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UN Call for Evidence on Custody cases, violence against women and violence against children

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This response is based on our academic studies on children's participation in family law proceedings, particularly when their parents' divorce or separate in the context of domestic abuse. These studies involve cross-national research and networks, empirical studies in Scotland, and legal and social-legal analysis. In our response we focus on children's rights to participation and protection under the UN Convention on the Rights of the Child (UNCRC) and their intersection with the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). We wish to highlight five key issues in our response to this call:

- **Children's human rights as enshrined in the UNCRC must be prioritised in discussions on alienation and domestic abuse.** As members of families in which domestic abuse has occurred, children often have information about family life, their own experiences and needs that may be overlooked when children are dismissed as either 'manipulated' or too vulnerable to speak about their own lives. This undermines UNCRC Article 12 children's participation rights and potentially undermines UNCRC Article 3 children's best interests.
- Domestic abuse is a significant concern in Scotland¹, and evidence from Scotland and elsewhere demonstrates that allegations and concerns of domestic abuse underlie many, if not the majority of, disputed contact cases that reach courts.² **Family law systems and procedures need to treat concerns about domestic abuse not as the exception, but the norm.** They need to be able to deal with allegations of domestic abuse and manipulation in ways so that they do not act as barriers to implementing children's participation rights or articulating children's best interests. Many mechanisms developed to facilitate children's participation rights in family law are unsuitable in cases where there are allegations of domestic abuse or manipulation.³ There is an urgent need to consider how mechanisms might be developed or adapted to accommodate these groups of children who are the main constituents of family courts.
- There are immediate ways Scots law could better protect both children's protection and participation rights. They could implement **a system of child advocacy** that was intended to be enacted through the Children (Scotland) Act 2020. This would ensure independent advice, ongoing support and trusting relationships, and information, that children repeatedly tell researchers they need.⁴
- **Contrary to Article 11 of the Istanbul Convention, no routine data is available on courts practices and outcomes in relation to disputed contact in Scotland.** Effective monitoring is crucial to ensure children's rights are effectively provided for. Data needs to be collected and made available to monitor the implementation of children's rights in this context.
- **Scottish and other legal systems can be so overly concerned about potential harm or distress to children if they participate in contested child contact cases, that they seek to distance and 'keep children out' of both the courts and the parental dispute.** This is not compatible with the obligations under Article 12 of the UNCRC. Rather than protect the child, this approach can make children more vulnerable. Children report disempowerment when they are not informed, when their views are not considered, and when they do not know what decision has been made or why. This is not only disempowering but often distressing, with some children finding no avenues to change contact arrangements.

¹ Scottish Government. 2019 [Family Justice Modernisation Strategy](#)

² CAF/CASS & Women's Aid. 2017 [Allegations of domestic abuse in child contact cases](#); Mackay, K. 2013 [The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse](#), Scotland's Commissioner for Children and Young People.

² <https://www.scottishlegal.com/articles/legal-aid-crisis-hitting-scotlands-most-deprived-families>

³ Morrison F, Tisdall EKM, Warburton J, Reid A & Jones F. 2020 Children's Participation In Family Actions - Probing Compliance With Children's Rights Research Report. Scottish Government.

⁴ Children's Human Rights Observatory. 2022 [Theory of Change](#); Yello!, 2019 [Response to call for views on the Children \(Scotland\) Bill](#) Children and Young People's Commissioner Scotland and Scottish Women's Aid. 2017 [Power up/ Power down](#); Morrison, F. 2014 [Children, Contact and Domestic Abuse](#) (unpublished doctoral thesis), University of Edinburgh.

1. The different manifestations or specific types of domestic and intimate partner violence experienced by women and children, including the use of “parental alienation” and related concepts in child custody and access cases. Please also include a description of the different forms of violence that may be experienced by the mother and child as well as fundamental human rights violations, where relevant.

