

# Response to Discussion Paper on Civil Remedies for Domestic Abuse

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Our response focuses on the proposals regarding domestic abuse and child contact, informed by our collaborative research projects across Scotland and internationally.

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We acknowledge the Scottish Law Commission's role lies firmly in proposing legislative reform; however, we have significant concerns about proposing legislative changes in isolation. From our research, we know that successful legal reform on child contact and domestic abuse depends on three critical elements: transforming cultural attitudes within the family justice system, substantial investment to build system-wide capacity, and fundamentally reconceptualising how we approach and resolve child contact and residence disputes. These are foundational issues that must be addressed alongside legislative reform—otherwise even the most carefully crafted laws will fall short of their transformative potential without a family justice system that is equipped to implement and sustain meaningful change.

## Foundational issues that need to be addressed:

### 1. Reforms with poor implementation

Scotland’s current approach to family law suffers from systemic weaknesses. Although the Children (Scotland) Act 2020 introduced groundbreaking reforms to strengthen children’s rights in family law, its lack of implementation represents a significant failure. [Many of its key provisions remain dormant, undermining the intended protections for children’s rights.](#) This implementation gap not only compromises ambitions to advance children’s rights but also casts doubt on the feasibility of future legal reforms like those proposed by the Scottish Law Commission.

Looking ahead, many legislative proposals in the Discussion Paper are well-considered and welcome. However, their success in advancing children’s rights depends on effective implementation, adequate resourcing and embedding mechanisms that drive forward accountability for children’s rights. Well-crafted legislation is not enough. Without comprehensive plans for implementation and strategies for rights accountability, sufficient resourcing, and a sustained commitment to building capacity, reforms will fall short of delivering their intended benefits.

## **2. Making domestic abuse visible in family law**

Research shows that the majority of disputed child contact cases involve significant child welfare concerns and allegations of domestic abuse (Barnett 2020; Walsh 2024). Yet victims of domestic abuse frequently report being actively discouraged from raising these critical safety issues in family court proceedings (Baker 2023; see also Choudhry 2024, 2018 for similar findings across Europe and in England). When adult victims do raise concerns about their own or their children’s safety, they are often negatively labelled as ‘hostile’ or ‘uncooperative’ (Hunter et al 2020). This creates a dangerous paradox: those seeking protection are effectively silenced by the very system designed to safeguard them.

Valuable lessons can be drawn from other public services that have fostered environments where domestic abuse disclosure is encouraged. Notably, the health sector, particularly maternity and emergency care has seen significant success through routine enquiry practices (Baird et al 2013; Dheensa et al 2020). This proactive approach has increased the identification of abuse and improved access to support. The family justice system could benefit from adopting similar principles and approaches. Achieving this would require comprehensive training and resourcing for legal professionals and the judiciary on domestic abuse, helping to shift the culture from one that deters disclosure to one that acknowledges and addresses legitimate safety concerns.

## **3. Adversarial adult systems and the impact on children’s rights**

A fundamental flaw in the current family court system lies in its adult and adversarial orientation. This undermines attention to a child’s best interests, under Article 12(2) of the UN Convention on the Rights of the Child, and its ability to make decision taking a child’s best interests as the paramount consideration, under Section 11(7)(a) of the Children (Scotland) Act 1995. A system built on confrontation rather than open inquiry creates a hostile environment where adult disputes risk overshadowing children’s rights. This inherent contradiction — between a system designed for adult conflict and its mandate to protect children — highlights the need for radical reform. What is required is not merely procedural amendments to existing law but a complete reimagining of the family court system with children’s human rights at its core. This demands a decisive shift away from the traditional adult adversarial model towards a more inquisitorial approach that fully embeds and embraces children’s rights, both in legislation and in practice.

## **4. Systemic barriers to realising children’s rights in civil law when there is domestic abuse**

There is a clear disconnect in how children and domestic abuse are addressed across Scotland’s legal frameworks. Although domestic abuse is firmly recognised as both a child protection concern and a criminal offence<sup>1</sup>, the family court system remains ill-equipped to handle these issues effectively when adjudicating child contact or residence disputes. The contrast with child protection processes is stark. For instance, Section 11 orders lack the routine review mechanisms found in the Children’s Hearings System and other child protection frameworks, leaving potentially dangerous situations unmonitored over time. Those responsible for preparing child welfare reports often lack specialised

