

Chapter 5: Private and family life  
Getting it Right?  
Human Rights in Scotland

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# Theme 5: Private and Family Life

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## Introduction

The Scottish Human Rights Commission (SHRC) seeks to empower people to know and claim their rights, and to increase the ability and accountability of public and private bodies to deliver on human rights in Scotland. In support of these goals SHRC promotes the evidence based and inclusive development of Scotland's National Action Plan for Human Rights – a road map to the further realisation of all human rights in practice in Scotland.

The report as a whole presents a summary of some of the key gaps and good practices which have emerged from a scoping project undertaken by the SHRC. This specific section summarises the findings relating to theme of Private and Family life. It is not intended to be a comprehensive 'state of human rights in Scotland' report, but a prompt for discussion in the development of Scotland's National Action Plan for Human Rights. With this in mind, individuals and organisations are encouraged to consider their views in response to two key questions as they review this thematic section:

**1. Based on the evidence presented in the report *Getting it right? Human rights in Scotland*, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland's National Action Plan for Human Rights?**

**2. What specific and achievable actions do you consider would best address the concerns you identify in your response to question 1?**

## Scoping Project Methods Summary<sup>1</sup>

The data collection began in 2010 and was divided into two phases - a first phase focussing on collating and analysing a range of secondary data sources<sup>2</sup> and a second phase where SHRC convened a series of small focus groups and in-depth interviews with a range of communities, groups and individuals in Scottish society.<sup>3</sup> In line with the SHRC's statutory mandate, particular attention was given to hearing from those who tend to be marginalised and whose voices are less often heard in mainstream debates surrounding human rights. In taking this approach SHRC sought to put a 'human face' on the issues uncovered in the scoping project.

## Introduction to Private and Family Life

This thematic section explores the theme of 'Private and Family Life' in Scotland, which is one of the eight core themes that were drawn from the rights analysis. While the topic of private and family life is potentially very broad, following a prioritisation process,<sup>4</sup> this thematic section focuses on six areas, namely: domestic abuse; forced marriage; same-sex marriage; the right to family life for people with learning disabilities; the rights of parents and children; and parental imprisonment.

The focus of this scoping project has primarily been on issues of human rights concern that are within the competence of the Scottish Parliament. Across all thematic areas, there are some, often complex issues, which raise issues of concern that are devolved, whilst others are reserved to Westminster,<sup>5</sup> including equality legislation. The Equality Act 2010, however, does place a duty on the Scottish Government to abide by the public sector equality duty,<sup>6</sup> which could bring about a more substantive role for Scottish equality duties in the future.<sup>7</sup>

## Domestic Abuse

### Terminology<sup>8</sup>

Within the existing research and literature on domestic abuse, it is clear that domestically and internationally, a number of definitions of domestic abuse are currently in use. Moreover, the terms domestic violence and domestic abuse are often used interchangeably. Domestic abuse, however, is often more than physical abuse or indeed not physical at all. It frequently takes the form of psychological, rather than physical abuse. As such, non-violent abuse and behaviour should not be excluded from any definition of domestic abuse. An earlier literature review on the subject of domestic abuse described a “dizzying variety of definitions of domestic violence” (Scott, 2008). The Scottish Government recognises domestic abuse as ‘gender based abuse’ that requires a response that takes into account and addresses the inequalities between men and women in Scotland.<sup>9</sup>

A number of participants in this scoping project expressed frustrations with current terminology used by the Scottish Government. One criticism centred on the name of the government unit being the ‘violence’ against women unit, which was felt by some not to recognise their experience of emotional and psychological abuse. Some participants felt that renaming the government department as one that dealt with domestic abuse would be a progressive step. As one participant noted:

*The Scottish Government need to better recognise that there are different aspects of abuse... the government department ‘violence against women’ takes away from all the other forms of abuse... I have come across this recently with the police<sup>10</sup> as well, they don’t seem to get it, they just think there’s been some kind of misunderstanding, you know that because he hasn’t actually hit me it’s not really abuse, police are meant to be trained to deal with domestic abuse, but that’s twice they’ve been out and they’ve not done the risk assessment or offered me a domestic liaison officer or anything like that... it’s like they respond to certain issues, violent issues, but not when it is other forms of abuse, the bruises heal but emotional abuse doesn’t heal. And what you suffer, the anxiety attacks, the depressions, you can’t focus, you can’t function properly because of the fear, and that wasn’t me getting beaten up it was the emotional abuse.*