Parental alienation has yet to become mainstream terms in Scottish family law. However, ‘manipulation’ has become a common concern in cases of contested contact. Our research⁵ highlights risk to implementing children’s participation rights (Article 12 of the UNCRC), in cases where children were depicted as ‘influenced’ or ‘manipulated’. We found when ideas of influence or manipulation were combined with allegations of domestic abuse, they posed a significant and serious risk to children’s participation rights. We suggest that legal constructions of the child’s views as being separate from the parental dispute risk feeding into ideas of manipulation and influence with unintended and serious consequences for children’s rights. When combined, children’s participation rights risk being breached rather than implemented. This is often through attempts to protect children from ‘adult problems’ and shield them from ‘manipulation’. However, rather than protect children it excludes children from decision making in ways that are harmful to them and their interests. The construction of children as inherently ‘vulnerable’ to manipulation can result in the loss of valuable information to courts when making decisions about children’s best interests (Article 3 of the UNCRC). As members of families in which domestic abuse has occurred, children often have information about family life, their own experiences and needs that may be overlooked when children are dismissed as either ‘manipulated’ or too vulnerable to speak about their own lives. This is a harm in its own right and potentially undermines children’s best interests.

2. The factors behind the increased number of allegations of parental alienation cases in custody battles and/or disputes involving allegations of domestic violence and abuse against women, and its differentiated impact on specific groups of women and children.

Domestic abuse in contested contact a significant concern in Scotland⁶, and evidence from Scotland and elsewhere demonstrates that allegations and concerns of domestic abuse underlie many, if not the majority of, disputed contact cases that reach courts.⁷ Thus, family law systems and procedures need to treat concerns about domestic abuse not as the exception, but the norm. They need to be able to deal with allegations of domestic abuse and manipulation so that these are not barriers to implementing children’s participation rights or articulating children's best interests. There are significant concerns about the capacity and practice of those professionals in courts to assess allegations of alienation and domestic abuse, and to implement children's rights in these cases. There are further and significant concerns about the adequacy of legal aid provision and the implications this has for effective legal representation of non-abusing parents and children during contested child contact.⁸

3. The way in which different groups of women and children experience this phenomenon differently based on any intersecting elements such as age, sex, gender, race, ethnicity, legal residence, religious or political belief or other considerations and the factors that contribute to these situations.

The UN Committee on the Rights of the Child is clear that all children should be presumed to have the capacity to express views. It is the duty of the relevant individuals to enable that child to express their views in the manner most suitable to the child. We have concerns that in practice younger children are routinely disenfranchised from their rights as set out under the UNCRC. This is due the absence of an infrastructure to support young children to express their views. We have further concern that the rights of specific groups of children (e.g., children with learning difficulties)

⁵ 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>

⁶ Scottish Government. 2019 [Family Justice Modernisation Strategy](#)

⁷ CAFCASS & Women’s Aid. 2017 [Allegations of domestic abuse in child contact cases](#); Mackay, K. 2013 [The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse](#), Scotland’s Commissioner for Children and Young People.

⁸ <https://www.scottishlegal.com/articles/legal-aid-crisis-hitting-scotlands-most-deprived-families>

are also at risk. The Children (Scotland) Act 2020 made provisions to develop advocacy and support for children involved in disputed child contact; however, the provision about advocacy has yet to be implemented. This leaves children's participation rights and their best interests especially vulnerable when there are allegations of domestic abuse and alienation.

4. The role that professionals play, including welfare workers, child protection services, guardian ad-litem, psychologists, psychiatrists, and how they are regulated in any way as expert witnesses.

The Children (Scotland) Act 2020 introduced a register for child welfare reporters and curators ad litem. This has the potential to address gaps in training and skills for these professionals and meet obligations under Article 5 of the Istanbul Convention. However, progress has been slow. To address children and young people's concerns about practice on implementing children's participation rights, training and resources are required, so that child welfare reporters and curators ad litem spend sufficient time with children to build relationships and develop trust so that children can give their views to the court. These roles need clarity about the professionals' responsibility to transmit, rather than translate, children's views to the court. Research and measures are needed to investigate and ensure the quality of practice across this area.

5. The consequences of the disregard for the history of domestic violence and abuse and intimate partner violence or the penalising of such allegations in custody cases on the human rights of both the mother and the child, and the interrelationship between these rights.

International research that shows that child contact and legal proceedings can become a focal point for post-separation abuse.⁹ As outlined in Scottish Women's Aid's response, we are concerned that women are advised against raising domestic abuse in child contact proceedings and that domestic abuse is not adequately addressed through court proceedings with negative consequences for women's and children's rights to protection. Work is required to harmonise the ways in which domestic abuse is addressed across criminal, civil and public law. There is need for consistent definitions of domestic abuse that includes children and the impact domestic abuse has on children. Recent Scottish research has pointed to gaps in criminal law, including less rigorous implementation of protective orders (non-harassment orders) for adult and child victims of domestic abuse in criminal proceedings so that such orders do not 'interfere' with child contact.¹⁰ This raises significant concern about children's and women's rights to protection.

