

Domestic Abuse and Child Contact: The Interface Between Criminal and Civil Proceedings

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Introduction

This Research Summary presents the findings of the *Domestic Abuse and Child Contact: The Interface Between Criminal and Civil Proceedings* research study (Burman et al 2023), funded by the Scottish Government. The study set out to examine the operation of Scottish family law in child contact cases in the context of domestic abuse. The overall objective was to determine whether and how the interpretation and application of relevant civil law statutory provisions are informed by contemporary understandings of domestic abuse as enshrined in Scottish criminal law, with a view to providing useful research-based information to support considered thinking which, in turn, may enhance policy and practice work in this area.

Context

Scotland has introduced some significant policy and legislative reforms to the criminal justice response to domestic abuse. Most recently, the Domestic Abuse (Scotland) Act 2018 (DA(S)A) introduced a statutory offence of domestic abuse aimed at properly reflecting the experience of victims of long-term abuse and ensure more effective investigation and prosecution (Burman & Brooks-Hay 2018; Cairns 2017; Scott 2018). In its criminalisation of a *course* of violent, threatening, or intimidating behaviour that is abusive towards a partner or ex-partner, DA(S)A recognises, for the first time, that domestic abuse is experienced as a continuum rather than a discrete incident. In recognition that domestic abuse adversely affects children, DA(S)A introduced a sentencing aggravator where behaviour is directed towards a child, is witnessed by a child, involves a child in the commission of the offence or is likely to adversely affect a child. This is the only UK legislation with a statutory aggravator to reflect the harm that can be caused to children growing up in an environment where domestic abuse takes place

Scotland has also seen considerable reform in the context of child law, family law and children's rights, with an ambitious and innovative strategy in pursuit of a civil law framework suitable for contemporary families. The Children (Scotland) Act 1995 represented a major reform of the law relating to parents and children, establishing the foundational framework of parental responsibilities and rights (PR&R), and providing the statutory basis for regulation of private law relationships between children, parents and other relevant adults. For families who require the intervention of the civil courts to resolve parental conflict, section 11 of the 1995 Act provides the legislative framework under which civil court orders can be applied for and judicial decisions reached to regulate arrangements. It sets out orders which may be sought in respect of PR&R, including contact orders, and the principles on which decisions should be made.

The issue of child contact with the non-resident parent has gained policy prominence in Scotland, amidst debates about whether, in the context of domestic abuse, contact with an abusive parent is in the 'best interests' of the child. The Scottish Government's (2019a) consultation on the 1995 Act highlighted that, in practice, domestic abuse continues to be disregarded in court decisions relating to contact and the welfare of the child. The Family Justice Modernisation Strategy (Scottish Government 2019b) set out a commitment to introduce new measures for domestic abuse victims, including ensuring civil courts are provided with information on domestic abuse and improving interaction between criminal and civil courts, all in the context of domestic abuse.

However, the low volume of child contact cases which proceed to proof in Scotland means that there are few reported judgments on which to base analysis of how domestic abuse is understood by the civil courts. Little is known about the nature of child contact applications, how child contact proceedings work in practice, the extent to which the treatment of domestic abuse in the civil courts reflects criminal practice, or whether and how the interpretation and application of the civil law statutory provisions are informed by contemporary understandings of domestic abuse and changing definitions or practices in the criminal law. This research set out to address some of these gaps.

Methodology

The research entailed, first, an online survey of family law and criminal law practitioners (n=38) who undertake civil court work and/or criminal court work in domestic abuse cases to determine how their understandings of domestic abuse inform their handling of child contact cases. The survey also sought their views and experiences of the relationship between the investigation and prosecution of domestic abuse in criminal justice and parallel child contact proceedings in civil justice.

Second, the research involved a set of semi-structured qualitative interviews with family law and criminal law practitioners (n=15). The interview questions were developed based on analysis of the survey responses, and sought practitioners' understandings of domestic abuse in child contact proceedings, and their views on the level and nature of interaction between child contact and criminal or other proceedings

Ethical approval for the research was granted by the University of Glasgow College of Social Sciences Ethics Committee and Edinburgh Napier University Research Integrity Committee.

Findings

In what follows, findings from the survey responses and interviews are drawn on to distil **eight key messages** which together encapsulate the ways in which domestic abuse and coercive control are conceptualised, and how their relevance for child contact is understood and applied in contact proceedings, and which highlight a(dis)articulation between domestic abuse criminal proceedings and civil law child contact proceedings.

