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

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1. Introduction and Aims of Study

This Report presents the findings of the *Domestic Abuse and Child Contact: The Interface Between Criminal and Civil Proceedings* research project, funded by the Scottish Government. The study set out to examine the relationship between civil and criminal law in the context of child contact proceedings which raise issues of domestic abuse. The impetus behind the study is to better understand how, if at all, developments in domestic abuse proceedings and changing definitions in the context of criminal law in Scotland, inform the handling of child contact cases which are conducted within the scope of civil justice.

Scotland has seen several major policy and legislative developments aimed at reforming responses to domestic abuse, most recently the introduction of the Domestic Abuse (Scotland) Act 2018. These developments have been primarily situated within the context of criminal law and the criminal justice process. There has been relatively less attention paid to civil law. The negative impact of domestic abuse on children is well-recognised in Scotland (see, e.g., Callaghan et al 2018). Growing awareness of the nature and impact of domestic abuse is reflected to some extent in the explicit statutory obligations, introduced by the Family Law (Scotland) Act 2006, on the civil courts to consider domestic abuse in the context of actions for child contact. In further recent debate and reform of child law and family justice, domestic abuse has been highlighted and children placed at the heart of the decision-making process. Decisions in respect of child contact generally, and in particular where there are allegations of domestic abuse, continue to present significant challenges.

Relatively little is known of how these provisions of Scots family law work in practice; of the extent to which the treatment of domestic abuse in the civil courts reflects criminal practice, or of the ways in which individual child contact cases may (or may not) interact with criminal justice proceedings. How child contact, more generally, works in practice in Scotland, is an under-researched area with Wilson and Laing's (2010) study a rare exception. The significance of the interaction of the criminal and the civil, in the context of domestic abuse and child contact, was clearly identified by the Scottish Government in the commissioning of a significant scoping project: *Contact Applications Involving Allegations of Domestic Abuse: Feasibility Study* (McGuckin & McGuckin 2004) but the planned Phase 2 did not follow. Much of the research evidence we have on this specific issue in Scots family law derives from two doctoral theses (Mackay 2012; Morrison 2014). Overall, there is limited research evidence on the operation of family law in child contact cases, and 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. The research which has been published has consistently stressed the need for further, large scale (e.g., McGuckin & McGuckin 2004; Wilson & Laing 2010) and longitudinal study (e.g., Mays & Christie 2001).

Through a focus on the interrelationship between the investigation and prosecution of domestic abuse in criminal justice and parallel child contact proceedings advancing through civil justice processes, this research study contributes to addressing the current knowledge gap.

The key stated aims of the study are:

- a. to understand the ways in which domestic abuse proceedings may inform the handling of and decision-making in child contact cases;
- b. to explore family law practitioner understandings of the impact and relevance of a course of conduct of domestic abuse and its implication in contact cases under s.11 7A – C of the Children (Scotland) Act 1995;
- c. to identify and explain perceived impediments or obstacles to communication and information exchange in such cases; and
- d. to examine the links or lack thereof between domestic abuse criminal proceedings and Child Welfare Hearings (contact).

2. Background and Context

2.1 The criminal justice response to domestic abuse in Scotland: a brief overview

For over 25 years, Scotland has been engaged in an ambitious and innovative strategy to tackle domestic abuse. There have been some significant developments in terms of:

- the conceptualisation of domestic abuse, specifically the early adoption of a policy definition that focuses on “abuse” rather than violence (Scottish Executive 2000; 2003);
- a gendered understanding of domestic abuse as a cause and consequence of gender inequalities (Scottish Executive 2000; McFeely et al 2013; Cairns 2017);
- the development of a joint protocol between Police Scotland and the Crown Office & Procurator Fiscal Service (COPFS) (2019, 5th edition) to ensure a consistent and robust approach to investigation and prosecution; and
- the implementation of a raft of policy and practice responses (Brooks-Hay et al 2018), including the introduction of specialist domestic abuse courts (Reid Howie Associates 2007; Burman 2018).

Taken together, these developments have positioned the Scottish approach to domestic abuse at the international forefront in this area (see, e.g., Coy et al 2007; McKie & Hearn 2004).

Legislation has been introduced to encourage reporting:

- the Criminal Justice and Licensing (Scotland) Act 2010 criminalised stalking;
- the Victims and Witnesses (Scotland) Act 2014 introduced greater protective measures for victims giving evidence;
- the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 criminalised intimate image abuse or so-called “revenge porn”.

Most recently, the Domestic Abuse (Scotland) Act 2018 (hereafter DA(S)A 2018) introduced a specific statutory offence of domestic abuse aimed at properly reflecting the experience of victims of long-term abuse and ensuring more effective investigation and prosecution (Cairns 2017; Burman & Brooks-Hay 2018; Scott 2020). In its criminalisation of a course of violent, threatening or intimidating behaviour that is abusive towards a partner or ex-partner, DA(S)A 2018 recognises, for the first time, that domestic abuse is experienced as a continuum rather than a discrete incident.

DA(S)A 2018 draws centrally upon the concept of “coercive control” (Stark 2007, 2009) which emphasises the importance of power and control in relationships characterised by domestic abuse. For Stark, coercive control is a cumulative form of subjugation that uses a range of tactics – physical abuse alongside a pattern of non-physical abusive behaviours such as threats, intimidation, stalking, destruction of personal property, psychological abuse, economic oppression and restrictions on liberty – that both isolate women and “entrap” them in relationships with men by making them constantly fearful (Stark 2007). Under DA(S)A 2018, for an offence of domestic abuse to have been committed, two conditions must be met: the behaviour needs to be such that a reasonable person would consider it likely to cause the victim physical or psychological harm; and the accused either intended to cause the victim

physical or psychological harm, or else has been reckless as to the causing of such harm. Hence, the focus is on the behaviour of the alleged perpetrator rather than relying on the victim's evidence that they were in fact harmed or distressed by the abuse.

Despite the reforms, domestic abuse remains prevalent in Scotland. Police Scotland recorded 65,251 incidents of domestic abuse in 2020-21, an increase of four per cent compared to the previous year, and the fifth consecutive year that this figure has shown an increase (Scottish Government 2021a). This equates to 119 incidents of domestic abuse per 10,000 population. This data shows that in 2020-21, 50 per cent of domestic abuse incidents were perpetrated against a partner and 49 per cent by an ex-partner. Domestic abuse is overwhelmingly perpetrated by men on women, with over 80 per cent of incidents recorded by the police in Scotland involving a female victim and a male accused.

Respondents to the Scottish Crime and Justice Survey (SCJS) are asked about their experiences of physical and psychological "partner abuse"¹ since the age of 16 and in the 12 months prior to interview. In 2018/20 SCJS (Scottish Government 2021b), 16.5 per cent of adults said they had experienced at least one incident of partner abuse since the age of 16 years, with women more likely than men to have experienced such abuse, both in the 12 months prior to interview and since the age of 16 years.² Engender (2021) has observed "at least one in five women in Scotland will experience domestic abuse in her lifetime."

2.2. Domestic abuse in a civil justice setting: the case of child contact

Over a similar period of time, Scotland has seen considerable reform in the context of child law, family law and children's rights. Here too there is strong evidence of an ambitious and innovative strategy, this time in pursuit of a civil law framework suitable for contemporary families. The Children (Scotland) Act 1995 represented an early commitment to the alignment of Scots family law with the terms of the United Nations Convention on the Rights of the Child (UNCRC) and, more recently, this ambition has been furthered through the commitment to "Getting It Right for Every Child" (Children and Young People (Scotland) Act 2014) and to full incorporation of the UNCRC (United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill). Within this developing civil law framework, domestic abuse also features. Domestic abuse was first addressed within family law by the introduction of statutory occupancy rights in the matrimonial or family home (Matrimonial Homes (Family Protection) (Scotland) Act 1981) and, more recently, it has been explicitly highlighted within the context

¹ Partner abuse in the SCJS is defined as "any form of physical, non-physical or sexual abuse, which takes place within the context of a close relationship, committed either in the home or elsewhere. This relationship will be between partners (married, co-habiting or otherwise) or ex-partners". This definition is consistent with the definition adopted by Police Scotland in recording domestic violence.

² Information around a number of sensitive issues, including partner abuse, is collected through a self-completion element in the SCJS. This is collated over two survey years and reported biennially. The 2019/20 SCJS combines the self-completion information about partner abuse from 2018/19 and 2019/20 reports these as 2018/20.

of child law, including ongoing contact between parents and children.³ It is that latter focus on domestic abuse in the context of child contact which is addressed in this research.

The Children (Scotland) Act 1995 represented a major reform of the law relating to parents and children, with Part I establishing the foundational framework of parental responsibilities and rights (PR&R). Subject to some reform, it continues to provide the statutory basis for regulation of private law relationships between children, parents and other relevant adults and it is within that framework that domestic abuse may become a relevant consideration.⁴ The starting point is the setting out in section 1 of the 'parental responsibilities' with the corollary 'parental rights' in section 2: the latter being clearly secondary and only existing to support fulfilment of the responsibilities. Child contact is understood in Scots law within the context of these PR&R. Section 1(1) provides that:

"a parent has in relation to his child the responsibility— [...] (c) If the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis;"

and in terms of section 2(1)(c), the parent has a 'right' to do so. Norrie (2013: 7.17) describes the approach to contact as follows:

"The responsibility and right of contact is based on the assumption that it is a benefit to the child that he or she maintain links with both parents, though that assumption does not amount to a presumption in favour of making a contact order: it is more in the nature of a 'working principle born of human experience', or a 'point of reference based on the common conception of what will, generally speaking, be in the interests of children'."

Section 11 is a key section in the 1995 Act, setting out a range of orders which may be sought in respect of PR&R, specifically for the purposes of this research including contact orders, and the principles on which decisions should be made. Whilst the court may make any order regulating PR&R as it sees fit, section 11(2) establishes eight court orders referred to collectively as "section 11 orders". Amongst them is a contact order made under section 11(2)(d):

"an order regulating the arrangements for maintaining personal relationships and direct contact between a child under [the age of 16] and a person with whom the child is not, or will not be, living (any such order being known as a 'contact order')."

When considering whether or not to make an order for contact, or for that matter any section 11 order, the court must apply "the welfare test", in terms of section 11(7) of the 1995 Act:

"in considering whether or not to make an order [for contact] and what order to make, the court—

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all;

and

³ We use the term "parents" but it should be noted that the adults concerned are those who have or seek to have parental responsibilities and rights (PR&R) in terms of the 1995 Act. They are not necessarily "parents", as understood either legally or socially but could, for example, include grandparents or the cohabitant of a parent.

⁴ It should be noted that this research does not explore the reforms of the 1995 Act which will be implemented as a result of the Children (Scotland) Act 2020.

(b) taking account of the child's age and maturity, shall so far as practicable (i) give him an opportunity to indicate whether he wishes to express his views; (ii) if he does so wish, give him an opportunity to express them; and (iii) have regard to such views as he may express."

Section 11(7) incorporates the three overarching principles of the 1995 Act. The first is the welfare principle (section 11(7)(a)) which places the welfare of the child as the paramount consideration in any decision. The second principle (section 11(7)(a)) may be described as the non-intervention principle and it reflects a wider preference for consensus. The third principle, in section 11(7)(b), of children's participation, reflects the commitment to the UNCRC which underpinned the 1995 Act.

Among concerns identified by the Scottish Executive (2004) consultation, *Family Matters: Improving Family Law in Scotland*, was a need to strengthen protection against domestic abuse. Scottish Ministers undertook to examine the issue during the passage of the Family Law (Scotland) Bill. The Justice Committee heard evidence from a range of organisations and commentators, including from women's and children's organisations who proposed a statutory presumption against contact in cases involving domestic abuse. The proposed presumption was opposed on the basis that it added little to the existing welfare test that required the court to have regard to the welfare of the child as the paramount consideration.

A statutory presumption against contact in domestic abuse cases was rejected. However, Scottish Women's Aid presented evidence that domestic abuse was not being considered in child contact cases (Scottish Parliament 2005, col 1894). As a result, section 24 of the Family Law (Scotland) 2006 introduced new "abuse provisions" by adding section 11(7A-C) to the 1995 Act. A further two new subsections were added, (7D) and (7E), which direct the court to consider, in deciding whether or not to make any order, whether "two or more relevant persons would have to co-operate with one another as respects matters affecting the child".⁵ The amendments direct the court, in assessing whether or not to make an order for contact,⁶ to have regard to particular matters concerned with the need to protect the child from domestic abuse. The section states:

"(7A) - In carrying out the duties imposed by subsection (7)(a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.

(7B) Those matters are—

- (a) the need to protect the child from (i) any abuse; or (ii) the risk of any abuse, which affects, or might affect, the child;
- (b) the effect such abuse, or the risk of such abuse, might have on the child;
- (c) the ability of a person (i) who has carried out abuse which affects or might affect the child; or (ii) who might carry out such abuse, to care for, or otherwise meet the needs of, the child; and
- (d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities."

⁵ While these "co-operation" provisions may clearly be relevant in the context of domestic abuse, they are not specifically the focus of this research.

⁶ Or any section 11 order.

“Abuse” is defined in section 11(7C) to include:

- “(a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical, or mental, fear, alarm or distress;⁷
- (b) abuse of a person other than the child; and
- (c) domestic abuse;”.

‘Conduct’ is, in turn, defined in section 11(7C) to include: “speech; and presence in a specified place or area.”

These provisions provide the legislative basis for defining domestic abuse in contact cases in Scotland. While a significant reform, they have attracted relatively little attention in published judgments⁸ (Morrison 2014) and limited academic comment (Whitecross 2017).

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 at CWHs. The measures proposed include banning personal cross examination, preventing repeat litigation, 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.

Significant changes to the 1995 Act will be introduced by the Children (Scotland) Act 2020.⁹ The changes, as yet unimplemented, seek to:

- ensure the views of the child are heard in contact and residence cases;
- provide additional protection to victims of domestic abuse and their children;
- ensure the best interests of the child are at the centre of all contact and residence cases; and
- further compliance with the United Nations Convention on the Rights of the Child 1989 (UNCRC) in family court cases.

2.2.1 Contact Orders

This research focuses on court-based processes, but it should be stressed that, in many cases, arrangements for contact and the management of family relationships, are made among the parties themselves without the need for adjudication (Wasoff 2007: 29). There are limited civil justice statistics available in Scotland and it is not possible to state with any certainty the level of contact disputes which come to court or the number of orders granted.¹⁰ Some indication can be found in the data from the *Growing Up in Scotland* study, which found that only five per cent of families with a non-resident parent in each cohort of the study had been to court

⁷ This part of the definition of “abuse” under section 11(7C) (a) of the 1995 Act, and the definition of “conduct” is identical to the definition of “abuse” and “conduct” under section 7 of the Protection from Abuse (Scotland) Act 2001.

⁸ Which in itself is not surprising in view of the very low number of contact cases which proceed to proof.

⁹ The Children (Scotland) Act 2020 was passed in October 2020; however, these provisions are still to be implemented.