6. The challenges in collecting disaggregated data on courts' practices concerning custody cases, the areas/sectors for which data is particularly lacking and the reasons for such challenges.

Contrary to Article 11 of the Istanbul Convention, no routine data is available about courts practices and outcomes in relation to disputed contact in Scotland. Effective monitoring is crucial to ensure children's rights are effectively provided for. Data needs to be collected and made available to monitor the following: decisions made by court; the nature of cases (e.g., where there are allegations of domestic abuse and alienation); how children's participation rights were implemented; children's experiences of the process (including their participation rights). Without robust

⁹ Birchall, J. and Choudhry, S. 2022. 'I was punished for telling the truth': how allegations of parental alienation are used to silence, sideline and disempower survivors of domestic abuse in family law proceedings. *Journal of Gender-Based Violence*, 6(1), pp.115-131. See Hunter, R., Barnett, A., Kaganas, F. and Choudhry, S. eds. 2020. *Domestic Abuse and Child Contact: International Experience*. Routledge. Holt, S. 2017. *Domestic Violence and the Paradox of Post-Separation Mothering*, *The British Journal of Social Work*, 44(7) 2049–2067; Morrison, F., 2015. 'All over now?' 'The ongoing relational consequences of domestic abuse through children's contact arrangements. *Child Abuse Review*, 24(4), pp.274-284; Hardesty, J. L., Haselschwerdt, M. L., & Johnson, M. P. 2012. Domestic violence and child custody. In K. Kuehne & L. Drozd (Eds.), *Parenting plan evaluations: Applied research for the family court* (pp. 442–475). Oxford University Press

¹⁰ See Houghton, C., Morrison, F. and Warrington, C. forthcoming. *Domestic Abuse Court Experiences Research: the perspectives of victims and witnesses in Scotland*. Scottish Government; McPherson, R. 2022. *Unintended Consequences Of non-harassment Orders: Child Contact decision-making*, *Journal of Social Welfare and Family Law*, DOI: 10.1080/09649069.2022.2136714

disaggregated data on courts practices it is not possible to monitor the implementation of children's rights in this context.

7. The good practices, strategies adopted by different organs of the State or other non-State actors, at local, national, regional, or international level to improve the due consideration of domestic and family violence, including intimate partner violence against women and abuse of children in determining child custody, as well as in providing remedies and redress for victims/survivors.

Across jurisdictions, there has been innovation around mechanisms that seek to facilitate children's participation in disputed contact. However, many of these mechanisms are frequently highlighted as unsuitable for cases where there are allegations of domestic abuse, manipulation, and other complex issues.¹¹ These are the very cases that come to court and are the cases where children's best interests and participation rights are especially contested. There is an urgent need to consider how mechanisms might be developed or adapted to accommodate these groups of children who are the main constituents of family courts. This would engage with the need for skilled and individualised support for children.

In Scotland we note two examples of promising practice:

Children's Rights Officer, West Lothian Council

Funded by the Scottish Government's Equally Safe policy agenda, this service is located within West Lothian Council's Domestic Abuse and Sexual Assault Team. The service is specifically for children with experience of domestic abuse who are subject to contested child contact. It has evolved in consultation with sheriffs in the West Lothian area. The service aims to feed children's views directly into cases of contested contact. Originally, the service was only accessible to children if a sheriff made an order for the service to take the child's view. However, now the service has been developed to provide children's views without an order from a court. To note that this model was trialled in several European countries, through the [Improving Justice in Child Contact](#) project.

Edinburgh Women's Aid Legal Advice Service

Funded by the Legal Education Fund, the one-year pilot project was set up to provide free legal advice and support for civil matters to survivors of domestic abuse. It enables women to have longer, more targeted consultations with the lawyers who are highly experienced in domestic abuse cases and has a strong understanding of the dynamics of abuse. The lawyers liaise with Edinburgh Women's Aid staff, training workers to understand better the legal aspects of domestic abuse, and what the women might encounter. The pilot has provided support and advice to over 150 women, with over half seeking advice about child contact. It has not yet been able to provide an equivalent service for children.