Lack of mechanisms to raise awareness of domestic abuse in child contact cases

There is no systematic recording of domestic abuse in civil court data. The survey responses and the interviews made clear that practitioners do not routinely enquire about domestic abuse in child contact cases and there is no formal mechanism by which they are informed of criminal proceedings in relation to domestic abuse. Rather, they are heavily reliant on their client informing them that they have been subjected to domestic abuse, or that their ex-partner is alleging/has alleged domestic abuse.

Where such information flow is dependent on the client, then there is a risk of partial or inaccurate information being conveyed. Not having the full picture can potentially lead to delays in case preparation and the progress of civil proceedings, as well as affect decision-making in child contact. Importantly, lack of awareness of domestic abuse and the outcome of any associated criminal proceedings may compromise the safety of the child and the non-abusive parent.

Limited understanding of domestic abuse and its effect on children

Whilst there has been substantial work on improving the criminal response to domestic abuse in Scotland, this does not appear to have permeated into the civil justice system. Survey responses and interviews highlight a belief that domestic abuse against a parent does not necessarily have an impact on the child, and that only physical violence directed at or in the presence of the child is relevant. Most survey respondents and interviewees equate domestic abuse with discrete incidents of physical violence, underplaying other forms of abuse, which is considerably divorced from current policy and legislative definitions of domestic abuse.

There is a prevailing understanding of domestic abuse as primarily an “adult matter”. For the most part, child contact proceedings are conceptualised within the context of two opposing parties with domestic abuse considered as a point of contention between parties, and not as a (gendered) crime characterised by the imposition of power and control.

Views varied as to the importance of domestic abuse as a significant consideration in child contact deliberations, with differences of opinion concerning the relevance of domestic abuse to the safety and wellbeing of the child, ranging from it being extremely important to being of limited importance. This suggests a likelihood that the risks to the child are being underplayed, because the nature and impact of abuse is misunderstood.

Domestic abuse not fully considered in child contact proceedings

The research revealed a widely held perception that the court is limited in its ability to consider domestic abuse as a factor in a child’s best interests, and that the provisions of the Children (Scotland) Act 1995, requiring domestic abuse to be considered in child contact cases, do not always read through into practice. Consideration of domestic abuse is seen to be inhibited both by the processes and practicalities of child contact proceedings where there is insufficient “space” in the proceedings to effectively consider domestic abuse and its impact on the child; by underlying perspectives on domestic abuse as an “adult matter”; and the prevailing culture in family law which favours contact.

Upholding rights: hearing the voice of the child

Most survey respondents and interviewees perceive that the courts pay sufficient attention to children’s views in contact proceedings, although there was some variance in opinions. Whilst acknowledging that the child’s view is key for resolving differences between parents in child contact disputes, some respondents suggested that where the child’s view is heard, this may be used more as an investigatory option for the court, or as a test of the validity of arguments being made by parties, rather than in terms of the children’s right to express their views or have those views considered. This suggests a failure to effectively uphold children’s rights to participate.

Ongoing presumption of contact is in best interests of child

The findings reveal a strongly pro-contact philosophy in the practice of family law. This includes the idea that contact is preferable to no contact at all, and that unsupervised contact is the ultimate aim.

For some interviewees and survey respondents, domestic abuse is considered less relevant to the question of contact than maintaining existing contact status and, in particular, that stopping contact would create a gap in contact that could affect any future decisions. Some interviewees held the view that physical abuse of the child would not necessarily mean that contact would be prohibited by the court.

Supervised contact is assumed to be safe and considered to be a solution in cases of domestic abuse. But supervised contact does not protect children from the emotional harm of having to have contact with a parent who has previously traumatised them.

Shortcomings in risk assessment and safety planning

The research highlights a lack of consistent mechanisms for the provision of risk assessment and safety planning in cases of domestic abuse that can be taken into account when determining contact arrangements. It is vital that there is a professional and informed assessment of the associated risks and vulnerabilities to adequately safeguard the child and their non-abusing parent that is made available to the court.

The pro-contact philosophy can potentially exclude effective consideration of the risks to children arising from domestic abuse. Evidence of domestic abuse and its effects is not consistently balanced with safety risks. The research revealed relatively little consideration given to how the safety of the child or the non-abusing parent or indeed other factors relating to the best interests of the child might be balanced in terms of child contact. Even in discussion of cases where there was a known background of domestic abuse, there was little consideration given as to how risk to the child (or the non-abusive parent) might be determined and taken into account in decision-making around contact. It appears therefore that a high level of risk needs to be established before contact is considered harmful.