¹⁰ The recent Scottish Government Civil Justice Statistics (2021c) do provide more information on ancillary craves as discussed on p12.

at any point in relation to contact between the child and the non-resident parent (Marryat et al 2009). For the small proportion of families who require the intervention of the civil courts to resolve parental conflict, section 11 of the Children (Scotland) 1995 Act provides the legislative framework under which civil court orders can be applied for and judicial decisions reached to regulate arrangements.

Against a background in Scotland where little was “known about the nature and extent of contact applications ... how many have been awarded and what proportion ... involve allegations of domestic abuse”, a feasibility study in 2004, sought to “assess the availability and quality of existing data on contact applications [by] parents involving allegations of domestic abuse” (McGuckin & McGuckin 2004:10). By extrapolation from a sample study of three sheriff courts (Glasgow, Dundee and Dumfries), it was estimated that there were, annually across Scotland, 2,000 applications for contact with allegations of domestic abuse against the pursuer in 310 of those applications. Based on the sample of actions explored in the three study courts, “allegations of domestic abuse were mentioned in 30% of the actions involving contact” and “charges relating to domestic abuse or offences against children were mentioned in 5%” (McGuckin & McGuckin 2004: 4). In a study of court papers relating to a sample of 208 contact disputes, raised in two urban sheriff courts during 2007, Mackay (2013a: 3) found that “domestic abuse was either alleged by a parent and/or described by a child in 49 per cent of the cases”.

Despite McGuckin and McGuckin (2004) identifying clear potential for the Courts Management System (CMS) to record better data relating to child contact and domestic abuse, its prevalence remains unclear and unquantified. In the 2019-20 Scottish Crime and Justice Survey (SCJS) (Scottish Government 2021b), an estimated three in ten adults reported experiencing a civil justice problem in the preceding three years. Among the main problem areas identified by the survey, 17 per cent of adults reported experiencing problems with home or family arrangements. This includes harassing behaviour of a partner, ex-partner, or other person, as well as child contact, residence, and maintenance.

The Scottish Government (2021c) Civil Justice Statistics (2019-20) provide some insights into the context of family actions in the Scottish civil courts. The vast majority of family law cases are heard in the sheriff court, with only one per cent of cases being heard in the Court of Session. Of those heard in the Court of Session, 80 per cent were in respect of divorce and dissolution. Family cases made up 16 per cent of principal craves (legal remedy sought). The cases recorded under family law cover a broad range of matters including divorces and dissolutions, and applications in relation to PR&R. Divorce and dissolution and PR&R account for 93 per cent of cases started in the civil courts at 72 per cent and 21 per cent respectively. Furthermore, family law cases also include interdicts preventing a party from making contact or coming into close proximity of another, and exclusion orders that suspend the rights of an individual to live in the family home. Turning to the cases initiated in respect of PR&R, the most common are for contact (1,354), residence (1,168) and PR&R (593). The joint protocol between Police Scotland and COPFS (2019:19) states that standard prosecution reports should include “Details of any previous or ongoing civil court proceedings or other concerns relating to child residence or contact”.

It remains difficult, however, to draw significant conclusions from these statistics which are categorised on the basis of the principal crave, in light of the findings (McGuckin & McGuckin 2004:1) that “applications for contact were found across a range” of family actions and that contact “was not the first crave in the majority of contact applications”.

2.2.2 Child Welfare Hearings – the civil process

Child Welfare Hearings (CWHs) were introduced into Chapter 33 of the Ordinary Cause Rules (OCRs) (Schedule 1 to the Sheriff Courts (Scotland) Act 1907) in 1996 as a key mechanism for dealing with civil actions concerned with the welfare of a child under section 11 of the Children (Scotland) Act 1995.¹¹ They were seen as an “innovative measure” requiring sheriffs and practitioners “to adopt new ways of approaching the resolution of child-related disputes” (Mays & Christie 2001: 161). With the majority of contact actions being heard in the sheriff courts (99 per cent) under the OCR, it is clear that CWHs are central to understanding how domestic abuse is considered in the context of child contact.

The first hearing that parents in all defended contact actions will attend is a CWH.¹² Both parents must, except on cause shown, be present at the CWH. Parents are under a duty to provide the sheriff with sufficient information to enable the conduct of the hearing.¹³ The OCR provides that CWHs may be held in private, but CWHs are typically closed to the public.

The OCR states that at the CWH:

“the sheriff shall seek to secure the expeditious resolution of disputes concerning the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute”.¹⁴

In practice, the court will have the parties’ written pleadings (initial writ and defences) that set out their respective statements of the facts. The sheriff may “order such steps to be taken, make such order, if any, or order further procedure, as he thinks fit”.¹⁵ It is open to the court to make or vary an interim order for contact at the first or any subsequent CWH if the sheriff is satisfied that the statutory welfare test has been met.

After the first CWH, it is within the court’s discretion to order whatever further procedure the sheriff thinks fit. In practice, this is invariably another CWH, usually four to eight weeks after the first. At any subsequent CWH, as at the first, the sheriff will seek an update from the parties’ agents on the details or progress of any contact that has previously been agreed or ordered, whether either party seeks to vary that contact, and to outline the basis of any opposition.

A sheriff can elect to adhere to current standard civil court procedure in defended actions that determine from the outset a date for an Options Hearing, at which a Case Management Hearing will be fixed to ascertain the scope of evidence to be heard, and a Proof hearing

¹¹ Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956 (S.223) Schedule 1 Chapter 33 Family Actions. All references below are to the rules for actions and minutes to vary lodged on or after 24 June 2019.

¹² OCR Chapter 33.22A (5).

¹³ OCR Chapter 33.22A (6).

¹⁴ OCR Chapter 33.22A (4).

¹⁵ OCR Chapter 33.22A (4)(a).

scheduled to hear evidence in the case.¹⁶ While one CWH must take place early in the process in all defended actions (and the sheriff retains the discretion to fix more thereafter), the sheriff can at any CWH determine that the matters in dispute are such that it is appropriate to fix procedure for Proof so that the court can assess a range of oral and documentary evidence on material matters relevant to the welfare of a child and make a judicial determination as to the facts and the key question of contact.

In England and Wales, Practice Direction 12J¹⁷ sets out the general principles to be applied in contact cases involving domestic abuse. It determines the process in such cases where “it is alleged, or there is otherwise reason to believe that the child or a party has experienced domestic violence perpetrated by another party or that there is a risk of such abuse”.¹⁸ It directs the family court to decide the appropriate procedure at an early stage in the proceedings including whether to conduct a “fact-finding hearing” and, if so, which of a range of allegations should be the focus of that “fact-finding”. In Scotland, there is no direct equivalent to PDJ12 for cases involving domestic abuse; an issue which has attracted some comment from practitioners (Sharma 2021).

The CWH allows for a process which is focused on resolution, reflecting well the relational nature of families and family law, but tensions identified in early review of CWHs (Mays & Christie 2001) have come to the fore. While the “cautious process” of the CWH has been welcomed (Mackay 2018: 483), it can also lead to protracted actions, with *NJDB v JEG* [2012] UKSC 21, an extreme example. Fears about lengthy delays and the harm they may cause to child welfare generally, and specifically in the context of domestic abuse, effective case management has become the key method for minimising abuse of process (Whitecross et al 2017). But there remains a balance to be achieved and in recent guidance from the Sheriff Appeal Court it was acknowledged that there can be a “clash between two competing issues: (a) procedure (and its policy)”, which in respect of child contact and CWHs was a move “towards expedition and the avoidance of delay” and “(b) the need for flexibility when dealing with the interests of a child” (*LRK v AG* 2021 SLT (Sh Ct) 107, [14]).

Mays et al (2001:165) highlighted one of the potential tensions in CWH as follows:

“There is a paradox here: that sheriffs are being encouraged to be interventionist, in the sense that they are to attempt to bring parties together to reach a compromise ... Yet this interventionist philosophy is being used to secure a non-interventionist end: namely the aim of making no formal order so that families are left to make their own decisions to as great an extent as possible.”

Subsequent studies of child contact applications have confirmed that “very few cases proceed to proof” (McGuckin & McGuckin 2004: 2), with none of the 97 cases in Mackay’s sample going to a “full proof hearing” (2013). While this may be viewed as a success of the CWH process, we

¹⁶ Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956 (S.223) Schedule 1 Chapter 33AA Expeditious Resolution of Certain Causes. It should be noted that there are changes planned for case management in family actions which are not yet in place.

¹⁷ Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 18 May 2022.

¹⁸ Practice Direction 12J para 2. (18 May 2022)

may be “missing the point in relation to some commonplace and serious concerns in relation to the welfare of the child” (Sassan 2010: 48).

2.2.3 Child Welfare Reports

Under OCR 33.21(1) and (2) a sheriff may direct that a Child Welfare Reporter (CWR) be appointed at any time either:

“(a) to seek the views of the child and to report any views expressed by the child to the court; or (b) to undertake enquiries and to report to the court... where the sheriff is satisfied that the appointment... is in the best interests of the child; and will promote the effective and expeditious determination of an issue in relation to the child.”

Since October 2015, the court order or interlocutor appointing a CWR must specify a number of matters including for example, the issues in respect of which the child’s views are to be sought, the scope of the enquiries to be undertaken and the issues to be addressed in the report. Sheriffs may also use a form, F44, to set out the matters to be considered. In the F44, the sheriff must give specific direction whether a copy of the main report is to be provided to the parties, whether the views of the child should be recorded in a separate report and, if so, whether a copy of that report is to be provided to the parties.

2.3 Children and domestic abuse: an overview

The international research evidence is clear that domestic abuse is harmful to children and that the harm is not limited to situations where children “witness” domestic abuse but rather that they actively experience domestic abuse with the non-abusing parent (Hester 2000; Mullender 2004; Radford et al 2013; Campo 2015; Katz 2016; Callaghan et al 2018). For example, Jaffe et al (2003) juxtapose misconceptions about domestic abuse and child contact proceedings with research evidence, citing evidence of negative changes in children’s brain and neural development when they live in an environment with domestic abuse against the misconception that domestic abuse only affects children if they are directly abused. Field et al point to a false dichotomy where child abuse and domestic abuse have been treated separately, where in fact “living with IPV [Intimate Partner Violence] is a form of child abuse” (2016: 223).

Historically, justice systems have tended to fail to recognise that children experience domestic abuse with the non-abusing parent, focusing primarily on adult victims (Lemon 1999). However, recent criminal legislation has started to address this and make children more visible. In England and Wales, the Domestic Abuse Act 2021 explicitly defines children as victims of domestic abuse where they witness or experience the effects of the abuse. In Scotland, the Domestic Abuse (Scotland) Act 2018 acknowledges the experience of children and young people, constructing them as experiencing abuse rather than only witnessing it. Section 5 of DA(S)A 2018 includes an aggravation where behaviour is directed towards a child, is witnessed by a child, involves a child or where a reasonable person would consider the perpetrator’s behaviours likely to adversely affect a child, reflecting the harm that can be caused to children growing up in an environment where domestic abuse takes place. This approach to understanding children’s experience of domestic abuse through an aggravator has however

been criticised for not properly recognising children as victims (Cairns & Callander 2022). The Act also set out the Scottish Parliament's expectation that criminal courts dealing with DA(S)A 2018 or offences with a domestic abuse aggravator would impose a non-harassment order in relation to the adult victim and child/children unless they could explain why this protection was not needed. In the civil justice arena, criticisms persist as to the extent to which civil systems recognise and effectively tackle the ways in which perpetrators of domestic abuse harm children (see section 2.3.1 below).

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. While in an early decision considering s11(7A) – (7C), the sheriff noted "regrettably" the absence of "judicial guidance on the matters to be considered" (Treasure v McGrath 2006 Fam LR 100 at [10]), there are examples in more recent cases of highly informed and sensitive handling of the issues (for example, A v A [2020] WLUK 613).

2.3.1 Child contact as a means of ongoing domestic abuse against parent and child

It is well-established that domestic abuse does not cease if the adult victim and the perpetrator separate (Thiara & Harrison 2016; Holt 2017; Brooks-Hay et al 2022). Separation has long been established as a key risk indicator for the most severe domestic abuse, including adult and child homicide (Stanley 2011). Jaffe et al (2003:59) relate this to domestic abuse being the perpetrator's attempt to control the adult victim, where the perpetrator may become "most dangerous and extreme" during separation to regain any perceived loss of control. Post separation abuse commonly involves harassment, including breaches of non-molestation orders. This could be because one parent was not accepting that the relationship had ended, was in conflict with a new partner of the other parent, or was seeking to continue to influence and control the relationship (Cafcass/Women's Aid 2017). At the same time, the child's experience of domestic abuse after separation can worsen in many ways (Field et al 2016).

Against that well-established research, a recent sheriff court decision (*LRK v AG*) was a reminder of the potential gap in understanding. While an appeal was successful, with the interlocutor being recalled and the cause remitted to a new sheriff for consideration (2021 SLT (Sh Ct) 107), the findings of the original sheriff are worth noting. It was clearly established:

"that the relationship between the parties was characterised by incidents of domestic violence and domestic abuse on the part of the respondent, including a conviction for assaulting the appellant for which he was sentenced to 12 months' imprisonment and the subsequent breach of a non-harassment order".

Despite the fact that there could be "little doubt that ... the domestic violence and volatile behaviour ... some of which took place in front of [the child], must have affected her", the sheriff continued as follows:

"However, the parties have separated, and have no contact with each other, and therefore there is no question of [the child] being exposed to further domestic abuse. That was only a factor when the parties were living together ... the historical abuse is not, in my view, sufficient to prevent an award of contact being made."

An approach which is in stark contrast to established understandings of domestic abuse as explored above.

Concern about how the family justice system responds to children having contact with fathers who have abused their mothers is not new. Research shows that many abusive men manipulate the relationship between mothers and their children and child contact provides further opportunities for the perpetrator to continue their abuse of both the child and the non-abusing parent (see, e.g., Mullender et al 2002; Humphreys et al 2006; Thiara 2010; Coy et al 2012). Specialist women's support services have long highlighted that it is problematic to presume that the relationship between a child and abusive parent is unaffected by domestic abuse, and that contact proceedings are frequently invoked by perpetrators as a means of seeking to continue to manipulate and control women and children (Coy et al 2012; 2015), for example, by making negative comments about their mothers, asking them to repeat abusive messages, probing for the details of her activities, friends and relationships (Edleson et al 2003; Holt 2011; Thiara 2010; Thiara & Gill 2012).

A wide range of studies has shown that judicial decisions about contact arrangements which fail to take safety into account may endanger both women and children physically and emotionally (see, e.g., Radford et al 1997; Mullender et al 2002; Harrison 2008; Thiara 2010; Thiara & Gill 2012). In worst case scenarios, children may be murdered by perpetrators of domestic abuse during child contact (Women's Aid 2016); in some cases, such murders appear to be designed by the perpetrator as an act of revenge or control against the mother e.g. the murder of seven year old Andrea Rascón González by her father during a court ordered unsupervised visit, the day after he told her mother at a court hearing that "he was going take away what mattered most to her", (CEDAW Communication No. 47/2012, 2.16). Examples of children's experiences of abuse during child contact include:

- being isolated from friends and family (including, but not limited to, the non-abusing parent);
- being left alone in spaces in which children felt unsafe (for example, on pub steps in the dark);
- being prohibited from undertaking school work or eating healthily;
- verbal abuse if children refuse to provide the perpetrator with passwords for the non-abusing parent's online accounts (Mackay 2018; Galántai et al 2019; Dragiewicz et al 2022).