**Elaine, victim/survivor of domestic abuse and member of a women’s support group.**

*Why when we talk about domestic abuse is the focus always on the violence? We are talking about financial abuse, emotional abuse, we are talking about all these interconnected things, and the effect it has on mental health is terrible.*

**Aasimah, Interpreter.**

*I think that there is a lot of that type of controlling behaviour that doesn't necessarily get deemed as domestic abuse when indeed that is exactly what it is. I was isolated from my friends, isolated from my family, she would have the financial controls, she was very, very manipulative and able to put me into situations where I would give in to whatever her demands were. That was the controlling aspect of it.*

**Derek, social worker, victim/survivor of domestic abuse and parent of children with shared residence.**

This report refers to domestic abuse in recognition of the fact that not all domestic abuse is violent. Where the terms domestic violence and violence against women (which also excludes men as potential victims/survivors) are used, this is the terminology used by the original authors.

## **International Law**

The right to respect for private and family life, in Article 8 of the European Convention on Human Rights (ECHR) is a qualified right. As such interferences can be justified where they have a legal basis, pursue a legitimate aim, and are a proportionate means of achieving that aim. The State also has a positive duty to prevent, protect and remedy violations of physical and mental integrity including domestic abuse (or intimate partner violence, gender based violence or violence against women). The European Court of Human Rights (ECtHR) has for example found violations of Article 8 in cases where the authorities have failed to take adequate measures to punish and control abusive partners. They have also found that considering such abuse to be a 'private matter' is incompatible with obligations under Article 8.<sup>11</sup>

In the most extreme cases, domestic abuse may engage the right to life, particularly the positive obligation to protect the individuals from a real and immediate risk to life which the authorities either knew of or ought to have known of. A violation of this right was found by the European Court of Human Rights (ECtHR), for example, in a case where the police had assisted a woman to withdraw a complaint when she returned accompanied by her husband, who later went on to murder their children.<sup>12</sup>

Domestic abuse may reach the threshold of cruel, inhuman or degrading treatment or punishment which is prohibited under Article 3 of the ECHR.

In a landmark case in 2009 the ECtHR found a violation of Article 3 where the State had failed to protect a woman from a series of serious assaults by her husband, despite repeated complaints from her. The ECtHR found a violation due to a failure to set up and implement a system for punishing domestic violence and protecting victims/survivors. Amongst other things the ECtHR found that there should have been a

legal framework allowing criminal proceedings to be brought irrespective of whether the complaints had been withdrawn (in the facts of the case the complaints were withdrawn by the women involved following further threats). The gender based nature of the violence meant the State was found to have violated Article 14 (prohibition of discrimination), in conjunction with Articles 2 and 3.<sup>13</sup>

The positive obligations under Article 3 may also be invoked where the facts demonstrate a series of incidents of harassment, which taken in their entirety may breach the threshold of Article 3. In such a case a State was found in violation of its positive duty where:

*“...no serious attempt was made to assess the true nature of the situation complained of, and to assess the lack of a systematic approach which resulted in the absence of adequate and comprehensive measures” (Hurley et al., 2007).*

The court found that other than police investigation into individual incidents there had been no systematic response, and a lack of inter-agency cooperation between for example the police and social services.

Violence against women and children also engages several Articles of UN human rights treaties including the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC). The Committees responsible for monitoring progress under those treaties have expressed concern at continued rates of domestic violence in the UK and at the closure of rape crisis centres and domestic violence shelters (UN CEDAW, 2009). They have made several recommendations including increasing efforts to raise awareness of violence against women, training of relevant public authority staff, increasing support services for victims/survivors, ensuring the prosecution and conviction of perpetrators and adopting and implementing a unified and multifaceted national strategy to eliminate violence against women and girls, which would include legal, education, financial and social components (UN CEDAW, 2009, UN CESCR, 2009).

In January 2012, the European Social Committee highlighted recognition of an example of good practise in Scotland, the existence of a specialist domestic abuse court in Glasgow.<sup>14</sup> In 2008, the Scottish Government was also commended for launching a toolkit "*Handling Domestic Abuse Cases*" to provide information to support the handling of domestic abuse cases in the justice system which was circulated to all Sheriffs Principal and a wide range of agencies and organisations dealing with domestic abuse, its victims/survivors and their families (Council of Europe, 2012). The Committee has asked for a more detailed description of measures taken to combat domestic violence in Scotland (measures in law and practice, data, etc.) before its next report.

