006)** Domestic violence and child protection: directions for good practice. London: Jessica Kingsley Publications
- **Humphreys, C. and Thiara, R. (2003).** "Neither justice nor protection: women's experiences of post- separation violence". *Journal of Social Welfare and Family Law* 25(3) 195-214
- **Jaffe, P. G. and Crooks, C. V. (2005).** Understanding women's experiences parenting in the context of domestic violence: implications for community and court-related service providers. Washington, DC: Violence Against Women Online Resources
- **Johnson, Saccuzzo and Koen (2005).** Child custody mediation in cases of domestic violence. Empirical evidence of a failure to protect
- **Kurz, D. (1996).** "Separation, divorce and woman abuse". *Violence Against Women* 2(1) 63-81
- **Mullender, A., Kelly, L., Hague, G., Malos, E. and Iman, U. (2002).** Children's perspectives on domestic violence. London: Routledge
- **Radford, L. and Hester, M. (2006).** **Mothering through domestic violence.** London: Jessica Kingsley Publications
- **Scottish Executive (2002a)** It's everyone's job to make sure I'm alright - report of the child protection audit and review. Edinburgh: Scottish Executive.
- **Scottish Executive (2002b)** Growing support - a review of services for vulnerable families with very young children. Edinburgh: Scottish Executive
- **Sharp C and Jones, J (2012);** Children living with domestic abuse; WithScotland; October 2012
- **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)