As well as the ongoing experience of abuse, the requirement to spend time with the abuser may hinder the recovery of the child (and that of the non-abusing parent), both as an individual and in terms of their relationship with the non-abusing parent (Thiara & Harrison 2016).

2.3.2 Concerns about child contact proceedings for adults and children

A significant number of cases reaching court in relation to child contact are likely to involve domestic abuse. Reviews of child contact cases in the US (Jaffe et al 2003), in England and Wales (CAFCASS/Women's Aid 2017) and in Scotland (Mackay 2013b) have consistently found allegations of domestic abuse in 50 per cent or more of cases. Despite the prevalence of domestic abuse in child contact cases, and the significant harms experienced by children from domestic abuse, research on judicial training suggests that the judiciary do not necessarily see that an understanding of the complex nature and dynamics of domestic abuse is core to their role (Benton & Sheldon-Sherman 2015). In contrast, there are examples of judgments where sheriffs demonstrate strong understanding of domestic abuse and coercive control (e.g. *A v*

A [2020] 10 WLUK 613) although there remains a need for consistent recognition of the importance of a “more contextual understanding of the nature of the relationship between the parties” (Sharma 2021).

Research highlights that child contact proceedings can be experienced as highly stressful for non-abusing parents. As a participant in Coy et al’s study said: “It’s been like going through the abuse again” (2015: 60). A key concern raised about child contact proceedings is that they are often unable to make effective decisions about the child’s best interests, failing in particular to consider children’s safety, including their experience of domestic abuse (Bailey 2013; Elizabeth et al 2012). Choudhry and Herring (2006) argue that, as such, the civil courts in England and Wales are failing to meet state obligations to children under the Human Rights Act 1998, that is Article 3, prohibition of torture, and Article 8, right to respect for family and private life, which includes rights to bodily and psychological integrity. Whilst some research suggests that court processes limit the court from determining facts in relation to abuse, preventing them from making “wise decision[s]” for children (Harris 2010:191), others argue that even where the court is satisfied that abuse is taking place, there is still limited weight given to the child’s experience of abuse in determining the outcome, resulting in inappropriate orders (Alexander 2015). The strength, clarity and consistency of views expressed by children (Mackay 2013) and an understanding of “how contingent children’s views might be” (Morrison, 2014: 171) are key factors in effective decision-making.

For some time, there has been a trend towards a pro-contact philosophy based on the presumption that this serves the best interests of children (Anderson 1997; Aris & Harrison 2007; Harrison 2008; Thiara & Gill 2012). Indeed, Barnett claims that the pro-contact philosophy is so strong and pervasive that it sets a high, and increasing, “acceptable” level of abuse that the child (and non-abusing parent) are expected to tolerate to ensure contact can take place (2015: 73). Robinson found that the child contact system “was designed to keep fathers involved rather than to keep children safe” (2007: 368). While in Scotland there is no formal, legal presumption in favour of contact (*Sanderson v McManus* 1997 SLT 629; *White v White* 2001 SLT 485), in practice it is sometimes observed that there is a “general” presumption “in favour of contact as being in a child’s best interests” which is at odds with research and “may be misplaced” (Wasoff 2007: 2).

The pro-contact philosophy is particularly damaging where there is, or has been, domestic abuse. Stubbs and Wangmann (2015) describe how the myth of the ‘no contact’ mother has been created in civil contexts; this is the idea of a mother who resists contact for no reason with the system unable to recognise legitimate concerns for the abuse experienced by the child. Morrison et al (2020) also raise concerns about the failure of the court to recognise abuse as a legitimate reason for a parent to resist contact, suggesting this stems from the court’s persistence in viewing child contact as a dispute between parents rather than being about the child: an approach reflecting the framework of the Children (Scotland) Act 1995 which constructs it as such.

2.3.3 Legal systems abuse

Legal engagement can be an opportunity to exercise coercive control over a former partner, giving rise to concerns that child contact proceedings are complicit in the perpetrator’s

domestic abuse of the child and the non-abusing parent (Elizabeth 2017; Douglas 2018). Using legal systems such as child contact processes to continue domestic abuse has been termed by researchers “legal systems abuse” (Douglas 2018) or “papers abuse” (Miller & Smolter 2011) and may be intertwined with ongoing financial abuse (Glinski 2021). Douglas (2018) describes a wide variety of tactics used by perpetrators of abuse to continue to control women’s time after separation, such as requiring her to repeatedly attend court hearings, and notes that mechanisms open to women to deal with legal systems abuse often require them to continue to engage with the perpetrator through the legal system, that is, to subject herself to further abuse (for example, if a perpetrator refuses to pay a costs order). Moreover, requirements on the non-abusing parent to physically attend court hearings with the perpetrator provide further opportunities for abuse (Corbett & Summerfield 2017; Robinson 2007).

Furthermore, broader concerns about child contact proceedings, such as failures to effectively uphold children’s rights to participate, are highlighted in situations of domestic abuse. For example, Mackay (2013a) found that children’s views were not always taken into account and that a court outcome consistent with their views was less likely where the children were not in favour of contact with a non-resident parent; 96 per cent of the children who expressed a view that they did not want contact described abusive behaviour by that parent (Mackay 2013: 2).

2.4 Interaction between child contact and other processes

Child contact proceedings in the context of domestic abuse involve expectations and constructions of the abusing parent, the non-abusing parent and the child, that are somewhat different from other legal proceedings, in particular criminal proceedings for domestic abuse and child protection processes (see, e.g., Stubbs & Wangmann 2015; Hester 2011). Not only can this be bewildering for those who are involved in more than one kind of proceeding but the interface between child contact and other forms of legal proceedings, especially criminal proceedings, has received little academic research attention. In a notable exception, Robinson (2007) conducted an exploratory study of the interface between civil and criminal processes in Wales for victims of domestic abuse. She raised a number of concerns about civil proceedings generally, for example that they did not appear to be able to take domestic abuse into account, and that perpetrators of abuse were able to continue their abuse in or through the courts. More specifically, this research highlighted a lack of knowledge by legal practitioners working in one area about the other, for example, prosecutors not being aware of civil remedies, and the lack of mechanisms for information-sharing between civil and criminal systems, despite there often being a requirement for that information, for example, having to produce police reports to access a non-molestation order. The research also revealed how the lack of information sharing hindered the court’s ability to make informed decisions. In terms of child contact, particular concerns were raised that the courts would prioritise the child having contact over the risk of the child being abused. In Scotland, the *Feasibility Study* noted that allegations of domestic abuse were not recorded in the Courts Management System (CMS) database, that the presence of children in a case was not systematically recorded, and that “sheriffs were often unaware at the beginning of [child contact] proceedings if domestic abuse was an issue” (McGuckin & McGuckin 2004: 2).

Research has also identified concerns about the interface between child protection, civil proceedings and criminal systems. In Australia, Wilcox (2010) flagged that while some progress had been made in terms of joining up criminal, child protection and domestic abuse services at the state level, family law remained largely separate. This research also identified problems with child contact proceedings: notably a lack of clarity with regard to whether contact with a non-resident parent or safety from abuse were prioritised in terms of the best interest of the child, and; failures to recognise domestic abuse, with legal practitioners referring to “high conflict” families rather than recognising the coercive and controlling behaviour of abusers (Wilcox 2010: 1026). This research also identified particular tensions at the interface between systems, such as child protection rulings that the abusive parent should not be allowed to have contact, whilst at the same time family courts were determining that the non-abusing parent was in breach of contact agreements, and; some confusing “buck-passing” with, for example, reticence on the part of the police to get involved unless there was a family court order in place, alongside police refusing to get involved because there was a family court order in place (Wilcox 2010: 1027).

In terms of protective orders, the Domestic Abuse (Scotland) Act 2018 made clear the Scottish Parliament’s expectation that courts would impose a form of protective order, a non-harassment order (NHO) unless the court could explain why victims – including children – would be safe without them.

There is evidence to suggest that protective orders, a legal intervention that prevents contact between two parties for specified periods of time, are an effective secondary prevention tool in cases involving domestic abuse. However, how protective orders are handled may have knock-on implications for child contact decision-making. In research undertaken in the US, Agnew-Brune et al (2017) report that, whilst in some cases children witnessing incidents of domestic abuse led to an increased likelihood of protection orders being granted, in other cases this was viewed as an indicator that orders were being sought for tactical reasons, in particular to influence child contact proceedings. The researchers also noted a general perception amongst District Court judges that protective orders were negative for children because they would restrict access to a parent. Also in the Australian context, Douglas and Fitzgerald (2013) found that protective orders are not necessarily protecting the abused partner. They note concerns of rising numbers of cross-applications for protective orders (where applications are made by both parties) and that perpetrators of abuse may apply for a protective order as a continuation of their abuse or to neutralise the victim’s attempt to seek protection. From their review of cross-applications they suggest that the police may not be effectively assessing the risk and severity of violence being alleged, and therefore whether one person is more in need of protection.

3. Methods

The research comprised two phases:

- an online survey of family law and criminal law practitioners who carry out civil court work and/or criminal court work in domestic abuse cases, and
- semi-structured interviews with legal practitioners (family law and criminal).

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.

3.1 The online survey

The online survey was designed to collect both quantitative and qualitative 'free text' data and was administered using the online platform Qualtrics. The survey was guided by the overall research project objectives and aimed specifically to determine how legal practitioners' understandings of domestic abuse inform their handling of child contact cases, and to obtain their views and experiences of the interrelationship between the investigation and prosecution of domestic abuse in criminal justice and parallel child contact proceedings in civil justice.

The survey comprised (36) questions, arranged in five sections:

- A. Child contact matters where there are allegations of domestic abuse, including a subsidiary section about interaction with criminal processes
- B. Protective Orders
- C. Criminal Cases
- D. Open Question (where participants were offered the opportunity to elaborate on their answers)
- E. About the respondent.

Respondents were required to actively select that they consented to taking part in the survey before they were shown any of the survey questions; they were required to answer the consent and screening questions but were able to skip any other questions. The survey questions were designed primarily as closed questions to make it straightforward to complete, but with optional short answer spaces to enable respondents to expand on their answers.

Initial screening questions about respondents' experience determined which sections were to be completed and directed participants to specific questions. For example, section C on criminal cases contained questions about the interaction between civil and criminal matters, with parallel questions to the subsidiary block in section A. Respondents answered only one of these sections and answers were amalgamated for analysis. The full survey is attached as Appendix A.

The survey was targeted at family law practitioners in Scotland who carry out civil court work but was also open to criminal law practitioners with experience of the interaction between child contact and criminal proceedings relating to domestic abuse. To encourage the widest participation, the survey was advertised through a range of professional networks, including within a short article in *Scottish Legal News*, and in the *Clan Childlaw Bulletin* for their network

members. Requests were made to key organisations, such as the Law Society of Scotland and the Family Law Association, to share information about the survey through their relevant channels and through social media. The survey link was also accessible on the research project [webpage](#) located on the [Scottish Civil Justice Hub](#) (SCJH).

Following piloting and some slight amendment, the survey was implemented from 25th October to 6th December 2021. Thirty eight substantive responses were received, although a further 34 individuals commenced the survey but did not complete it. The majority of these dropped out on the introduction page, which included definitions and information about the content of the survey, or during the initial screening questions, so this may suggest that they did not feel the survey content was relevant to their experience. As such, analysis in this Report is based on the 38 substantive responses only.

The majority of respondents described themselves primarily as family law practitioners (n=25). All but one of the 38 respondents had experience of representing adults in child contact civil matters. Half (n=19) of the respondents had also represented clients in criminal proceedings in domestic abuse cases and some had experience of representing children (n=15) or acting as Child Welfare Reporters (CWRs) (n=9). Almost all (n=33) had experience in applying for protective orders in the context of domestic abuse. Over half of the respondents had more than 11 years' experience of legal practice. While the number of survey responses is too small to be considered representative, there were respondents from all six sheriffdoms in Scotland. All but five of the respondents stated they were female.

3.2 The qualitative interviews

Fifteen semi-structured interviews were carried out with legal practitioners in January and February 2022. The interview topic guide (see Appendix B) was developed on the basis of analysis of the survey responses, and comprised four main sections

- A. An introduction asking for a description of the participant's practice and experience of child contact work
- B. Understandings of domestic abuse in child contact proceedings
- C. Interaction between child contact and criminal or other proceedings
- D. An open question for interviewees to provide any key information which they felt they had not been asked about.

Interviewees were recruited from those who had completed the online survey and indicated that they were willing to be contacted for a follow-up interview. Of the 15 interviewees, 13 were female. The length of time that interviewees had been working as lawyers ranged from one to over 40 years. Interviewees included those with experience of legal aid and non-legally aided work, covered those working in large firms and as sole practitioners, as well as those with experience of public/charitable provision of legal advice. There was also a range of relevant experience, including representation of children in children's hearings, as a CWR and of undertaking mediation. Across the participants there was experience of working in all of the sheriffdoms in Scotland.

All interviews were carried out virtually (using Teams or Zoom) with a small number by telephone, depending on the interviewee's preference. Interviews lasted approximately one hour and were recorded and transcribed with all identifying details removed.

Interview data was coded and analysed using the qualitative data software package NVivo 12. An iterative categorisation coding frame (Neale 2016) was devised with overarching codes relating to the interview themes (e.g., experience, understanding of domestic abuse, interaction between civil and criminal justice). Transcripts were coded using these top-level nodes and further thematic analysis was undertaken.

4. Findings from the online survey

This section reports on the key findings from the online survey drawn from the responses from the 38 individuals who completed the survey.

4.1. Information about domestic abuse

The majority of respondents (n=30) reported that, in most child contact cases, they are 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. A small number reported receiving referrals from specialist organisations who provide support services to domestic abuse survivors and so they are made aware that way. Most said they do not routinely ask about domestic abuse as a background factor unless it is raised by their client.

Asked how the court becomes aware of the presence of domestic abuse at a Child Welfare Hearing (CWH), the vast majority of respondents (n=30) said this was usually raised by the party against contact, and rarely by the party seeking contact. A very small number (n=2) reported cases in which the court had become aware of domestic abuse from ongoing or recently completed criminal proceedings.

Whilst most respondents said they would inform the court if they were made aware of domestic abuse, the accompanying qualitative comments to this question highlight some key differences in approach. Whereas some were of the view that domestic abuse is a significant factor and should be *"brought to the court's attention as soon as possible as it is a key consideration in whether a child should have contact with the other parent"*; others believed this to depend on whether the allegation of domestic abuse was made in relation to the defender or the child, or whether this posed a risk to their client: *"I don't necessarily raise the issue at Child Welfare Hearings unless protective issues arise regarding the safety of my client at handover of child for contact."*

Some comments suggest a view that children may not always be at risk of or impacted by domestic abuse, for example:

"In my view domestic abuse is relevant to such cases where there is a risk to the child through the perpetrator's behaviour or there has been an impact on the child because of such behaviour."