8. Recommendations for preventing the inadequate consideration of a history of domestic violence and abuse and gender stereotyping in custody cases to restore the human rights of mothers and their children, as well as ensure that survivors/victims are effectively protected and assisted.

There are immediate ways Scots law could better protect both children's protection and participation rights in the current legal framework for family law. They could implement a system of child advocacy that was intended to be enacted through the Children (Scotland) Act 2020. This would ensure independent advice, ongoing support and trusting relationships, and information, that children repeatedly tell researchers they need.¹² There needs to be

¹¹ Morrison F., Tisdall, EKM., Warburton J., Reid A. & Jones F. 2020 [Children's Participation In Family Actions - Probing Compliance With Children's Rights Research Report](#). Scottish Government.

¹² Children's Human Rights Observatory. 2022 [Theory of Change](#); Yello! 2019. [Response to call for views on the Children \(Scotland\) Bill](#) Children and Young People's Commissioner Scotland and Scottish Women's Aid. 2017. [Power up/ Power down](#); Morrison, F. 2014 [Children, Contact and Domestic Abuse](#) (unpublished doctoral thesis), University of Edinburgh;

increased training and funding of court officials, and clearly articulated expectations to ensure children's views are transmitted and not translated in legal proceedings. However, we argue a more radical approach is needed to ensure that disputes about child contact are centred on the child, rather than parental responsibilities and rights. With that formation, children's views would not be subsumed merely as evidence to decide on a child's welfare. Children's participation rights would be recognised in themselves, as well as their intersections with children's welfare: the UN Committee on the Rights has itself wrestled with the articulations between a child's best interests and a child's participation rights (2009 and 2013), to ensure neither are subsumed. In a context where the European Convention on Human Rights needs to be considered, the European Court of Human Rights' respective balancing of parental responsibilities, rights, and children's rights can be instructive (Daly, 2018 and European Union Agency for Fundamental Rights and Council of Europe, 2015).

9. Any other issue of relevance that are vital for consideration but that may not have been mentioned in this call for inputs.

As most contested child contact cases involve allegations of domestic abuse or other concerns about child welfare, we suggest that contested child contact would be more appropriately treated as child welfare concerns – rather than parental / adult disputes. This raises broader questions, about whether child contact disputes should be heard in an adversarial system at all, as it is in Scotland, or whether a better system would be one more akin to that of an inquisitorial child welfare system.¹³

In Scots law, contrary to General Comment on Implementation of the UNCRC¹⁴ there is no clear or accessible way for children to complain or seek remedy about court decisions and practices about child contact. There are no clear or accessible ways for children, to tell a court that their child welfare report was inaccurate before a decision is made. While there is an existing legal process for appeals it is not accessible to children. This needs to be addressed for law and practice to be compliant with the UNCRC.

About the authors

This submission is underpinned by several research partnerships and projects:

- Children's Participation in Family Actions: Probing Compliance with Children's Human Rights. Morrison, Tisdall, with Clan Childlaw. Funded by the Scottish Government.
- Improving Justice in Child Contact. Tisdall with partners across Europe including Scottish Women's Aid. Funded by the Rights, Equality and Citizenship Programme of the European Union.
- Preliminary Research Study into Child Contact Proceedings for Children Affected by Domestic Abuse. Morrison, Tisdall and Clan Childlaw. Funded by the Commissioner for Children and Young People in Scotland.
- Constructions of Children and Parents in the Reform of Family Law in Scotland. Morrison and Tisdall with Mair. Funded by Carnegie Trust for Universities in Scotland.
- Developing the Evidence Base for Innovation in Social Care for Children and Families Affected by Domestic Abuse. Morrison and Tisdall with partners from across the UK. Funded by ESRC.

¹³ Tisdall, EKM., Morrison, F., & Warburton, J. 2021 Challenging undue influence? Rethinking children's participation in contested child contact, *Journal of Social Welfare and Family Law*, 43:1, 8-22, DOI: [10.1080/09649069.2021.1876305](https://doi.org/10.1080/09649069.2021.1876305)

¹⁴ UN Committee, Committee on the Rights of the Child, General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child*, 2003.