In June 2012 the UK signed the new Council of Europe Convention on preventing and combating violence against women and domestic violence.<sup>15</sup>

## Domestic Law

The Gender Equality Duty requires that all public bodies have due regard to eliminating discrimination and promoting equality between men and women. The actions which authorities and agencies undertake to address 'violence against women' are considered to be integral to complying with this duty.<sup>16</sup> However, research has indicated that there is:

*“an extreme lack of awareness about the impact of the Gender Duty on public sector workers” (Hurley et al., 2007).*

There is no specific criminal offence of domestic abuse and the common law offences of assault and breach of the peace are most commonly employed by the police and prosecutors in response to domestic incidents (Scottish Government, 2010a).

There are a range of statutory remedies, civil and criminal, available to tackle domestic abuse. These remedies are found within a number of different statutes as there is no consolidated act dealing with domestic abuse.<sup>17</sup> Furthermore, legislation is both UK wide, such as the Protection from Harassment Act 1997, and Scottish, including, most recently, the Domestic Abuse (Scotland) Act 2011. While the criminal law is recognised as insufficient to combat domestic abuse,<sup>18</sup> problems also exist in over reliance on civil remedies. These include the undue burden that civil remedies place on the survivor of abuse to pursue court orders and subsequently enforce compliance, leading to limited use of such remedies (Rosengard, 2009).

The Domestic Abuse (Scotland) Act 2011 is intended to increase access to justice for victims/survivors of domestic abuse and enable police and prosecutors to provide a more robust response to civil protection orders which have been breached. It does this, first, by removing the need for a survivor to wait for a series of incidents before seeking a 'non-harassment order'. Second, it further extends criminal offences in the area of domestic abuse.<sup>19</sup>

For Norrie (2011), however, the most significant feature of the Act is the definition of domestic abuse:

*“By s 3(2), a domestic abuse interdict is one granted for the protection of the applicant against his or her spouse or civil partner, cohabitant or person with whom he or she is in an ‘intimate personal relationship’.”*

This, he notes is:

*“...significantly narrower than the definition of ‘domestic abuse’ proposed in the original bill that became the Act, for there, domestic abuse meant any abuse by a ‘partner in an established relationship of any length’.”*

Norrie considers the limitation of the definition to abuse by a partner (and hence the exclusion from the Act of inter-generational abuse) to be “*unfortunate*” and likely to be contradicted in practice by the definition which should be given to the term under the Children’s Hearings (Scotland) Act 2011 (Norrie, 2011).

## Scottish Policy Development

Since the late 1990s,<sup>20</sup> domestic abuse has featured prominently in public policy in Scotland (Flueckiger, 2008, Hearn and McKie, 2010). It has also featured heavily, as is explored in the following section, within social research in Scotland over the last two decades. This in-depth analysis reflects its prevalence in society, increased awareness of the problem, as well as being indicative of the status that consecutive governments have afforded to tackling domestic abuse in Scotland. Tackling the problem of domestic abuse and, in particular, its impact on women and children has attracted significant resources from government:

“The protection of women and children from all forms of violence is one of our highest priorities and both the Scottish Government and local authorities have committed significant resources to ensure we reap the benefit of the expertise, commitment and passion of those taking this fight forward across Scotland”  
(Donnelley, 2009).

The approach taken by Scotland in its work on ‘violence against women’ has gained international recognition (Donnelley, 2009, Scottish Women’s Aid, 2009). In 2007 the Equality and Human Rights Commission (EHRC) reported that the investment in frontline services made by Scotland had had positive outcomes and that, this therefore, was the model that the national and regional governments of the UK should pursue with regard to its strategic approach to developing ‘violence against women’ strategies (Coy et al., 2007).

Strong political support is considered to be crucial to tackling domestic abuse, at a local and national level. The Scottish Government is noted for having placed ‘violence against women’ and its impact on children high up the political agenda, funding 73 projects across Scotland and investing over £44 million in tackling ‘violence against women’ (Donnelley, 2009, Brunner, 2010). High profile public awareness campaigns such as, *Domestic Abuse: There’s no excuse*,<sup>21</sup> specific criminal justice interventions such as the domestic abuse court in Glasgow<sup>22</sup> and government strategising on the subject (including, for example, a strategy for dealing with the impact on children and young people,<sup>23</sup> a strategy for tackling ‘violence against women’,<sup>24</sup> and a national training strategy),<sup>25</sup> have helped to make this gendered analysis of domestic abuse a ‘mainstream’ issue. The Scottish Parliament has also returned to the issue on a number of occasions, most recently in relation to the *Domestic Abuse (Scotland) Act 2011*, discussed above.