A siloed consideration of (the effects of) domestic abuse?

A key message emerging from the research is the primary focus on the private law matter(s) raised in an application for contact, with less regard paid to the needs of the family as a whole. Criminal proceedings for domestic abuse and civil processes for child contact operate as separate and distinct spheres, connecting only through serendipitous means, although they both have significant impact on the family. Yet, as highlighted by research participants, criminal and civil proceedings involving the same family impact on each other, particularly in terms of timing and outcomes.

Decisions made in criminal processes concerning bail conditions and non-harassment orders can have a direct impact on child contact decisions. Yet, information about criminal proceedings or outcomes is not consistently conveyed to the civil system and, because only one party in civil proceedings has representation in criminal proceedings (the accused) the court is not being provided full information in order to make such decisions.

Lack of clear and transparent civil justice data

In conducting this research, we were inhibited by the absence of clear and transparent civil justice data. Despite some improvements in civil justice statistics in Scotland, the collation and availability of relevant data remains a significant issue. While relevant information may be available in court papers, it is not transparent or accessible.

The lack of clear and transparent data is not only a problem for research but, it may also impact on legal practice. Without evidence of the volume of contested child contact matters, the prevalence of domestic abuse in child contact cases or the frequency and patterns of contact being ordered or refused, it is difficult for legal practitioners to advise clients effectively.

Despite considerable reform within family law in recent years, there is scant research addressing its implementation. This research project is another small contribution to the overall picture, but research evidence remains piecemeal and limited.

Recommendations

The **eight messages** lead on to a set of **12 Recommendations** which we hope will inform policy thinking. Addressing these Recommendations will require engagement of a range of agencies at a system level.

- 1:** The issue of domestic abuse should be brought to the attention of the family lawyers and the court as soon as possible, and not left to the parties. Consideration should be given to development of robust mechanisms which ensure the early identification of any prior or ongoing action or concerns relating to domestic abuse in child contact cases, and the setting out of the responsibilities of all key professionals in the system to appropriately convey that information.
- 2:** Cases involving allegations of domestic abuse and those where there have been previous or ongoing criminal proceedings for domestic abuse should be flagged on family court databases.
- 3:** Specialist enhanced training on domestic abuse, coercive control and the impact on children's lives should be made compulsory for all sheriffs, judges and legal practitioners working in the civil system.
- 4:** Information about domestic abuse should be included in pleadings, Child Welfare Hearings (CWHs), and proofs in order to allow the court full information about the abuse and sufficient time to be able to consider the impact of domestic abuse on children.
- 5:** For child contact proceedings to operate in a way that realises children's rights to participate, greater attention must be paid to facilitating the child's right to express their views and have those views considered by the court.
- 6:** The research suggests variable understanding of the nature of supervised and supported contact. Consideration should be given to national level guidance about what constitutes supervised and supported contact.
- 7:** When child contact arrangements are put in place, they should protect the safety of the child and the parent with whom the child is living. In particular the court should clarify how the requirements of supported or supervised contact will ensure the child and the parent's safety. The court should ensure that the arrangements do not expose either to the risk of further harm and keep the arrangements under review.
- 8:** As the child's welfare is paramount, to ensure the safety and wellbeing and minimise harm for children, decisions about contact should include a consideration of whether the non-residential parent can offer benefit to the child and the child's situation. Where the parent has been found to be abusive there needs to be specific deliberation as to why contact is in the child's interests.
- 9:** A more coordinated and integrated approach to ensure safety from domestic abuse is required, which extends across civil and criminal justice systems where the same family is involved. There should be consideration of a centralised service to approach the family's multiple needs and take broader responsibility for their welfare and safety from domestic abuse.
- 10:** Exposure to domestic abuse can have a severe effect on the child's well-being. Courts should seek risk assessments from those individuals and organisations with specialist knowledge and experience around domestic abuse to assess the complex risks to children presented by domestic abuse before making decisions about contact.
- 11:** There is a dearth of recent research on the operation of family law in Scotland and in particular on child contact. Consideration should be given to the funding of a programme of research on this important issue, including a study of the treatment of domestic abuse in the context of CWHs and longitudinal research on the operation and impact of child contact decisions.

12: The current civil justice data on child contact are very limited, and there are no available data on cases of child contact in the context of domestic abuse. Whilst there are various potential data sources, for example, SLAB, CAB, Courts, little is known about what data this may comprise, nor how it may be accessed. As such, consideration needs to be given to a review of the statistical data that is currently collected for civil cases involving domestic abuse and child contact.

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