Others suggested that domestic abuse allegations were used as a tactic in the court process, with one stating *"Allegations of domestic abuse are the easiest accusation to make in order to thwart contact - usually for other reasons."*

Over two thirds of respondents (n=26) were of the view that information about domestic abuse strengthens the position of the party against child contact. Most of the remaining respondents (n= 10) believed that this information makes no difference and one thought it made the position weaker.

See recommendations 1, 2, 3 and 4.

4.2 Attention paid to the views of the child

The majority of respondents were of the view that the courts pay sufficient attention to the child's views (n=24), the child's age and stage of development (n=27), the child's right to a relationship with both parents (n=22) and parents' rights (n=22). However, there were differing views concerning the level of attention paid by the court to the impact of domestic abuse on the child's safety and wellbeing, with a greater number (n=18) stating that, in their opinion, this was insufficient, compared to others (n=15) who thought the court got this about right. One respondent specifically raised concerns that a sense of the long-term welfare of the child was lacking from the court's consideration: *"I think more focus needs to be given to the long-term welfare of the child. It is not just the here and now."*

Another stated that:

"Children's views are often taken without addressing if they are trying not to offend a parent or without addressing what they have been told. As a result, domestic abuse, even historical, in the context of family contact cases impacts family units for generations, regardless of the alienated parent retaining PRR."

Nineteen respondents thought that the court paid insufficient attention to the adult's safety and wellbeing, compared to a smaller group (n=12) who thought the level of attention given to this issue by the court was about right.

Few respondents thought that the courts paid too much attention to any of the factors asked about, although a handful thought the court paid too much attention to parents' rights (n=4) or to the child's right to a relationship with both parents (n=4).

See Recommendation 5.

4.3 The interface between child contact and criminal proceedings for domestic abuse

The survey included a set of questions about respondents' experience of working on child contact matters where there were also consecutive or recently completed criminal proceedings. Most (n=30) had experience of this interface between systems, although two-thirds of this group (n=20) described their main area of legal practice as family law. Regardless of the focus of their practice, legal practitioners working around child contact appear to be operating across both civil and criminal systems, and therefore may need an understanding of both.

Around a third of respondents (n=11) reported that, in their experience, information would not routinely be shared between or across the criminal and the child welfare processes, suggesting a clear disarticulation between these systems. As one stated: *"the sharing of information between processes is complicated and far from straightforward."* While others (n=18) said information was shared, this was described as *"variable"* or *"inconsistent"*, for example, occurring only because the same sheriff dealt with both matters, or because one or both parties mentioned that a parallel criminal process was ongoing or recently completed.

Nevertheless, most respondents were of the view that the criminal and the civil cases did impact on each other, in terms of timing or process (n=18) and/or in terms of outcomes (n=20). Again, however, the views on exactly how these processes impacted on each other showed variation, with some respondents suggesting that the timing of civil processes would be impacted by criminal proceedings by, for example, needing to wait to ascertain bail conditions, or the outcome of sentencing, particularly if a custodial sentence was a possibility which would affect decisions about child contact. One respondent raised concerns about the impact on parents or children of the civil case waiting for the criminal as potentially having: *"a long-term detrimental effect upon the relationship between parents and children."* In contrast, another respondent suggested that there was no relationship between the timing of the processes: *"Neither takes account of the other and instead hearings appear to be rigidly fixed according to the court timetable rather than the interests of the parties."*

Similarly, there were different views and experiences about whether a criminal case would have an impact on the decision-making in child contact matters, with some respondents of the view that a conviction would be viewed as *"significant"* or would have an impact on the level or form of contact. The impact might also go the other way, with a respondent suggesting that a not guilty verdict *"can in some cases have more of an impact and lead to domestic abuse matters being pushed aside."* However, another respondent also noted that it was *"very dependent on what judge you have"* in terms of whether or how a criminal outcome had an impact, with another stating:

"The interaction between domestic abuse and child contact cases can, all too often, come down to the importance placed on it by each individual sheriff. Much to the frustration of all parties."

The information provided suggested that the flow of information and the impact went more from criminal proceedings to civil proceedings than in the other direction. The majority of respondents thought that the civil processes would inform arguments in the criminal case around bail decisions (n=18) but fewer thought the civil case would inform arguments about non-harassment orders (n=10) or mitigation (n=8) in the criminal case.

When asked about processes for information-sharing between the civil and criminal proceedings, and who might be best placed to do this, one respondent stated *"None. All are subject to limitations"*. Another stated that there should be clear requirements placed on both the defence agent and the procurator fiscal appearing in the criminal cases to share information with those involved in the civil process. While just about half of respondents (n=17) suggested Child Welfare Reporters (CWRs) were very well placed to convey this information, it was also noted that CWRs may not be able to obtain this information. One respondent also noted a problem relating to the variable skills of CWRs and inconsistency in the standards of the reports produced for court.

See recommendations 1, 2, and 9.

Where respondents had experience of representing clients in criminal cases for domestic abuse (n=14) they were asked to give an approximation of how often they had been aware of children being in the household in these cases. Responses were split: a third (n=5) believed

this was around three quarters of such cases in which they were involved; a third (n=4) thought that this was about half of all cases, and a third (n= 5) thought this was about a quarter of all such cases. Importantly, this highlights that all were aware of the presence of children. Domestic abuse cases taken forward under section 1 of DA(S)A 2018 can have a child aggravator attached where the perpetrator's behaviours are likely to adversely impact a child; COPFS (2022) report that such an aggravator was applied in 16 per cent of DA(S)A 2018 cases in 2021-2. This perhaps seems low compared to legal practitioners' perception that children are in the household in 25-75 per cent of domestic abuse criminal cases of which they had experience.

Respondents were also asked whether they had experience of representing clients in criminal cases for domestic abuse where the allegations included behaviours relating to child contact, such as threats not to return children or using contact to monitor the other parent. Ten of the 17 respondents answering this question confirmed experience of such cases, two were unsure and five reported that they had not had experience of this. This highlights the importance of there being effective processes where criminal and child contact systems intersect. If systems are not joined up effectively, as Wilcox highlighted in respect of Australia (2010), then this may be problematic with police not feeling able to take action about abuse that takes place in the context of child contact.

4.4 Summary of survey findings

The survey provided valuable baseline information on legal practitioners' experience and handling of child contact cases, and their views and experiences of the interrelationship between the investigation and prosecution of domestic abuse in criminal justice and parallel child contact proceedings in civil justice.

It is clear from the survey responses that legal practitioners acting in child contact cases are heavily reliant on obtaining information about the occurrence of domestic abuse from their clients, and they gain this information primarily from the party opposing contact. For those acting for the party seeking contact, this information is rarely provided. Whilst the majority of respondents were of the view that information about domestic abuse strengthens the position of the party against child contact, there is no reliable or consistent mechanism to obtain this information. Whilst there may be some information flowing between criminal and child contact processes, this seems to happen 'by chance' or where there is a likely impact on the timing of the decision-making. This signals a clear absence of systematic ways to gather and make available information about domestic abuse where it has occurred (or is still occurring) in cases involving child contact. Not having the full picture can potentially lead to delays in case preparation and the progress of civil proceedings, as well as affecting decision-making in child contact. These findings echo strongly the findings of McGuckin & McGuckin to the effect that there was no systematic recording of domestic abuse in court data and "the likelihood of knowing if domestic abuse is an issue is lessened when the perpetrator and pursuer may well be the same person" (2004: 2).

There were varying views as to the importance of domestic abuse as a significant consideration in child contact deliberations. Key differences of opinion were evident in the views provided about the relevance of domestic abuse to the safety and wellbeing of the child, ranging from

it being extremely important to being of limited importance. Whilst the majority of respondents considered that the courts pay sufficient attention to the child's views in child contact cases, there were differing views concerning the level of attention paid by the court to the impact of domestic abuse on the child's safety and wellbeing.

5. Findings from the qualitative interviews

This section reports on the key findings from the semi-structured qualitative interviews undertaken with 15 legal practitioners.

5.1 Bringing domestic abuse into child contact cases

The statutory framework which underpins the discussion of child contact in this research is the Children (Scotland) Act 1995, and in particular section 11 (see 2.2, above). Section 11(7A) – (7C) directs the court to consider aspects of domestic abuse in making decisions relating to child contact, and other issues relating to parental responsibilities and rights (PR&R), but how is the issue of domestic abuse brought to the attention of the court? The interviews made it clear that, in common with other areas of family law and civil justice more generally, the role of the solicitor is key; reflecting the findings of Wilson and Laing that “solicitors had been a first port of call for help for those pursuing contact actions” (2010: 2).

In some respects, however, child contact work is “different” from other types of civil and family disputes due, at least in some measure, to the process of Child Welfare Hearings (CWHs). A key theme to emerge from the interviews was the extent to which there was space and a place for domestic abuse within this process. While early comment on the operation of CWH by Mays and Christie (2001), did not identify domestic abuse as a particular concern, it did note emerging issues, including:

- the possibility of variation in practice;
- potential tensions between informal process and formal orders, inquisitorial and adversarial practice; and
- the continuing uncertainty as to the place of the child: “the policy aim of treating the child as a full legal citizen and the natural (instinctive?) desire to protect children for the stresses and strains of a court action” (2001:165).

In any decision of the court relating to PR&R, children should be given the opportunity to express their views and those views should be taken into account. This current research is based on the provisions of the 1995 Act, prior to their most recent amendment by the Children (Scotland) Act 2020, and the 1995 Act framework provides for the regulation of PR&R rather than direct enforcement of children’s rights. The extent to which children are heard in the context of child contact actions and specifically within the process of CWHs was a key theme to emerge in the interviews.

5.1.1 The role of the solicitor in child contact cases in the context of domestic abuse

Interviewees were asked about when and how they are made aware of the background of domestic abuse in child contact cases in which they act. A key finding is that they are not routinely made aware of domestic abuse from any external source and are heavily reliant on being told about it from one or other of the parties. This confirms the survey findings on this point. In some cases, a referral for legal advice from a Women’s Aid branch or a similar organisation will alert the lawyer to domestic abuse, but by and large this information will be

conveyed by the non-abusing parent, who is almost always the female partner. While this is largely unsurprising, in the context of civil work, where a solicitor takes instructions from their individual client, it is notable in its distinction from the development of practice and policy within the criminal justice approach to domestic abuse (see 2.1, above). It highlights the value to the court of Child Welfare Reports (see below, 4.2.2.3), which “communicate to the sheriff what is not presented by any of the parties as they don’t want you to know” (Mackay 2013b: 6; 2018).

When and how domestic abuse is raised with solicitors varies as the following quotes illustrate:
“domestic abuse takes a lot of different forms. It’s not always physical and ...they maybe don’t realise they are the victims of domestic abuse” (FF14).

“they [victims of domestic abuse] are generally quite reluctant to talk about it because they are getting over something that has been really quite horrific” (FF3).

Other interviewees agreed that women may find it difficult to recognise that they have been experiencing domestic abuse, notably if it was controlling or coercive behaviour, and that this may be a reason why they are not informed about domestic abuse until some way into the child contact proceedings. As one interviewee put it, women sometimes need *“distance...to realise”* their experiences as domestic abuse and to label *“what has been going on... wasn’t right”* (FC1).

Gaining the client’s trust and establishing a relationship in which the client can disclose personal matters was regularly mentioned. But whilst it is accepted that there are sensibilities, this does raise the question of why enquiring about the presence or otherwise of domestic abuse as a contextual factor is not routinely put to the parties at the commencement of the case. Interviewees with considerable experience in handling family cases did exactly that, as the following quotes illustrate:

“I always ask... ‘I don’t want to pry into your private life, but what was the nature of the separation” (FC9);

“Because I’ve been dealing with it for a long [time]... I know how difficult it is, it’s always downplayed” (FC9).

When domestic abuse is raised, interviewees commented on the additional dimension of their role, in terms of the provision of both legal and emotional support for their clients. For example: an interviewee referred to a client who needed a lawyer *“who was going to listen to everything. Because she did not feel heard at all”* (FF14) and the importance of making time to listen. Others spoke of *“managing a client’s expectations”* (FF11) about the degree of emotional support that could be provided and noted that there is a limit to what they can do and the need to *“make them aware of organisations that they can go to that they can get support from”* (FF15).

Dealing with domestic abuse in contact cases, can mean that lawyers *“work really hard to try and calm things down”* (FF3). For many there is a sense of purpose that underlies their professional practice. For example, *“I still think it is one of the most rewarding areas actually... is where there have been issues with children and domestic abuse”* (FC13). However, handling

contact cases with domestic abuse can be emotionally draining: *"It'll be the little things ..."*(FC1) and *"Sometimes it is really difficult ...[to retain] my tolerance by Friday afternoon ..."*(FF3).

See recommendations 1, 2, and 9.

5.1.2 The distinctiveness of child contact proceedings

One of the most consistent findings was the view held by interviewees regarding the nature of child contact proceedings. All highlighted the processes of negotiation and multiple CWHs which monitored developments around child contact arrangements. These were variously characterised as *"complex"*, *"lengthy"* and *"ongoing"* rather than a swift and tidy push towards a decision compared to other areas of civil business:

"You know, you get contracts when people are getting divorced and you deal with the financial provision, you do a nice little Minute of Agreement and there you are. But when it comes to a child all you do is you vary the action if there's a change of circumstance. So you really are never at the end of the road when it comes to children." (FF4).

As such, interviewees described child contact proceedings as *"different"* from other matters in which they represented clients in the civil justice system. This difference was said to be reflected not only in terms of the civil processes embedded in wider court structures which are required to be followed, but also in terms of what some interviewees described as the culture of the civil justice system. Specifically, CWHs were characterised as focused on finding out what was going on for the child rather than testing evidence to make a judgment with regards to one or other of the (adult) parties. For example:

"The children are at the heart of the legal system when it comes to the kind of family aspect of the law. So the court are really, really interested in finding out what kind of contact does the child have, does he see mum, does he see dad, how are they getting on?" (FF2)

That child contact proceedings are experienced as distinct is not surprising, reflecting the *"innovative"* nature of the CWH (Mays & Christie 2001:161). While the CWH method may be well suited to the developing and changing nature and needs of children and facilitate a gradual and managed approach to contact and parenting, the fact that *"it's always got the capability of being opened up"* (FF4) raises concerns as to how it operates in the context of an abusive and controlling relationship. That possibility of keeping things open, is an inherent part of the CWH process and it is linked to the methodology of *"promoting conciliatory approaches and compromise"* (Wilson & Laing 2010: 3). One consequence, however, is the limited focus on the testing of evidence, in the context of child contact actions, which stands in contrast to more adversarial family law actions generally and to the treatment of domestic abuse within the criminal justice system. The experiences reported in the interviews echoed Mackay's findings to the effect that, none of the cases, from a data set of 97 cases relating to child contact, *"went on to a full proof hearing in which the parties may present evidence and both they and their witnesses may be questioned by the other side"* (2013b: 7)

5.1.3 The views of the child

Despite the legal framework and the belief that *“children are at the heart of the legal system”* (FF2), there were varying views as to the extent to which children’s views are actually taken into account and, if they are, on what basis they are heard. This accords with Mackay’s (2013a) findings that children’s views are not always taken into account in contact proceedings, raising concerns about failures to effectively uphold children’s rights to participate. For example, one interviewee, who had also acted as a Child Welfare Reporter (CWR) commented:

“And I think what’s often the thing, when I’m acting for a particular client is I hear everything that client’s saying, I’ll hear a lot of what the other parent’s saying. But there’s very little, if any, information about what the child’s actually saying” (FF5).