The Scottish Government’s current strategy on domestic abuse, *Safer Lives: Changed Lives* (Donnelley, 2009) is based on four themes: protection, provision, prevention and participation. Tackling ‘violence against women’ is one of two priority areas identified by Scottish Ministers for the advancement of equality of opportunity between women and men in Scotland, (Reid Howie Associates and Equality Plus, 2010). Furthermore, tackling the causes and consequences of ‘domestic violence’ is considered necessary to achieving more general national outcomes such as: equality in Scottish society; improving the life chances of children, young people and families; and having strong, resilient and supportive communities (Reid Howie Associates and Equality Plus, 2010).



The high level focus given to domestic abuse, driven by an energetic voluntary sector,<sup>26</sup> has resulted in a significant degree of policy development as well as research by academic institutions, government, and civil society. The evidence base of the gendered analysis approach to the issue of domestic abuse in Scotland is very well developed, with a range of comprehensive literature reviews aiding the development of the *National Domestic Abuse Delivery Plan for Children and Young People* (Scottish Government, 2008b) and in the *Ministerial Priorities for Gender Equality* document (Reid Howie Associates and Equality Plus, 2010).

However, some identify aspects of the policy approach which they believe could be strengthened. Hearn and McKie (2010) have criticised the current approach for what they consider to be its relative failure to address perpetrators. For example, of the 13 priorities for action in the *National Domestic Abuse Delivery Plan for Children and Young People* (Scottish Government, 2008b) only two are directed towards the perpetrators of domestic abuse. Similarly a 2009 review of domestic abuse in North Ayrshire (Rosengard, 2009), found no domestic abuse offender programmes in operation. However, initiatives such as the creation of the Strathclyde Police Domestic Abuse Force, has reportedly attempted to change the emphasis within domestic abuse investigations from one which was 'victim/survivor' focused to one which is focused on challenging offenders.<sup>27</sup>

A limited amount of research has also been undertaken which has explored the prevention of domestic abuse (Brunner 2010); domestic abuse from a comparative perspective (Hearn and McKie, 2010, Zimmerman et al., 2009); the effectiveness of specific criminal justice interventions, such as the domestic abuse court (Reid Howie Associates, 2007) and the experience of domestic abuse in particular localities (for example, North Ayrshire, (Rosengard, 2009)).<sup>28</sup>

## The Minority Experience

Another area in which current responses to domestic abuse have been criticised is in their approach to members of minorities.

Recent research has considered women's experiences of domestic abuse in a manner which identifies intersectional aspects of discrimination. Such research has considered the experience of older women,<sup>29</sup> women with disabilities,<sup>30</sup> ethnic minority women<sup>31</sup> and women on the basis of their sexual orientation or gender identity. There has also been some research on a woman's status and how that impacts on experiences of domestic abuse. This has focussed on asylum seekers<sup>32</sup> and women with no recourse to public funds.<sup>33</sup> In addition research has considered children and young people who experience domestic abuse.<sup>34</sup> The majority of research has, however, for the most part focused on the general experience of women as victims/survivors<sup>35</sup> and the rights and needs of particular groups of women are yet to be fully addressed in domestic abuse policy. For example, it is reported that older women are more likely to be living with their abusers and policy is more likely to focus on protecting and meeting the needs of

women with dependent children than on the particular needs of older women (Scott, 2008, Scott et al., 2004, Hearn and McKie, 2010).