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<sup>1</sup> The Children’s Hearings (Scotland) Act 2011 introduced a child having “a close connection with a person who has carried out domestic abuse” as specific grounds for referral to the children’s hearings system (Scotland’s child welfare and juvenile justice system). The Domestic Abuse (Scotland) 2018 Act sought to expand the definition and criminalisation of domestic abuse. While not directly addressing children as victims in their own right, if a child witnesses, is targeted by, or used as a tool of coercive, controlling or other abusive behaviour, this is designated as a potential aggravating factor in sentencing for the offence. Thus, we see that both child protection and criminal law recognise the pervasive and ongoing nature and impacts of domestic abuse, on children as well as adult survivors.

training in communication with children, risk assessment, domestic abuse, and child welfare evaluation — all critical skills in cases involving domestic abuse (e.g. Scottish Government 2022; SPICe 2019; Yello! 2019). This was meant to be addressed by establishing a register for child welfare reporters through the Children (Scotland) Act 2020, however progress has been slow.

Child contact centres, in contrast to supervised contact provision in child protection services, frequently lack adequate resources and expertise to safely monitor parent-child contact in cases involving domestic abuse and child welfare concerns (SPICe 2019; Yello! 2019). Empirical evidence remains limited concerning children's outcomes in child contact centres (e.g., Sears et al 2023; Morrison and Wasoff 2012; Birnbaum and Allagia 2006). Moreover, the regulation of contact centres is a yet unmet requirement of the Children (Scotland) Act 2020.

The most troubling issue is that family courts routinely exclude children from proceedings that fundamentally affect their rights and safety—an exclusion that would be unacceptable in child protection cases. Framing child contact and residence as adult disputes rather than child welfare or child rights concerns undermines children's status and standing, raising serious concerns about whether courts are best placed to act in their best interests. When children are denied meaningful opportunities to participate in decisions that impact their lives, their rights to protection and participation are diminished, and courts are hindered in accurately weighing and safeguarding their welfare (e.g. Morrison et al 2020a; Morrison et al 2020b; Tisdall et al 2021).

These systemic weaknesses result in a gap: while parts of the legal system acknowledge the dangers of domestic abuse, family courts lack the necessary infrastructure to be able to protect or involve children effectively. This leaves children in precarious situations, where risks cannot be properly investigated, addressed, or mitigated, and their rights to participation remain unrealised. The family justice system requires infrastructure to be able to address domestic abuse with the same rigour and resources allocated to cases in child protection and criminal contexts. Family law must incorporate robust accountability mechanisms to protect all of children's rights, including accessible complaint procedures and clear pathways for children to obtain remedy and redress when their rights are violated.

#### **Responses to specific questions on children and child contact:**

#### **46. Should a child under 18 be recognised as an adjoined victim/survivor of abuse perpetrated by or against a parent or connected adult in their life?**

Yes. However, we are concerned that individual children's needs and rights may be overlooked or subsumed by those of adult victims or other child victims. It is essential to ensure that each child is recognised as a victim, with their own rights and protection needs.

#### **47. Should a civil protection order be available for a child who is an adjoined victim/survivor:**

- (a) As part of a civil protection order/DACPRO sought by the victim/survivor;
- (b) If sought by the adjoined victim/survivor themselves, where they have capacity;
- (c) If sought by a parent/guardian on their behalf?

These options show promise: however critical questions remain about their accessibility and implementation for children. Key considerations include how children will be meaningfully engaged

in these processes and, crucially, how they will secure independent legal representation. We are particularly concerned about research on criminal courts, where non-harassment orders are reported to be withheld to accommodate child contact arrangements (McPherson 2024; Houghton et al 2023). Similar conflicts could arise with these proposed orders, and greater clarity is needed on how they will interact with existing child contact provisions.

Additionally, there is a need to address the substantial financial and emotional burden that civil remedies place on adult and child victims to ensure their own safety and protection from domestic abuse. The ongoing crisis in [legal aid funding](#), combined with these factors, must be central to developing implementation strategies for such measures.

**48. Do you agree that the Children (Scotland) Act 1995 should be amended so that:**

**(a) the court is required to provide written reasons for making an order under section 11 (such as a contact or residence order), where there is a history of domestic abuse?;**

While this development would be welcome, evidence shows that victim-survivors are often discouraged from raising domestic abuse during proceedings—a practice that fundamentally compromises the safety and well-being of both children and the non-abusing parent. The practicality of this amendment raises additional concerns, particularly given provisions under the Children (Scotland) Act 2020 requiring courts to explain decisions to children remain unimplemented.

To strengthen protections, two critical changes are needed. First, the family justice system must transform from one that discourages disclosure to one that proactively addresses domestic abuse concerns, ensuring victim-survivors feel safe and supported in raising these. Second, the provisions of the Children (Scotland) Act 2020 regarding the explanation of court decisions to children must be implemented without further delay.