This interviewee also pointed out the value of going to speak to teachers, social workers and others with knowledge of the child and family in order to *“get to the crux of the matter.”*

Whilst most interviewees were of the view that the child’s view is key for resolving differences between parents in child contact disputes, this was rarely described in terms of the children’s *right* to express their views or have those views considered. This was sometimes described as an investigatory option for the court, to be initiated by the court rather than to be realised as a right of the child. For example: *“if there were further enquiries that the court felt would be appropriate the Child Welfare Reporter might be asked to take the views of the child”* (FF11).

It was also reported that the child’s views are sometimes used as a proxy to test the validity of arguments being made by parties (which were not being tested by the court, unless and until the process moved out of CWHs and to a proof):

“Because if I tell a sheriff the kids are terrified and don’t want anything to do with dad anymore, straight away a sheriff will be like, well let’s get views, let’s go and speak to these kids, let’s find out what’s happening” (FF2).

Reflecting on the use of children’s views as evidence or as a test of validity, some interviewees believed that the child contact system was not always able to act in a way that was supportive of children’s rights. Court processes, and the prevailing culture around pro-contact, were perceived to block the realisation of children’s best interests, despite children’s views being sought in the child contact process.

There may be a variety of reasons why the airing of children’s views were described through an evidential lens rather than through a rights based mechanism, such as:

- the norms of court processes to test evidence or specificities of the child contact process;
- the use of CWHs without a mechanism to test evidence; and
- the position of the child as at the centre of processes but rarely a party and therefore not explicitly visible in terms of considerations around access to justice.

Several reasons were put forward by interviewees as to why children’s rights to express their views might not be realised by the court, for example if the child is younger their views may not be deemed useful, or there may not be a process to effectively enable the child to express their views if a CWR is not deemed necessary by the court (including situations where the court may have cost considerations not to order a CWR). While reforms to structures around CWRs

(Children (Scotland) Act 2020) may tackle some of these concerns, the broader issues around the difficulties for child contact proceedings to work in a way that realises children's rights to participate, and therefore acts in their best interests, are unlikely to be resolved by reform to CWRs alone.

See recommendation 5.

5.2 Domestic abuse as a consideration in child contact proceedings

A key theme from the interviews was the view that the court is limited in its ability to consider domestic abuse as a factor in a child's best interests. Consideration of domestic abuse was seen to be inhibited both by the processes and practicalities of child contact proceedings and by underlying perspectives on domestic abuse and contact.

5.2.1 Pleadings, process and practice

While a small number of interviewees referred to the provisions of the Children (Scotland) Act 1995, requiring domestic abuse to be considered in child contact cases, it was noted that this did not necessarily read through into practice:

"I always do really detailed pleadings relating to 11(7E) and sometimes it just doesn't come through though, in a hearing, it just doesn't. In Child Welfare Hearings, however detailed and forensic your pleadings are, that's generally not the focus of the hearing [...] so the theory of that law and legislation is great, but I just don't find that it cuts through to practical decisions." (FF7).

Part of the reason why the legislation requiring the court to consider domestic abuse did not read through into practice appeared to be the process that is required to be followed in child contact cases. As stated above, the interviews confirmed the survey findings that solicitors are not routinely made aware of domestic abuse and are heavily reliant on being told about it from one or other of the parties. The findings from these recent interviews are a striking echo of findings from the earlier *Feasibility Study* where respondents confirmed what had been found in the data set that, "information about domestic abuse is not always contained in writs" although there was a general confidence that it "will surface early on in proceedings" (McGuckin & McGuckin 2004: 60).

Information about domestic abuse might be included in pleadings but these were not necessarily considered at CWHs. Interviewees did refer to pleadings potentially being picked up again if a case went to proof, though the consensus was that cases rarely go to proof. In terms of CWHs, which interviewees described as the main process by which child contact matters proceeded, it was suggested that the pleadings were not really relevant, and certainly not in comparison to the underlying pro-contact philosophy embedded in the system that child contact was always in the best interests of the child:

"I think the majority of sheriffs, certainly in [place] anyway, but most places I think would normally put some form of contact in place, pretty much regardless of what's in the pleadings." (FC1)

According to some interviewees, another process issue that inhibits the effective consideration of domestic abuse in relation to child contact is the time available to the court to hear cases. They noted that CWHs usually last between 15-30 minutes (often less during Covid-19), and that this was insufficient time to enable the court to get into the detail of what was happening. Interviewees also described having to provide information about domestic abuse to the court in an incident-based form, for example, that a parent was assaulted on a particular date, rather than providing evidence of domestic abuse as an ongoing course of conduct. Even if the court was able to consider the impact of domestic abuse on children, it is unlikely to have available appropriate information about the abuse or sufficient time to consider it.

See recommendation 4.

5.2.2 The relevance and impact of domestic abuse on children: beliefs and conceptualisations

Another key theme from the interviews concerned perceived differences in the levels of understanding of domestic abuse by those taking part in child contact processes. Some interviewees admitted to low levels of understanding of the nature and characteristics of abuse, whilst others considered that many court actors with whom they work had relatively poor understandings both of domestic abuse and its likely effect on the child. This was seen to inhibit effective consideration of domestic abuse, even if there was space in the process to do this.

The general consensus was that domestic abuse was only viewed as being relevant to child contact, and to the best interests of the child, if the child specifically *witnessed* domestic abuse. For example:

"It depends whether they [...] have seen it and whether they've heard it, whether they were around. If they were separated parents then they may not have seen it. And I suppose that...remember, I'm acting for a parent. So I'm looking to ensure that that parent has continued contact with the child." (FF12).

This is somewhat at odds with the widely held view in the research and practice literature that the potential harm to children is not limited to situations where children "witness" domestic abuse (Hester 2000; Mullender 2004; Radford et al 2013; Campo 2015; Katz 2016; Callaghan et al 2018).

Concerningly, given the wider developments in Scotland around conceptualisations of domestic abuse, the interviews revealed that domestic abuse is primarily understood in terms of physical violence. The following statements sum up that view:

"Until there's kind of solidified evidence to suggest that dad did hit mum, mum did hit dad or whatever, I think the court would just be looking into the best interests of the child and the best interests of the child is that mum and dad both have contact with them and have some sort of level of relationship with them." (FF2).

"It was really extreme, extreme domestic abuse and still it had to go to appeal after a sheriff decided, well, this terrible abuse had happened, but the child hadn't seen it, it hadn't been against the child..." (FF7).

The understanding of domestic abuse held by some actors in the child contact system therefore appears considerably divorced from current policy and legislative definitions: DA(S)A 2018 considers domestic abuse in terms of emotional, financial, psychological, sexual and physical abuse, and also specifically recognises the “adverse impact” on children of experiencing domestic abuse, without the need for them to specifically witness it. Whilst there were a small number of interviewees whose responses suggested that they understood domestic abuse in these terms, they expressed a lack of confidence that the child contact system would see the relevance of the impact of domestic abuse on children.

On the basis of interviewees’ comments then, even if there was an effective space to consider domestic abuse in terms of child contact, it is not at all certain that it would be considered relevant to issues of a child’s best interests.

Interviewees spoke of occasions where domestic abuse was minimised, either deliberately or because of a lack of understanding about its nature. There also appeared to be an underlying construction of domestic abuse as a “dispute between parents.” This is perhaps enforced by the overall structure of court child contact processes as a dispute between parties. In this context, domestic abuse was depicted as just another issue between parents, rather than as criminal acts of abuse by one parent against both the other parent and the children. For example:

“unless there’s a conviction, no one is going to accept it even happened. So then there’s just this, well, it’s a question mark, he says, she says, he says, she says, tit for tat it becomes. So this big, big thing can be lost in amongst other things that are far less significant and it just becomes another tit for tat, which is horrifying, when you’re seeing it happen in front of you and you’re trying to say, well, this is so fundamental to the decision making to this child’s outcome” (FF7).

Disputes about child contact, in terms of the Children (Scotland) Act 1995 are themselves constructed as disputes between the adults who have or seek PR&R. They are private law disputes between two adult parties and it is therefore to some extent unsurprising to see domestic abuse treated in this way. It is however a point of distinction from the developing understanding of domestic abuse within the criminal justice system.

Several interviewees suggested that making arguments about domestic abuse, particularly if there was no evidence of serious physical assaults, would be viewed negatively by the court, most likely as an attempt to manipulate the court, as the following illustrate:

“I wouldn’t even run that argument [financial, emotional abuse] in front of our sheriffs because I know that that is not something that they would attach weight to. Actually, it would [be] like I was mud-slinging and that does not help.” (FF3).

“It’s not accepted, it’s almost turned on its head, and a sheriff won’t actually ... She’s making this up to stop contact.” (FF14).

Another interviewee suggested that they would need to be cautious about how often they raised domestic abuse as an issue in cases:

“And again you’ve got the potential to lose the faith of the court if you do that on a regular ... if I was going to court every single day for a Child Welfare Hearing and I had

a party line for all my clients and saying, 'My Lord, My Lady, it's another domestic abuse affair here, there's coercive control, there's x, y and z.'" (FC10).

This raises significant concerns given that a large proportion of child contact cases reaching the court system are likely to involve domestic abuse (Mackay 2013a; 2018).

See recommendations 1, 2, 3, and 4.

5.2.3 Child Welfare Reporters

Interviewees described Child Welfare Reporters (CWRs) as potentially providing to the court the space and opportunity to consider domestic abuse and unravel issues which are pertinent to the best interests of the child. However, it was also flagged that CWRs are not appointed in every case, with factors such as the age of the child and the funding status of the parties affecting this decision-making. One interviewee, in describing a particular case where the child was a baby and no CWR had been appointed, believed that the court would not consider the impact of domestic abuse:

"I don't think they would, I think they would maybe hope there would be social work involvement and the social work would be able to make some sort of recommendation or some sort of inference of, well the child's welfare's fine, even though they've witnessed domestic abuse at a young age." (FF2).

A range of issues were raised about the quality of Child Welfare Reports, including where the CWRs did not appear to have a good understanding of domestic abuse, for example:

"I have seen reports that are just mince." (FF12).

"Especially when it comes to domestic abuse I think sometimes people just miss the point, they just miss it [...] quite often people who have been abused will kind of downplay it or will...and if they're not kind of forthright about it and saying this and this and this and this. If you don't have the experience to kind of look into that and ask them the questions, you're not going to get the information. And the same with people that are abusers, because more often than not, you know, they can be very charming and have all the right things to say and how to say them, and if you've not got the experience to kind of look into that and ask them the questions, then you won't necessarily get, you know, your full picture." (FC9).

Some interviewees referred to the potential for changes to how CWRs are trained and appointed to improve some of these shortcomings. However, it is not clear how improvements in CWRs will tackle the broader issues inhibiting the court from effectively considering domestic abuse, given levels of overall understanding of the impact of domestic abuse on children and its relevance to their best interests. This gives rise to the somewhat anomalous position where, even if the court is able to effectively take into account the complexities of the impact of domestic abuse on children and the relevance of this to their best interests, it is not clear that the court has available to it effective mechanisms to tackle domestic abuse in the context of child contact.

See recommendations 3 and 4.

5.2.4 The welfare of the child: pro-contact and safety considerations

In common with much of the research on child contact, a theme to emerge from the interviews was a strong pro-contact consensus. All interviewees were clear that the court viewed contact with both parents as, prima facie in the best interests of the child. For example:

"The general consensus is there should be contact, it's just a matter of what type of contact and what form that takes." (FC13).

"The best interests of the child is that mum and dad both have contact with them and have some sort of level of relationship with them." (FF2).

Against this context, the interviewees were unanimous that the main mechanism the court had to deal with any form of concern was through the use of supervised contact.

While supervised contact appeared to be a frequently used mechanism, with which interviewees were very familiar, it was apparent that this was a broad categorisation which comprised a range of different types of contact. There was also a range of views on the value of particular forms of contact, and the importance of safety considerations in making decisions about contact.

Most interviewees equated supervised contact with that which took place in a child contact centre and were confident that child contact centres were a *"safe environment"* (FF5, FF8, FF12) in that *"a child can't be at any risk having supervised contact. Someone is scrutinising every single minute of it and they will report back"* (FF7).

Some interviewees distinguished between supervised and supported contact in a child contact centre, where the latter would not involve constant scrutiny; others appeared to suggest that the main value of a child contact centre was that it allowed for handovers without direct contact between parents: *"a contact centre is a safe environment with the mother and father arriving at different times."* (FF12).

Other interviewees indicated that a child contact centre might be used as a way to reintroduce contact after a gap, or to provide supervision where there were doubts about a parent's parenting skills, such as where there were substance misuse issues. Interviewees described what supervision might be provided, and reported on, by child contact centre staff, but this was not always or necessarily oriented towards safeguarding the child in the event of domestic abuse. For example, use of a child contact centre was justified in the following terms:

"if we are looking for supervised contact by somebody completely independent that can provide us with a report to say, dad turned up on time. [...] But the absent parent has turned up on time, is not drunk, is not under the influence of anything, engages with the child." (FF3).

There were a small number of references to contact needing to occur only where it was in the child's best interests but, with some notable exceptions, there was 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. The interviewees were all experienced in family law and specifically in dealing with child contact and it might be

argued that decision-making on the basis of the welfare principle is so deeply ingrained in their practice that they did not always make explicit reference to it. It was notable, however, that, even in discussion of cases where there was a known background of domestic abuse, there was little consideration given as to how risk might be determined and taken into account in decision-making. It was clear from the interviews that this was considered to be the responsibility of others. For example:

"I think that as long as the contact's safe, you know, again usually ... I think most psychologists would accept and agree that contact, as long as it's safe, is better than no contact at all in the vast majority of situations." (FF5).

Other interviewees discussed the use of supervised contact in the community with family members providing the supervision and whether this might be in the best interests of the child, with some raising questions as to whether family members might possess what is required in terms of supervision. Again, however, this was not couched in terms of safety concerns. Despite the overall consensus that supervised contact was the preferred avenue in cases involving domestic abuse, primarily because it was considered 'safe', there was little examination or consideration of what made such supervised, or indeed any other kind of contact, safe, nor how this might ensure a children's safety or meet their best interests.