Participants in this scoping project raised particular cultural barriers to seeking support. As one participant who worked as an interpreter noted:

*So when I am talking about domestic abuse in the Muslim women's community in this area of [the city] where it is quite a small community – not that everyone knows everyone, but almost, so domestic abuse is something we don't like to talk about it, we like to hide it behind closed doors. And even then if someone knows about it, would they be daring enough to come forward and provide help. And even then it is always done hush hush... and when it is linked to mental health it is even more taboo. People in our community don't want to talk about mental health. So it is like a domino effect isn't it –one is linked to another and it is like a disease, how do we cure it?*

**Aasimah, Interpreter.**

Research commissioned by LGBT Youth Scotland and the Equality Network in 2010 is considered the first to examine transgender people's<sup>36</sup> experience of domestic abuse in Scotland (Roch et al., 2010). The picture emerging from that research was one of:

*“High levels of prejudice and abuse in transgender people's relationships and home life, coupled with unacceptable negative experiences of accessing services and support” (Roch et al. 2010:1).*

Eighty per cent of respondents stated that they had experienced emotionally, sexually, or physically abusive behaviour by a partner or ex-partner, although only 60 per cent recognised that behaviour as domestic abuse. The most frequently experienced abuse was both emotional and transphobic (73 per cent), with 60 per cent noting the experience of controlling behaviour.<sup>37</sup> This compares with 28 per cent of women (approximately 1 in 4) and 16 per cent of men (1 in 6) having ever experienced domestic abuse since the age of 16 (Flatley et al., 2010). This scoping project also found that few respondents (only seven per cent) who had experienced abuse felt able to approach a domestic abuse service to seek support, with many saying they did not do so because they expected to face prejudice and a lack of understanding (Roch et al., 2010).<sup>38</sup> Participants in this scoping project also highlighted the problems that transgender people are likely to face in accessing support following incidences of domestic abuse. This was seen to be particularly problematic in relation to refuge facilities:

*Think of appropriate services, if a trans[gender] woman suffers domestic violence, there is no refuge place for her to go is there? You couldn't go to a men's hostel, that wouldn't be appropriate.*

**Catriona, Trans[gender] woman and diversity trainer/consultant to public services.**

Police domestic abuse figures have been published by the Scottish Government each November since 2001, though this has changed to alternate years. The charity Abused Men in Scotland used freedom of information laws to gather the figures for 2010-11. The charity found, for 2010- 2011 that the number of incidents in which a male was

recorded as a victims/survivors of domestic abuse was 9,648, a rise of 11 per cent on the previous year and the 11<sup>th</sup> consecutive year the figure for male victims/survivors had risen (AMIS, 2011b).<sup>39</sup> Research in this area also suggests that men may tend to under-report even more than female victims/survivors, partly because of 'macho' attitudes and an anticipated unsympathetic police response (Mays, 2010, Waugh, 2010). Whilst it could be argued that services are available for male victims/survivors of domestic abuse through mainstream organisations, participants in this scoping project frequently stated that they were treated differently from women and felt consistently let down by mainstream services. All male victims/survivors who participated in this scoping project recounted experiences of the difficulty that they often had in getting services to recognise that they were suffering abuse, for example:

*[Katriona] throughout my marriage was abusive, both physically and mentally, financially and in a lot of different ways. When I asked for services, initially when it started in 2002 or thereabouts, I phoned up the social work's domestic violence unit saying that I was getting physically assaulted, emotionally abused and threatened at night where she would pick up knives and threaten to stab me while I was asleep and mentally tortured to the extent where I was going in to a high pressured job the following morning with absolutely no sleep and then having to take days off because of scratches on my hands and face or whatever. So I phoned up to report that and to see if she could get some help and support to deal with her aggression in different ways and I never got any reply. The letter that [Katriona] got though, which was following quite a violent incident where she had thrown a deep fat fryer at me with hot fat in it, which splattered all over me... she got a letter from them asking if she was ok and if she needed any support with regards to the domestic violence, I never got any further support or offers of support.*

**Derek, social worker, victim/survivor of domestic abuse and parent of children with shared residence.**

Participants in this scoping project raised a range of concerns at the lack of awareness and services directed at men as victims/survivors of domestic abuse, for example In Scotland there are reported to be no refuges or safe houses that exist for male victims/survivors.<sup>40</sup>

*Clearly, the problem is not gender neutral, but neither is the current policy response to it gender fair. Appropriate services need to be provided regardless of gender, age, disability, ethnicity or any other factor. Abuse is abuse.*

**Alice, mother, victim/survivor of domestic abuse and a member of a women's support group.**

The Scottish Government has since April 2010 provided a funding contribution towards the Men's Advice Line, a service based in London run by the charity, Respect. The only Scottish-based help line continues to be run by AMIS, funded initially but support from the Big Lottery and latterly via supporter fundraising and personal donations and now also by a charitable Foundation. AMIS has argued for the importance of maintaining a Scotland based helpline and in particular one that is not bound by any particular philosophy of domestic abuse.<sup>41</sup> Towards the end of 2011-2012 financial year, the

Scottish Government Equality Unit provided £15,000 funding to AMIS for capacity building purposes and AMIS hopes to encourage further involvement from the Scottish Government to support the services that they provide, which male victims/survivors feel that they are currently unable to access through mainstream organisations.