**(b) the safety of the parents should be considered by the court as part of the consideration of the child's welfare?**

The discussion paper suggests: “an amendment is made to the 1995 Act to require the court to consider not only the need for cooperation between the parents or relevant adults (as currently required by section 11(7D)), but also their safety.” (para 7.137). This would be a welcome development, in recognising the importance of the non-abusing parent’s safety to a child’s welfare while maintaining the court’s paramount consideration of the child’s welfare. Any such provision must be explicitly framed as a protective measure for non-abusing parents.

However, we are concerned that any considerations of a child's welfare—including the impact of domestic abuse on non-abusing parents —*should already* be central to family court decisions. Without fundamental culture change and investment in infrastructure to support improved risk assessments and evaluations of children’s best interests, and to ensure meaningful child participation, family courts will continue to lack the essential resources needed to address domestic abuse and child contact effectively. Without these changes, there remains a significant risk that harmful contact arrangements will continue to be ordered, undermining the rights and welfare of children and non-abusing parents.

**49. Are there any other ways of ensuring the safety of the child and of the victim/survivor is considered by the court in making orders under section 11 of the 1995 Act?**

The UNCRC Incorporation (Scotland) Act 2024 requires due attention to accountability systems, requiring accessible mechanisms for children to raise concerns, make complaints, and seek remedy and redress when their rights are violated in family court proceedings. The current system, where children rarely have independent legal representation, leaves them without viable pathways to ensure accountability or address rights violations. This accountability gap fundamentally undermines children's access to justice and their ability to protect their own interests within the family court system.

Please also see our answer to 48(b)

**50. Do you agree that a person seeking a civil protection order should be entitled to special measures as a party and while giving evidence during those proceedings?**

While this is a positive step, evidence from criminal law demonstrates that access to special measures remains unnecessarily restricted, complex, and bureaucratic (e.g. see Houghton et al 2023; Scottish Government 2023). To transform these measures from theoretical protections into genuine entitlements across both civil and criminal law, two essential changes are required: adequate resource allocation and streamlined processes. Only then will victim-survivors be able to readily access these protections and meaningfully engage with the justice system.

**51. Do you think that a person who alleges they have been subjected to domestic abuse by the other party to the proceedings, should be entitled to special measures as a party and while giving evidence in civil proceedings?**

Please see our answer to 50.

**52. Should remote hearings be available as a standard special measure?**

Please see our answer to 50.

**53. Do you agree that personal conduct of cases by a party to proceedings should be prohibited where a civil protection order is sought against them, as well as in all civil cases where there is a civil protection order, conviction or bail conditions in place in respect of that party?**

Yes.

**54. Should there be an obligation placed on parties who are (ex-) partners involved in civil proceedings, including those under section 11 of the 1995 Act, to disclose formal responses taken in respect of domestic abuse? If so, what should be disclosed?**

We believe the court should bear this responsibility, not the disputing parties. We acknowledge the potential complications for jurisdictional proceedings outwith Scotland and the UK.

**55. How can the existence of a criminal proceedings in relation to domestic abuse be effectively communicated to the court in civil proceedings, including those under section 11 of the 1995 Act?**

The lack of consistency and information sharing across justice systems is deeply concerning, and it also extends to child protection systems. This systemic failure highlights two fundamental issues:

first, the need to consistently conceptualise how domestic abuse is understood across systems—specifically as both a form of abuse and a criminal act – against adults and children; and second, the critical importance of establishing coherent coordination and consistent approaches across legal frameworks. The current fragmented approach compromises our ability to provide comprehensive protection for those affected by domestic abuse. As we outline earlier, achieving better outcomes in relation to children requires a more radical reimagining of the family court system with children's rights at its core.

**56. Should there be a statutory requirement for the Scottish Government to collect disaggregated statistics on the number of civil protection orders sought and granted in relation to domestic abuse?**

A significant knowledge deficit exists due to the lack of systematic data collection on children's rights implementation in court processes. To address this critical deficit, children must be specifically included in all data collection frameworks. This requires comprehensive monitoring of court decisions, case characteristics, and the practical application of children's rights. Furthermore, evidence gathering must extend to children's direct experiences of court processes to assess how effectively their rights are being upheld in practice.

The absence of both disaggregated data on rights implementation and accessible mechanisms for children and their representatives to report violations creates a fundamental accountability deficit and is problematic given the obligations of the UNCRC Incorporation (Scotland) Act 2024. Without these essential elements, meaningful oversight and improvement of the system remain impossible.

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