Furthermore, it was clear in the interviews that supervised contact is considered as a temporary measure. The expectation of the court is always that supervised contact would progress, in time, to unsupervised contact. Supervised contact is not therefore a mechanism in itself to protect a child, it is a stage in a process towards unsupervised contact.

See recommendations 6, 7, 8, and 10.

5.3 Interaction between processes

5.3.1 Criminal processes and child contact

Based on the interviews, what emerges as a common theme is the lack of a reliable mechanism for sharing information between criminal and child contact processes. For example, it was noted that:

"If there's a Child Welfare Reporter appointed, the interlocutor from the court will normally give them authority to get a list of the previous convictions and information from Police Scotland But there's not a particularly easy mechanism to get the information from the Crown." (FC1).

In addition to the lack of a reliable means of sharing information, concerns about the time pressures and quality of the information were expressed. For example, the civil pleadings may not accurately reflect the original charges in the criminal process, which may be relevant to the contact case. One interviewee, commenting on their work as a Child Welfare Reporter said:

"...you have to write to Disclosure Scotland [to get information on criminal convictions] ... you have to get a Disclosure check which makes it a bit awkward and it's also difficult with time restraints. I always struggle to get it on time because I normally only have six

weeks to do a report. ... it's only unspent convictions, you do not get the spent convictions." (FC9).

Others observed that in smaller courts they may be aware of more information for example due to informal discussions among lawyers, same legal representatives acting or indeed the same sheriff hearing both civil and criminal cases. One interviewee advised that:

"if you've got the same sheriff dealing with it, you get that kind of working together type of aspect to it where they go, there's an intermediate diet coming up or there's a trial date coming up or whatever, so they're going to kind of know the picture, you know." (FC13).

However, most interviewees noted that the main source of information about a criminal case (past or current) relied on the client. This was more straightforward where the client was the accused, because for example, they would have access to information about trial diet dates, or the solicitor handling the contact case may be able to contact the accused's criminal solicitor (who could share information with the client's permission). It was the perception of the interviewees that the victim was likely to have less access to this information themselves, making it harder for the civil solicitor to access. Even if the victim in a domestic abuse case is aware of the information, they may not understand the process, which can mean for instance that victims may not understand the bail conditions or any amended complaints. For example:

"... you're not guaranteed to be able to get that information out your client because they don't understand the process. So, for example, if they say yeah, he pled to one charge but pled not guilty except for that other one and he's been given a community payback order; a lot of clients will be like, I don't know what that means?" (FC9).

The lack of information and the challenges presented by the victim being unable to advise their lawyer for the contact case presents challenges for the lawyers. One interviewee observed that:

"We only have that information from the client which is not always accurate. It's really not on either side because you will have mum saying the police have told me it has been reported to the fiscal and you go, okay that's fine, what's happening? You go, I don't know, I don't know. Well, if you don't know I don't know. I have got no locus to get that information." (FF3).

Whilst no concrete proposals were put forward by interviewees for how the sharing of information between criminal and contact cases might be improved, some did offer their thoughts. One interviewee commented that it was extremely difficult to get information from the fiscal, though if the fiscal had written to the victim then family lawyers (if they had knowledge of criminal processes) could support the victim to understand that information. It was also observed that if the fiscal was aware of the importance of information for contact cases, then it could possibly be addressed. Similarly, others suggested that sheriff clerks handling either domestic abuse or contact cases could liaise and share information. Whilst it was noted that sheriffs hearing contact cases would only know about potential criminal proceedings if someone brought it to their attention or the sheriff was across both cases, perhaps there may be a way for those sheriffs to access information.

One interviewee contrasted the effective sharing of information amongst multi-agency partnerships in other areas. Criminal justice social work reports are potentially an important source of information for the civil court, though it was thought this would require the convicted person's consent. Others noted that, for civil court practitioners (either representing the victim or as Child Welfare Reporter) unfamiliar with criminal procedure, they may lack the necessary understanding of the nuances of criminal processes. Some interviewees suggested that, at the very least, sharing basic information about timescales between processes would be useful, for example, if the civil court knew when trial diets were happening it would enable them to agree dates if a proof was required.

Whilst information about the criminal process for domestic abuse cases was considered important, several interviewees did not see the relevance of information about the child contact process to the criminal process. Some suggested that they would be making arguments in the criminal process about child contact in terms of bail conditions or mitigation. Others raised practical issues, such as that a person in custody would be unlikely to have been able to contact a third party to ask if they'd be willing to do handovers for contact, and many solicitors would not think to ask about contact arrangements in terms of bail conditions.

It was considered that there are practical impacts arising from the criminal process that have an influence on civil processes. For example, bail conditions impact on how contact can take place. Of particular concern is the timing of the civil court process, so as not to jeopardise a criminal process (i.e. not proceeding to proof):

"Because the impact of bail conditions on contact can be really awful. Especially when you have a situation where contact has been working fine and it is all great. Then all of a sudden something happens and he is now on bail and the whole contact arrangement needs to be looked at because he can't turn up at her house to pick the child up anymore." (FF3).

"... the sheriff in that instance has said, I'm not going to substantially increase this contact until I know what's happening with the justice report. Because it may well be that a non-harassment order will be put in place, it might well be ... well it could be a restriction of liberty or supervision order." (FC10).

These concerns about the criminal process were explained by another interviewee as follows:

"The principal reason for it is obviously if the criminal situation is serious enough, criminal always takes precedence over civil anyway, but if it is serious enough, then that might end up with the parent losing their liberty or being curtailed in some way." (FC13).

In terms of the impact of criminal proceedings for domestic abuse on the CWHs, interviewees highlighted decisions such as not imposing bail conditions that restrict access to the children. However, they were unclear why such decisions had been made. Interviewees noted that concerns about creating a gap in contact between the child and the accused, may override concerns about waiting for a criminal process to conclude before making decisions about contact. One interviewee observed that:

"if you're the dad and you're waiting on the back of this and you don't contact for nine to 12 months, ultimately the allegations could have been ill founded or false, whatever, you're going to find it very difficult then to get contact up and running, certainly at any

great level. That's just a natural consequence. Which is probably why sheriffs will try and put some form of contact in place if possible." (FC1)

There appeared to be an assumption in some interviews that the main or only impact of a criminal process on child contact was the limitations of bail conditions (or NHOs) and that the role of the practitioner was to "work around" (FF11) these to put contact in place through a child contact centre or with third party handovers. This is summed up by FF12, who notes:

"once the criminal case is disposed of, more often [than] not the bail conditions fall away. But I suppose that in very serious cases, then the bail conditions may be replaced with the non-harassment order which still makes the same complexities and difficulties in people being able to see their children." (FF12).

Another observed that *"there may be special bail conditions in respect of the mother but that doesn't mean that the father shouldn't see their child."* (FF15). Underlying these observations, is an implied assumption that domestic abuse is an adult matter, affecting the mother and abuser, rather than the wider impact on the child.

Based on the interviews, there is no consistent pattern in terms of the impact of criminal processes on the outcome of decision-making in contact cases. The majority observed that there is likely to be at the very least a form of supervised contact. This is succinctly conveyed by one lawyer, who advised that: *"I think contact centre is going to be much more likely than no contact. I don't think I've ever had a no contact."* (FF8). It was suggested that supervised contact may be ordered if the court has concerns arising from allegations or convictions of physical abuse against the children or witnessed by the children. However, it was also noted that this is not necessarily always the case. As one interviewee said, a criminal conviction for domestic abuse would be a key factor in a contact decision *"only if it's ... really significant."* (FC9). Another said:

"I've had a few examples where I think if dad's already been convicted of stuff and has admitted to being convicted of stuff in his pleadings, in response to that sometimes the sheriff will make no order for contact. To be honest, it depends on who your sheriff is." (FC1).

The interviews indicate that courts rarely make no order for contact. Supervised contact, initially at a child contact centre, but subsequently outside of the child contact centre and unsupervised was generally held to be the most common approach. This approach, in favour of contact, was thought by one interviewee to be because the courts are *"pretty against stopping contact even if there was a domestic incident ongoing or domestic allegations ongoing"* (FF2). This includes if the contact case is running in parallel to a criminal action for domestic abuse. The centrality of contact between child and parent, even a parent accused of domestic abuse, is conveyed in the following quote:

"If it is possible for the civil to carry on with some form of supervised type arrangement or handover arrangement and the child is not the complainer, that would be the difference [compared to a case where the child is a victim/witness to assault] ... then certainly in my experience the civil case would keep going. The person that is facing the criminal case is probably not going to necessarily get the contact that they are looking for but the sheriff is not going to stop all contact unless there is a really good reason. Because the break in contact is not good, especially with small children. If you disappear

for six months out of a two year-old's life then it is a lifetime. So, no, we normally carry on." (FF3)

There is a degree of contradiction in the interviews. While some interviewees suggest that the court want to know the outcome of a criminal proceedings, there is inconsistency over how relevant this information is to any contact order made in the civil court. As one commented: *"I think the sheriffs like certainty and that [having the outcome of a criminal process] would give them certainty."* (FF14).

Another participant reflected this ambivalence over the significance of a conviction:

"A criminal conviction I think would have ... carry a lot of weight but I think the focus of the court, you know, despite that would still be on what's in the best interest of the child. Just 'cause, there's a criminal conviction does that necessarily mean that there should be no contact?" (FF5).

Equally, having a final decision in the criminal process does not mean there should be no contact. Another participant observed that:

"Whether there's a conviction or not, in terms of the child's contact with this parent, is actually – not irrelevant – but contact is occurring here, contact's going well. We should be looking to progress this to an acceptable level for all parties, particularly the child, insofar as it's in the child's best interests" (FC10).

This is a point confirmed by the sheriff in *M v M* [2018] 4 WLUK 730:

"Deprivation of parental responsibilities and parental rights in respect of one's child did not automatically follow a criminal conviction ... The welfare of the child remained the paramount consideration".

Interviewees commented that where there were allegations of domestic abuse, but no criminal conviction, these allegations, if raised during the contact case could be seen by the court as an attempt by the mother to prevent or stop contact. Raising concerns about domestic abuse may raise questions about the credibility of the victim (usually the mother). However, the majority of interviewees felt that whether this happened largely depended on the sheriff. Developing this point, one said:

"I think it very much depends on the sheriff you get and depends on, just because the person wasn't found to be guilty doesn't mean it didn't happen, there's just maybe a lack of evidence. And a sheriff might take that on-board, a sheriff might not take that on board; a sheriff might say well if a criminal court's found you not guilty of something then we're not going to put any weight on it." (FF2).

From the interview data, there is awareness that contact cases may be used as a tactic of abuse but little confidence that this is fully recognised. It was noted for example that:

"a lot of men will use the court proceedings or civil proceedings as a way of, kind of, continuing the control that they had. And you'll see it at court." (FC1).

Lawyers recognise that victims of domestic abuse *"continue to be manipulated through even a court process"* (FF15), and described abusers being:

“difficult ... about things or not agree to things, not agree to a child's going on holiday, because they've got parental rights and responsibilities, the other parent can't take the child out of the UK without permission, so then they'll have to go back to court to get permission. [...] only some sheriffs would pick up on that”. (FF15)

In preparing their clients for a CWH, interviewees emphasised the importance of how to present domestic abuse to the court. FF8 describes the need to *“prepare ourselves for a negative reaction [if we raise concerns about domestic abuse]”*. Another noted the challenges to widen the support for the victim attending CWHs (pre-Covid):

“In the days when Child Welfare Hearings were in court, you could sometimes ask – for example, if a Women's Aid worker came along – but one particular sheriff wasn't very keen on that. But you think, if they have that protection available to them in criminal, why shouldn't it be available in civil?” (FC6).

In terms of attending the court, interviewees noted that courts are able to make arrangements to keep parties separate. This was viewed as important, however it relies on the lawyer asking the court to allow those arrangements.

Some interviewees suggested that victims of domestic abuse may view the criminal justice system as not taking their experiences of domestic abuse seriously. In turn, victims may feel that the civil process equally does not take their experience seriously when considering a section 11 order. This could lead to a decision to remain in an abusive relationship and put the children at risk. For example:

“And I have had occasions where clients have reported it and the police have said, well, there's no evidence of it and it's not really went anywhere. So that's kind of just made people realise, well, if the police aren't taking me seriously then why would a [civil] court take me seriously? Or why would a judge take me seriously? [...] I find a lot of particularly females, males as well this happens to, but females where they kind of feel as if they're in a bit of a trapped situation where it's almost as if, you know, the police aren't taking me seriously, I'm worried in case I go to court and the sheriff won't take me seriously and my children are at risk so do I stay in this relationship?” (FF15).

Finally, interviewees raised several general concerns about criminal processes in terms of domestic abuse. Among the concerns raised was the possibility of a victim of domestic abuse being accused of abuse by the perpetrator. One interviewee noted that perpetrators in their experience were quite good at getting the accusations into the police first. Similarly, raising domestic abuse in the context of a contact case may have *“the opposite effect because it's gone back to what they used to say years ago; look, it's just a wee domestic” (FC6).*

It was observed that during the contact hearings the victims of domestic abuse are not asked about non-harassment orders, nor do these orders seem to be taken into account when making a contact order. The final point reflects a wider concern about access to legal advice, support and representation. Interviewees highlighted the difficulties facing victims of domestic abuse in terms of being able to access legal advice about the criminal process.

See recommendations 1, 2, 3, 4, 8, 9, and 10.

5.3.2 Protective orders and child contact

Protective orders can be the first stage in the process towards determining child contact. Commonly, where a client is fleeing domestic abuse, the legal practitioner's first step is to seek an emergency order to protect the client and the children. Several interviewees expressed concerns that where the non-abusing partner raises an action for interdict and residence, then that will almost always be defended, whereas if the non-abuser does not commence such action, then the abuser may never engage with the legal process:

"If they don't do something, if they don't raise the court action, it puts that burden on the abuser, so they have to find a solicitor, instruct a solicitor, apply for Legal Aid, raise a court action; and quite often they don't bother" (FC9).

Interviewees had strong views about protective orders, in particular the financial costs for their clients and the lack of Legal Aid, but were welcoming of the provisions of DA(S)A 2018, which made clear the Scottish Parliament's expectation that courts would impose non-harassment orders (NHOs) unless the court could explain why victims – including children – would be safe without them. For example:

"I'm always acutely aware, certainly of the client base that I have, is that if they're looking for a non-harassment order through the civil process, that's something they're really going to have to really pay for an ordinary action for, whereas if they go through the police and criminal process, then that's not something they're going to have to do off their own back. [...] I'm also aware of my client's financial position, and that might give them access to something that they can't pay me to do. And it's because of the new legislation recommending, in certain cases of domestic abuse, that non-harassment orders are granted, that gives them an opportunity to get those kind of protective measures that they might not be able to pay for, and get through me." (FF8).

Other concerns raised related to the time taken to secure an order, and the lack of information flow within the criminal process, in particular when bail conditions were going to fall, as it may not always be possible to convince a sheriff that an interdict is needed while bail conditions are in place. That said, some interviewees took the view that if someone has previously breached bail then that may convince the court to apply power of arrest to an interdict. It was also suggested that bail conditions were taken more seriously than interdicts (and did not require legal aid). Others believed that bail conditions were something to work around to make contact happen:

"Well if there's a non-harassment order or I suppose if there's an interdict against the person that I'm acting for about approaching or being in touch with or corresponding with ...the other parent, then you have to look for other ways in which you can facilitate the contact. [...] the first avenue after that would be through the contact centre." (FF12).