A specific concern also included the gendered nature of representations of domestic abuse in school and professional education materials:

*...it was all about what men do to women, the entire course is and if anyone raised a question as I did about what women do to men, or men do to men, or women do to women, you are told, well yes that can happen but that is not what we are focusing on, today we are focusing on what men do to women. But there is never a day when they talk about the other things.*

**Emma, support worker of male victims/survivors of domestic abuse and a school teacher.**

*I went on a course on domestic abuse run by the local domestic abuse partnership as part of my professional social work training, and I was sitting in there hearing all this training about what the man does to the woman, and I am sitting there knowing that on a more than weekly basis I was suffering this you know, this was happening to me.*

**Derek, social worker, victim/survivor of domestic abuse and a parent of children with shared residence.**

Research indicates that policy attention has increasingly addressed the impacts of domestic abuse on children. It has been estimated that 100,000 children and young people live with domestic abuse in Scotland (Weaver, 2006). Stafford *et al.* (2007) found that:

*“(c)hildren and young people experiencing domestic abuse have for some years now been identified as a priority group for service; their needs increasingly recognised and additional resources made available to meet identified gaps in service and levels of service”.*

In 2008 the Scottish Government and COSLA produced a *National Domestic Abuse Delivery Plan for Children and Young People*. The Delivery Plan included thirteen Priorities for Action under the themes of protection, provision, primary prevention through education, and participation. It was planned that £10m over the following three years would be devoted to its delivery (Scottish Government, 2008b).<sup>42</sup>

However, participants spoke of some continued problems in accessing support services for children. One of the priorities for action identified in the Delivery Plan is to:

*“Ensure all children and young people affected by domestic abuse have access to specialist services that meet their needs” (Weaver, 2006) .*

But, as one mother noted:

*I asked I don't know how many times for social work to help and intervene with my son. You could see he was having problems dealing with the aftermath of what had happened, but no, the request had to come from school or another*

*agency, it couldn't come from me. There I was saying, please help us, we need help now, but it had to come from someone else.*

**Lisa, mother and a victim/survivor of domestic abuse.**

Since 2006 the Scottish Government has funded the Cedar (Children Experiencing Domestic Abuse Recovery) Project<sup>43</sup> which works with children and their mothers recovering from domestic abuse. The projects have been shown to be effective at supporting children (and their mothers) through the aftermath of domestic abuse (Sharp et al., 2011). The projects are delivered primarily by organisations supporting female victims/survivors of domestic abuse.

Some male participants in this scoping project noted, however, that their children had been unable to access services that support children due to the gender of the parent being abused:

*I think another whole problem as to how the domestic abuse issues are viewed, my child is unable to get support because it is not their mother but their father that was being abused. If it was happening to a woman they would get help.... But they are funded by the government's violence against women unit. It is, particularly for children, [important that for] any service whether it be the male or female that is suffering domestic abuse, it should be open to the child.*

**Derek, social worker, victim/survivor of domestic abuse and a parent of children with shared residence.**

## Funding concerns

Scottish Women's Aid have expressed concern that in times of budgetary pressure it will be necessary to monitor the impact of any cutbacks on refuge accommodation and support services (Scottish Women's Aid, 2009). This concern was echoed by the UN CEDAW Committee.<sup>44</sup>

Scottish Women's Aid has also expressed concerned that devolving responsibility for addressing domestic abuse from national to local government, through Single Outcome Agreements (SOAs), may result in a patchwork response and the dilution of specialist domestic abuse services (Scottish Women's Aid, 2009). A subsequent study by Scottish Women's Aid expressed concern about the absence of meaningful compliance with the Gender Equality Duty at a local level and about how national policy on 'violence against women' is implemented and monitored at a local level (Scottish Women's Aid, 2010).