Interviewees described interdicts as something *"running alongside"* (FF5) but not integrated with child contact processes. To highlight this, one interviewee [FF4] gave the example of ongoing child contact proceedings where an interdict was sought following the return of the abusive parent after a period away, but it was not possible to amend the family action to add the interdict. However, because the child contact deliberations were subject to a three-day proof, they were able to argue that the interdict should be heard by the same sheriff so that all the pertinent issues did not need to be revisited in a different court.

The stage at which contact is sought, relative to the issuing of a protective order, was also considered significant. As illustration, an interviewee [FF2] described a case where the child contact action was not raised until the non-harassment order had ended, perceiving that as the main reason why the court was hesitant to grant any contact, because of the gap in contact it caused, and the fact that it raised questions about why the person had not sought contact sooner.

Whilst most interviewees thought that protective orders were most commonly sought for non-abusing parents, one participant described a case involving an application for a protective order for older children as well as the parent:

"I remember this case, it's quite unusual because [number of] children were teenagers at the time, young teenagers. And in this case, because he was not only out of the blue going and approaching mum in the street and causing her difficulties, he'd approach the kids, like, on their way home from school and that sort of thing. I actually raised the protective orders action for interdict on behalf...with mum as pursuer but also with mum as guardian of ... the teenagers, and got protective orders for all of them to stop him coming anywhere near them." (FF5).

See recommendations 1, 2, 4, 9, and 10.

5.3.3 Child contact and wider processes and agencies

While this project did not set out specifically to consider the interaction between child contact proceedings and processes beyond criminal and civil law, interactions with wider systems and organisations were key themes in the interviews. These included practitioners seeking information from schools or GPs, for example, to inform the court, though one interviewee also flagged a concern that women affected by domestic abuse might be deterred from seeking medical help due to concerns that the court would view this negatively. Another described a case where there were parallel child contact and immigration proceedings; the interviewee's perspective was that the non-resident parent's decisions in terms of the contact processes were motivated by their immigration proceedings (for example, refusing to accept a negotiated settlement that would not provide a necessary argument for the immigration case). The areas of interaction that seemed most important to interviewees were around child contact proceedings and children's hearings processes or social work.

Interviewees identified particular points of interaction between child contact proceedings and children's hearings, with a clear understanding that an order from a children's hearing of no contact would take precedence over child contact processes in the sheriff court:

"If you have got Children's Panel where you have got compulsory measures in place that say dad cannot see child, then that is going to trump what the dad is looking for within a family court action." (FF3).

However, this did not mean that child contact and children's hearings processes could not interact. Participants considered situations where, for example, grounds of referral for a children's hearing might be solely about one parent, and then a child contact action could potentially proceed in parallel, or that a supervision order might be discharged because the

mother was taking the actions required of her and then the father could raise a contact action in civil court.

Interviewees were less clear about how information about children's hearings would be known to the court in child contact proceedings, matching the issues highlighted about inconsistency in information sharing between child contact, other civil and criminal proceedings. Most interviewees stated that they would have to confirm in pleadings that there were no compulsory supervision orders in place. However, it was not clear how this information would be known to the lawyers other than from the clients. Some interviewees also flagged that there could be civil, criminal and children's hearings proceedings in relation to one family; it was suggested in this situation that because there were statutory agencies involved, then that information would be available, but they were not necessarily able to specify how this would happen. As one noted:

"I don't know what would happen if they [family solicitors] didn't [inform the family court to pause due to children's hearings processes], I mean, I think, no, the Children's Reporter would surely do that." (FF7).

Interviewees described problems in terms of a lack of interaction between child contact proceedings and social work, where social work involvement might be withdrawn when child contact proceedings were taking place. For example:

"So social work had become involved, they had advised the client that any contact should be supervised [...] when it called as a Child Welfare Hearing it was a different sheriff who did order that the contact was to be supervised. And the difficulty here is that social work then pulled the plug and said, we don't need to be involved anymore because there's a sheriff dealing with things [...] Social work steam in, they give advice, they then back track from the advice and go – no, no, we're closing the case 'cause it's in court, the sheriff will deal with it." (FC6).

Particular concerns were raised that social work might tell a woman that she had to keep the father away from the children or they would take her children away, but not provide any support to achieve this in the civil process

"So, on one hand, you're told keep away from this man or you'll lose your kids and, the next, you're trying to keep this man away from your kids, but in a civil context, you don't get any backup from that agency" (FF7).

One interviewee described a case where there was longstanding involvement between social work and the family and the relationship between the court and social work worked well; the social worker could inform the court (by email) that it would not be appropriate for a child to have contact with a particular individual at that time, that would be lodged with the court and the court would largely take that on board (FF2). This was described however as unusual, and attributed by the interviewee to the very longstanding relationship between a social worker and a family. In general, therefore, there was little mention of child contact proceedings interacting effectively with wider processes, such as child protection; child contact proceedings appeared isolated from multi-agency working.

See recommendations 4, 9, and 10.

5.4 Variation in approach and practice across courts

One of the themes to emerge from the interviews was around differences in approach to domestic abuse and practice. Variations in practice cohered around three main areas:

- variation across individual cases and how they are treated during the court process;
- variation in the approach of sheriffs;
- and finally, variation of practice in different sheriff courts.

The first theme is linked to the second. Interviewees noted that even in a case similar in detail to earlier cases handled by them, they could not guarantee how a given approach or argument would be viewed in court.

Most practitioners commented that whether domestic abuse is considered in a CWH depends heavily on the sheriff hearing the case, and they ascribed the variation to the experience and prior professional background of the sheriff. Whilst it was recognised that not all sheriffs seek further information on domestic abuse, interviewees commented positively on instances of pro-active, interventionist approaches by sheriffs used to progress cases or *“to forge an agreement”* (FF4).

Some interviewees flagged variations in terms of people’s experiences of child contact processes which related to perceived differences in the socio-economic status of families. For instance, it was suggested that there might be more social work engagement, and therefore more likelihood of interface with the children’s hearings system, where families were of a lower socioeconomic background.

Some interviewees raised particular concerns that victims of domestic abuse might become the *“blamed person”* by social work:

“Where [sheriffs are] coming at when they’re looking at this situation and the terrible, terrible harms that can be done to, usually mothers, in terms of how it impacts them and their ability to care and the child, it’s very much ‘well well, yes, he battered me or he strangled me, but he’s a good dad.’ What can I say to that? No, he’s not? No good dad strangles their child’s mother. No good dad keeps money from their child’s mother. No good dad manipulates their child’s mother.” (FF7).

See recommendations 3, 11 and 12.

6. Child contact proceedings and Covid-19

The Law Society of Scotland surveyed their members on their experience of civil proceedings during Covid-19 (Law Society of Scotland 2021). The results highlighted diverse views about remote CWHs. Some respondents viewed remote hearings as working well, whilst others held directly opposing views.

Although the experience of undertaking child contact proceedings during the Covid-19 pandemic was not the specific focus of our research, some interesting perspectives about the conduct of remote CWHs emerged. The majority of online survey respondents had taken part in CWHs remotely during the pandemic (n=32). In around half of these, their clients took part

remotely (n=15) with most of the remainder stating that clients were unable (n=10) rather than unwilling (n=1) to take part. Responses also suggested that there was a lack of clarity or expectation that clients would attend, for example attendance could be arranged if it was "required", but perhaps did not happen if clients were "not insistent" and that sheriffs were "less strict about attendance".

Many survey respondents (n=20) felt that remote CWHs affected clients' engagement with either the practitioner or the process. Several raised issues about difficulties in the practice of negotiating and reaching resolution on the day around the formal court hearing – because the agents could not have discussions, because they could not get a quick answer from clients on particular matters or because of the difference in interaction between the sheriff and clients, stopping the sheriff being able to provide guidance or warnings "which are short of something requiring a formal step".

These issues were also raised in the qualitative interviews, for example:

"It's difficult I think as well to have Child Welfare Hearings online, you're not meeting the client face to face, you're not seeing, you can't take instructions during the hearing, if the sheriff asks particular questions you've got no idea how your client's going to answer them. The sheriff isn't getting to meet the client; the sheriff isn't getting to see both individuals, what their body language is like during the hearing, because they're sitting behind a computer screen. Not all of them put their videos on either." (FF2)

Others had concerns about the clients' experience, with some suggesting clients took the process less seriously or were more able to be "difficult" because they did not have to face the gravitas of the court hearing. Several survey respondents raised concerns about access to justice for parents, that it was more difficult for clients to understand the process or participate remotely, with clients left feeling "remote, uninvolved or unheard". In the interviews, it was noted that this might be partly because clients were less able to ask questions of the lawyers to help them understand the process during remote hearings. Some interviewees also raised concerns about the impact of Covid-19 elsewhere in the system having knock-on implications for child contact, such as a backlog in criminal cases or pressure on child contact centres causing delays.

The main benefit articulated in relation to remote CWHs was that in situations of domestic abuse, it limited the ability of the perpetrator of the abuse to enact that abuse in and around the court hearings; in other words, it reduced the opportunities for legal systems abuse. This issue was raised spontaneously by interviewees, with one noting that the experience of being in court with the perpetrator was not only a negative experience for the parent affected by domestic abuse, but potentially diminished the ability of the process to reach an outcome in the best interests of the child, as the parent might be coerced, by the experience of taking part in the court process with the perpetrator of abuse, into agreeing to things that they did not believe were in the best interests of the child. This view, however, is at some odds with recent research on experiences of domestic abuse during Covid-19, which highlights how Covid suppression measures provided domestic abuse perpetrators with opportunities to further abuse, particularly through child contact arrangements (Brooks-Hay et al 2022).

The data collected in this study relating to experiences of remote CWHs during the Covid-19 pandemic highlight the importance of considering how CWHs may work in relation to all cases coming before the courts. Mackay's (2018) review of Scottish civil cases in 2007 found allegations of domestic abuse affecting approximately half of all children involved in child contact matters going through the court, though more recent research in other jurisdictions has found this proportion to be higher. For example, the CAFCASS/Women's Aid (2017) review of 2015-16 cases in England found allegations of domestic abuse in 62 per cent of cases. Cases involving domestic abuse are a large part of the workload of CWHs. If remote hearings can help ensure that decisions are made in the best interests of children in domestic abuse cases, it may be worth further exploration of how to manage remote hearings to ensure that access to justice more broadly is not compromised in order to take advantage of the possibilities of remote hearings.

7. Conclusions and Recommendations

This research study set out to examine the operation of Scottish family law in child contact cases where there is a background 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. Particularly in the area of domestic abuse and child contact, which is a focus for highly contested narratives, there is an urgent “need to ground policy in solid evidence ... as a means of assessing claims by various stakeholder groups” (Wasoff 2007: 4). The findings of this research, its conclusions and recommendations echo the findings of previous research in Scotland and, in particular, the findings of *Contact Applications Involving Allegations of Domestic Abuse: Feasibility Study* (McGuckin & McGuckin 2004).

In this final section, the key findings of the research are drawn together to address the stated aims of the study, which were:

- first, to understand the ways in which domestic abuse proceedings inform the handling of child contact cases;
- second, to explore family law practitioner understandings of the impact and relevance of a course of conduct of domestic abuse and its implication in contact cases;
- third, to identify perceived impediments or obstacles to communication and information exchange in such cases; and
- fourth, to examine the links between domestic abuse criminal proceedings and the CWH.

We do this by distilling **eight key messages** from the research findings which together encapsulate the ways in which domestic abuse and coercive control are conceptualised, and their relevance for child contact is understood and applied in contact proceedings, and which highlight the (dis)articulation between domestic abuse criminal proceedings and civil law child contact proceedings.

These messages lead on to a set of **12 recommendations** based on the views and experiences of legal practitioners engaged in family law proceedings which, if realised, could potentially improve the experiences of, and outcomes for, children in child contact proceedings. While each recommendation aligns with multiple key messages, for ease of reading each recommendation has been placed with one key message.

The recommendations include a range of actions that we consider are required to address the issues identified in the Report. As researchers, we believe that the recommendations are best addressed through collaborative action by criminal and civil justice agencies and statutory organisations including, the Scottish Courts and Tribunal Service, the Crown Office and Procurator Fiscal Service, Social Work Services, and the Scottish Civil Justice Committee’s Family Law Sub-Committee.

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

It is very clear from the online survey responses and the qualitative interviews that family law practitioners are heavily reliant on being informed about past or ongoing domestic abuse by their client. There appears to be no formal mechanism by which practitioners are informed of criminal proceedings in relation to domestic abuse, and practitioners do not routinely enquire about domestic abuse as a background factor when taking on a child contact case, although this may emerge as a case proceeds. 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.

Recommendation 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.

Recommendation 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.

7.2 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, fully or consistently, into the civil justice system. Most 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. Only a small number of interviewees demonstrate an informed understanding of the nature and characteristics of domestic abuse or coercive controlling behaviour and the effects on children.

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.

In particular there remains a belief that domestic abuse against a parent does not necessarily have any impact on the child, and that only physical violence directed at or in the presence of the child is relevant.

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.

Recommendation 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.

7.3 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. The prevalent view amongst practitioners is 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.

Recommendation 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.

7.4 Upholding rights: hearing the voice of the child

Most interviewees acknowledge that the child's view is key for resolving differences between parents in child contact disputes. However, children's views are perceived not to be always taken into account in contact proceedings, which suggests a failure to effectively uphold children's rights to participate. Moreover, where the child's view is heard, this is rarely described in terms of the children's right to express their views or have those views considered but rather used as an investigatory option for the court, or as a test of the validity of arguments being made by parties. Court processes, and the prevailing culture around pro-contact, were perceived to block the realisation of children's best interests, despite children's views being sought in the child contact process.

Recommendation 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.

7.5 Ongoing presumption of contact is in best interests of child

The research reveals 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. It should also be noted that 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 (Robinson 2007).

Recommendation 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.

Recommendation 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.

Recommendation 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.

7.6 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 in order 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.

Recommendation 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 specialised service to approach the family's multiple needs and take broader responsibility for their welfare and safety from domestic abuse.

Recommendation 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.

7.7 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 which take in arguments around child contact and, in the case of 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.

It was already recognised in 2004 (McGuckin & McGuckin) that "mainstreaming domestic abuse across all children's services is recognised as the most effective means of bringing about improved outcomes for children". What is confirmed by this research, however, is that domestic abuse is not "mainstreamed" across separate legal processes.

All of the recommendations speak to the need for mainstreaming domestic abuse across legal processes, particularly recommendations 1, 2, 4, 7, 9 and 10.

7.8 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. McGuckin & McGuckin found that "[l]ittle ... is known about the nature and extent of contact applications in Scotland, how many have been awarded and what proportion of cases involve allegations of domestic abuse" (2004:10) and recommended measures to address this gap. The position, however, does not appear to have changed. While relevant information may be available in court papers, it is not

transparent or accessible. Other potential sources of data exist, collected by agencies and organisation but little is known about what this entails nor how it can be accessed.

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. An early assessment of CWHs identified an emerging issue in respect of *“the possibility of variation in shrieval practice”* (Mays et al 2001: 164), which has been echoed in this current research but which, without data, remains untested.

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.

Recommendation 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.

Recommendation 12: The current civil justice data on child contact is 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.

7.10 List of recommendations

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 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.

Recommendation 12: The current civil justice data on child contact is 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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Appendix A: Survey Questions

Introduction

This survey is part of our research on “Domestic abuse and child contact: the interface between criminal and civil proceedings”. We are asking legal professionals with experience of court processes relating to child contact and domestic abuse to share their knowledge and expertise about these processes, how they intersect and how information is shared between them. The research is funded by the Scottish Government

This survey will take no more than 12 minutes to complete. The majority of the questions are tick boxes. We have given you an opportunity to tell us more about why you chose a particular option on some questions. Near the end of the survey we have given you a further opportunity to expand on any of your answers or tell us anything else you think we need to know.

Your answers to the survey will be kept confidential. Any identifying information, such as names or locations, will be changed to maintain your anonymity. For further information about the study and how your information will be used please see the participant information sheet [pdf].

Your participation is entirely voluntary. You can skip questions or choose to end the survey without submitting it.

By continuing with this survey you are giving your consent for your data to be used as described above.

- Yes, I have understood how my data will be used and consent to continue with this survey
- No, I do not wish to continue with this survey

Screening questions:

We want to make sure that you are asked the questions most relevant to your experience. Your answers to the following will make a difference to which questions you see in the rest of the survey. We therefore ask you to answer at least the first question, but you can skip any others in the survey.

Definitions

Throughout this survey:

By ‘domestic abuse’ we mean the Scottish Government definition:

“perpetrated by partners or ex partners and can include physical abuse (assault and physical attack involving a range of behaviour), sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threats, verbal abuse, racial abuse, withholding money and other types of controlling behaviour such as isolation from family or friends).”

By ‘child contact’ we mean matters falling within S.11 of the Children (Scotland) Act 1995 covering the communication (such as phone calls or spending time) between a child and a

parent they are not normally living with. The particular focus of this research is on Child Welfare Hearings.

- 1) Have you ever represented adult clients in the following types of matters where there are allegations of domestic abuse:
 - A) Child contact Y/N
 - B) Protective orders Y/N
 - C) Criminal proceedings Y/N
- 2) Have you ever represented children in relation to child contact where there are allegations of domestic abuse? Y/N
- 3) Have you ever acted as a Child Welfare Reporter where there are allegations of domestic abuse? Y/N

A: Child contact matters where there are allegations of domestic abuse

In this question, we are asking you to provide estimates based on your experience, not to provide any formal statistics.

- 4) Approximately what proportion of your workload is taken up with child contact matters
 - Less than one in ten
 - about a quarter
 - about a half
 - about three quarters
 - almost all
- 5) Of the child contact matters that you work on, roughly what proportion proceed to Child Welfare Hearings? (As opposed to e.g. being resolved with a Minute of Agreement)
 - Less than one in ten
 - about a quarter
 - about a half
 - about three quarters
 - almost all
- 6) Approximately what proportion of Child Welfare Hearings that you work on involve allegations of domestic abuse? [tick box]
 - Less than one in ten
 - about a quarter
 - about a half
 - about three quarters
 - almost all
- 7) In your view, domestic abuse is relevant to approximately what proportion of Child Welfare Hearings that you work on? [tick box]
 - Less than one in ten

- about a quarter
- about a half
- about three quarters
- almost all

8) How do you **usually** become aware of any allegations of domestic abuse relating to Child Welfare Hearings that you are working on? [tick box]

- Your client tells you
- You become aware through the civil court/case documents
- You become aware through a related criminal matter (e.g. from the defence agent)
- You ask clients/your organisation has a process for screening for domestic abuse
- Other (please specify)

9) Would your answer be different depending on whether your client was the alleged perpetrator or the alleged victim? Y/N

9a: If Y: Please briefly describe the difference [short answer]

10) If you were representing a defender in a Child Welfare Hearing who is objecting to contact and is alleging that the pursuer is a perpetrator of domestic abuse would you advise them to bring this information before the court? Y/N

10a) If Y: Please briefly describe any key considerations you would have about when and how this information would best be brought before the court. [short answer]

11) Overall, would you consider information that a client is a victim of domestic abuse to make a position opposing contact:

- Stronger?
- Weaker?
- This information would not make a difference.

The following questions ask for your insight into how the courts operate and view domestic abuse based on your experience of working with them.

12) In your experience, how does information about domestic abuse **usually** reach the court in Child Welfare Hearings.

- Raised by a party opposing contact
- Raised by a party seeking for/increased contact
- From a child
- From a Child Welfare Reporter
- From social work, school, other individuals or organisations
- Through a criminal process for domestic abuse
- Information about domestic abuse does not reach the court
- Other (please specify)

13) In your experience, do courts pay too much, too little or about the right amount of attention in Child Welfare Hearings to

	Too much	About right	Too little
The impact of domestic abuse on the child's safety and wellbeing			
The child's views about contact			
The child's age and stage of development			
The child's right to a relationship with both parents			
The parents' responsibilities and rights to the child			
The impact of domestic abuse on a parent's safety and wellbeing			

[page break]

14) Have you ever represented clients in Child Welfare Hearings where there were also criminal proceedings against either your client or the other party for domestic abuse?

Y/N/DK

[If N/DK to Q.18]

15) Was information about what was happening in Child Welfare Hearings and domestic abuse criminal proceedings shared between the two processes? Y/N

16a) If Y: Please briefly provide any thoughts about how information about what was happening in Child Welfare Hearings and domestic abuse criminal proceedings was shared between them.

16) Was there any impact on the timing or process of either Child Welfare Hearings or criminal proceedings for domestic abuse due to the other also taking place?

a) timing or process Y/N

b) outcomes Y/N

17a) If Y to either : Please briefly provide any comments on your views of the impact of Child Welfare Hearings or criminal proceedings on each other.

17) Would the ongoing Child Welfare Hearings inform arguments to the Criminal Court around any of the following (please select all that apply)?

- Bail
- Non-harassment orders
- Mitigation
- Other (please specify)

18) Who do you feel is best placed to obtain and provide information between the court processes where there are Child Welfare Hearings and criminal proceedings about domestic abuse happening in parallel?

- The defence agent in the criminal proceedings
- The legal representative in the Child Welfare Hearing for the party who is an alleged perpetrator of domestic abuse
- The legal representative in the Child Welfare Hearing for the party who is an alleged victim of domestic abuse

- Child Welfare Reporters
- Court staff
- Other (please specify)

We are aware of the recent Law Society of Scotland survey around the use of remote hearings for civil matters due to the COVID-19 pandemic. The following questions do not replicate those of the Law Society but rather focus on specific aspects of your experience around remote Child Welfare Hearings.

19) Did you take part in any remote Child Welfare Hearings? Y/N [If N end section].

20) Did your clients **usually** take part in remote Child Welfare Hearings?

- Yes – remotely from their own home/other location
- Yes – remotely in your offices
- No – clients were unable to take part
- No – clients were unwilling to take part
- Other (please describe)

21) Did you find that having Child Welfare Hearings remotely affected your clients' engagement and interaction either with you or with the court process? Y/N

21a) If Y: Please briefly provide any comments on your experience of the impact of remote hearings on your clients' engagement with you or with the process.

B: Protective Orders

22) Would you expect the process of obtaining a non-harassment order, or other protective order, against an ex-partner for reasons of domestic abuse to be more or less difficult if the pursuer had children with the ex-partner?

- More difficult
- Less difficult
- It would not make a difference if there were children

22a) If more difficult:

In what ways would you expect the process of obtaining a non-harassment order to be more difficult if there were children (please select all that apply)

- The process would take longer
- The pursuer would be less likely to get legal aid
- The defender would be more likely to get legal aid
- The process would be more expensive
- The process would be less likely to result in a non-harassment order being granted
- Other (please specify)

C: Criminal Cases

[If answering child contact section, questions 25-30 will not be displayed]

23) Of the criminal cases that you work on involving allegations of domestic abuse, in approximately what proportion are you aware of children living in the household of the alleged perpetrator, the alleged victim, or both?

- Less than one in ten
- about a quarter
- about a half
- about three quarters
- almost all

24) Have you ever represented clients in criminal proceedings relating to domestic abuse where the alleged abuse included abusive behaviours around child contact (e.g. threats not to return children, abusive communication about arranging contact visits, using contact with a child to monitor an ex-partner)?

Y/N/DK

25) Have you ever represented clients in criminal proceedings relating to domestic abuse where your client was also party to Child Welfare Hearings?

Y/N/DK

[If N/DK question 26-29 will not be displayed]

26) How do you **usually** become aware of the Child Welfare Hearings related to the domestic abuse proceedings you are working on?

- Your client told you
- You become aware from criminal court/case documents
- You become aware from the solicitors in the Child Welfare Hearings
- You/your organisation asks all clients alleged to have perpetrated domestic abuse about children/child contact matters
- Other (please specify)

27) Was information about what was happening in Child Welfare Hearings and domestic abuse criminal proceedings shared between the two processes? Y/N

27a) If Y: Please briefly provide any thoughts about how information about what was happening in Child Welfare Hearings and domestic abuse criminal proceedings was shared between them.

28) Was there any impact on the timing or process of either Child Welfare Hearings or criminal proceedings for domestic abuse due to the other also taking place? Y/N

28a) If answered: Please briefly provide any comments on your views of the impact of Child Welfare Hearings or criminal proceedings on each other.

29) Would the ongoing Child Welfare Hearings inform arguments to the court around any of the following (please select all that apply)?

- Bail
- Non-harassment orders
- Mitigation
- Other (please specify)

30) Who do you feel is best placed to obtain and provide information between the court processes where there are Child Welfare Hearings and criminal proceedings about domestic abuse happening in parallel?

- The defence agent in the criminal proceedings
- The legal representative in the Child Welfare Hearing for the party who is an alleged perpetrator of domestic abuse
- The legal representative in the Child Welfare Hearing for the party who is an alleged victim of domestic abuse
- Child Welfare Reporters
- Court staff
- Other (please specify)

D: Open Question

31) If there anything else you think we should know or any of your previous answers you would like to expand upon, please do so here. [short answer]

E: About you :

32) What is your main area of legal practice:

- Family
- Other civil
- Criminal
- Other (please specify)

33) How long have you been a practising lawyer?

- Less than 2 years
- 2-5 years
- 6-10 years
- More than 11 years

34) Which Sheriffdom do you primarily work in?

- Glasgow & Strathkelvin.
- Grampian, Highland & Islands.
- Lothian & Borders.
- North Strathclyde.
- South Strathclyde, Dumfries & Galloway.
- Tayside, Central & Fife.
- Other (e.g. international?)

35) How would you describe your gender?

- Female
- Male
- Other
- Prefer not to say

36) Would you be willing in principle to take part in a follow-up interview for this project. This would last no longer than one hour and would most likely take place by telephone or video conference. The interview could also take place face-to-face if this is your preference and covid restrictions allow.

Y/N

If Y please leave email address. Your email address will be separated from your survey answers in order to ensure that your responses remain anonymous.

Ending and thank you

Thank you for your time and expertise in completing this survey.

We will be publishing an executive summary of the research on the [Scottish Civil Justice Hub](#) once it is complete in 2022. If you have any questions about the research or your participation please contact ruth.friskney@glasgow.ac.uk.

Access to support

If you are affected by domestic abuse or by working on cases where domestic abuse is a factor, help and support is available.

Scotland's domestic abuse and forced marriage helpline is open 24 hours for telephone, email or web chat support:

0800 027 1234

<https://sdafmh.org.uk/>

helpline@sdafmh.org.uk

The Law Society of Scotland provides a range of online resources through LawScot Wellbeing <https://www.lawscot.org.uk/members/wellbeing/> including access to the LawCare helpline.

Appendix B: Interview Topic Guide

1. Introduction and Ethics

- Talk through practicalities (e.g. timeframe, able to stop/skip questions), and information sheet (e.g. anonymity, recording).
- Flag up that this is an area with relatively little research – while we will make space at the end of the interview in particular for you to raise any issues we have not touched upon, please also do so throughout because you are the person with expertise in the systems around child contact and what we need to know.

2. Opening

This is a research project looking at child contact proceedings, particularly Child Welfare Hearings, in the context of domestic abuse and their interface with any criminal proceedings or other civil proceedings (e.g. protective orders) around domestic abuse.

- Could you tell me a little bit about your experience with Child Welfare Hearings where domestic abuse is relevant?
- Could you talk me through a ‘typical’ child contact matter where domestic abuse is in the picture?

3. Understandings of domestic abuse

One of the things we’re interested in is how the child contact system understands and sees domestic abuse.

- Could you describe for me how you think domestic abuse is understood within Child Welfare Hearings and child contact work more broadly?
 - Are there particular aspects of domestic abuse that are more relevant to, or more easily recognised or understood by, child contact proceedings (e.g. physical, sexual, financial, emotional)?
 - Is the concept of coercive control used and recognised?
 - What would you describe as the main impact, if any, of domestic abuse on children that is recognised by or relevant to the courts in child contact proceedings?
 - Are there particular types or sources of information about domestic abuse that child contact systems find easier or more useful to understand or recognise (e.g. a criminal conviction, police reports, information from a voluntary agency, information from an adult victim/child)?

4. Interaction between processes

In our survey, many of our respondents said that information could be shared between criminal proceedings and Child Welfare Hearings, but there were also comments that suggested that this was quite complicated or did not necessarily happen in systematic ways. We’d like to understand more about that.

- Do you think that the court in Child Welfare Hearings or the criminal court in domestic abuse proceedings has access to the right information about what is happening in processes in the other?
 - What information would be valuable to Child Welfare Hearings that is not always available? What information would be valuable to criminal proceedings that is not always available?

- How and when does information pass from one process to another? What are the barriers? What facilitates information sharing?
- What works well, or could work well, in terms of sharing information between criminal and child contact proceedings?
- In our survey, many of our respondents said that when there were criminal and civil processes ongoing, that these could have an impact on each other, both in terms of process or timing and also in terms of outcomes. We'd like to understand more about what sorts of impacts these have on each other.
 - What, if any, impact have you seen on the timing of proceedings? What are the benefits and disadvantages of this?
 - What, if any, impact have you seen on the outcome of processes? Is this something that you think should be happening more or less?
- There's been discussion in policy circles about the need for joining up civil and criminal proceedings where domestic abuse is a factor. We're interested in whether you think there is generally the potential for joining up the civil and criminal systems and how this could work.

5. Closing

- Is there anything around Child Welfare Hearings and their interface with criminal proceedings around domestic abuse that you haven't had a chance to say and think we should know?
- Have you got any questions about the research or what happens next?
- Thank you.