The Scottish Government has, however, committed to investing £34.5 million "to help tackle the issue of violence against women", which will provide £11.5m of funding each year from 2012-2015. The funding will be spread across 138 projects throughout Scotland which provide:

*"support for women and children who are suffering from domestic abuse, or for women who have been violently or sexually abused".<sup>45</sup>*

## Forced marriage

Under international human rights law men and women 'of marriageable age' have the right to marry (Article 12, ECHR) on the basis of free and full consent.<sup>46</sup> In recognition of the principles of self-determination and human dignity, this extends to a right not to marry in the absence of free and full consent.<sup>47</sup> It has been argued that forced marriage also violates the right to bodily integrity inherent in the right to respect for private and family life (Article 8, ECHR), and the prohibition of inhuman or degrading treatment or punishment (Article 3, ECHR). To be sure, forced marriage should not be confused with arranged marriage: the latter being where marriage is entered into with the consent of all parties.<sup>48</sup>

The Scottish Government regards forced marriage as a:

*“violation of internationally recognised human rights and a form of violence against women” that “cannot be justified on any religious or cultural basis” (Scottish Government, 2008a).*

In 2009, the UK Government's Forced Marriage Unit (FMU) dealt with 375 cases of forced marriage, of which one per cent<sup>49</sup> originated from Scotland (Reid Howie Associates and Equality Plus, 2010). The majority of UK cases which the FMU dealt with involved people from Pakistan, Bangladesh and of Indian origin. In 2009-10, Shakti Woman's Aid supported seven women fleeing forced marriage and Hemat Gryffe Women's Aid supported 13 such women (Scottish Government, 2010b). The Scottish Parliament's Equal Opportunities Committee expressed the view that:

*“while numbers may be relatively low, the detrimental impact of forced marriage is extremely high and cannot be tolerated; that civil remedies are not sufficient; and that forced marriage must be addressed through more victim-centred legislation” (Taylor, 2011).*

The Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 was enacted to provide a specific civil remedy for those threatened with forced marriage and those already in such a marriage. In particular, it makes provision for forced marriage protection orders (FMPOs) to protect people against being forced<sup>50</sup> to enter into marriage without their free and full consent and for protecting those who have been forced to enter into marriage without such consent. An FMPO may be sought by the individual concerned, a local authority, the Lord Advocate or issued in the course of other proceedings to which the individual is party.<sup>51</sup> Through it a Sheriff Court or the Court of Session may include such provisions as appropriate to stop a forced marriage or protect an individual from a forced marriage.<sup>52</sup> Breach of an FMPO is a criminal offence. The 2011 Act brings Scotland into line with civil legislation in England, Wales and Northern Ireland, which came into force in 2008 (Taylor, 2010).

Prior to the Act research had noted problems in accessing civil remedies for forced marriage (Reid Howie Associates, 2009). In its first year in force approximately 50 people had been helped by the Scottish forced marriage and domestic abuse helpline and the first FMPO was reportedly issued in Scotland in April 2012 (Lavery, 2012). Eighty-six FMPOs were issued in England and Wales during the first year of the equivalent Act coming into force.<sup>53</sup>



## Same-sex marriage

In July 2012 the Scottish Government announced that it planned to pursue legislation to provide for a right of same-sex couples to marry. That decision followed a consultation which attracted tens of thousands of responses and strongly held opposing views from across Scottish civil society and religious organisations (Scottish Government, 2012a).

In its submission to the consultation SHRC clarified a number of questions surrounding the human rights issues engaged (SHRC, 2011). Firstly it clarified that there is no European consensus on same-sex marriages.<sup>54</sup> It noted that in the case of *Schalk and Kopf v. Austria*,<sup>55</sup> the ECtHR had found that Article 12 of the ECHR (the right to marry and found a family) read with Article 14 (non-discrimination) did not create an obligation to grant same-sex couples access to marriage. It found that the matter was within the 'margin of appreciation' of States. In essence it is permitted but not required to grant access to same-sex marriage. It found that "men and women" in Article 12 no longer means that:

*"...the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex"*<sup>56</sup>

*"The Court notes that since 2001 ... a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples ... Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of 'family' ... In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8."*<sup>57</sup>

SHRC further noted that this approach built on emerging practice of UN human rights bodies (UN CESCR, 2011).

On the relation of this right with the right to freedom of thought, conscience and religion SHRC noted that this includes freedom to manifest in private or in community religious views.<sup>58</sup> Nevertheless this freedom can be subject to limitations prescribed by law and necessary in a democratic society, such as not interfering with the rights of others. On balance, SHRC agreed with the Government's proposal that that no religious body or its celebrants should be required to solemnise same-sex marriages (SHRC, 2011).

## Right to family life of people with learning disabilities

Under Article 8 of the ECHR, as we have seen, everyone has the right to respect for private and family life. Article 23 of the UN Convention on the Rights of Persons with Disabilities (UN Disability Convention) further specifies with respect to people with physical, mental or learning disabilities, that States Parties should:

*"Take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others"*.

In practice, as recognised for example by the UN Committee on Economic, Social and Cultural Rights, the rights to marry and found a family are:

*“frequently ignored or denied, especially in the case of persons with [learning] disabilities” (UN CESCR, 1994).*

In practice, people with learning disabilities<sup>59</sup> continue to face particular challenges to exercising their right to respect for private and family life in Scotland.<sup>60</sup> A 2012 evaluation of the Scottish Government’s strategy on people with learning disabilities, *Same as You*, noted that:

*“Having more friends and the chance to have a romantic and/or sexual relationship were among the priorities which people with learning disabilities chose for their lives in a survey conducted by the Scottish Consortium for Learning Disabilities (SCLD) in 2006” (Scottish Government, 2012b)*

The law in Scotland relating to the sexual relationships of people with a learning disability is designed to strike a balance between protecting those people who do not have the capacity to consent to sexual relations or are vulnerable to harm, whilst upholding and preserving the rights of those people who do have the necessary capacity to consent.

The two central Acts of the Scottish Parliament in this area are the Adults with Incapacity (Scotland) Act 2000 (AWIA) and the Adult Support and Protection (Scotland) Act 2007 (ASP). AWIA was specifically designed to benefit, amongst others, people with learning disabilities.<sup>61</sup> It provides for a functional approach (as opposed to a status based approach) to assessing capacity. This means that the existence of a learning disability, even a serious one, will not of itself be determinative of capacity to make a decision.<sup>62</sup> Rather an assessment should consider whether the particular person has capacity to make a particular decision at a particular time – a so-called ‘tailor made’ approach.<sup>63</sup> ASP introduces several measures aimed to improve protection for adults at risk of ‘harm’ (broadly defined to include physical, psychological, financial or self-harm). ASP defines an adult at risk as those who:

- (a) Are unable to safeguard their own well-being, property, rights or other interests,
- (b) Are at risk of harm, and
- (c) Because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

Both ASP and AWIA are founded on human rights principles such as participation, least restrictive alternative and non-discrimination. Nevertheless, there has been some concern at the impact of ASP in particular on autonomy. For example the civil society coalition the Campaign for a Fairer Society Scotland (supported by a range of disabled peoples organisations and organisations working with disabled people)<sup>64</sup> has expressed concern that ASP:

*“...requires [public authorities] to have ‘regard’ for the adult’s ascertainable wishes and feelings (past and present), capabilities, background and characteristics. The Act gives local authorities powers to:*



- carry out medical examinations to determine if an adult at risk has been sexually or physically abused and to determine their competence to make decisions
- remove an adult at risk (and not the abuser) from their own home and place them somewhere else where they can be protected
- exclude an adult suspected of abusing the adult at risk from their presence for up to six months – even if the adult at risk does not agree with the exclusion.

*Disabled people are alarmed by the idea of removing the adult at risk, rather than the person suspected, from their own home, which violates their rights to privacy and to private home and family life. In addition, the exclusion of the suspected adult without the consent of the adult considered at risk may be further violation of these rights, and overall creates a prejudice of limited legal capacity.’<sup>65</sup>*

As SHRC has pointed out,<sup>66</sup> the effect of section 3 of the Human Rights Act 1998 is that all other primary and secondary legislation (including AWIA and ASPA) should be read in a manner compatible with the ECHR. This duty applies throughout the lifetime of the legislation, and the ECHR is recognised to be a ‘living instrument’, the interpretation of which depends on the prevailing standards of the time.

In addition, Section 17 of the Sexual Offences (Scotland) Act 2009 makes provision regarding the capacity to consent to sexual activity of a person with a mental disorder. It states that a person is incapable of consenting to conduct where, by reason of a mental disorder,<sup>67</sup> he or she is unable to do one or more of the following:

- Understand what the conduct is;
- Form a decision as to whether to engage in the conduct, or as to whether the conduct should take place; or
- Communicate any such decision.

Hollomotz (2009) suggested that many people with learning disabilities, who in the past were assumed to lack capacity, do in fact have the capacity to make decisions about sexual relationships. Current Mental Welfare Commission for Scotland (MWC) guidance for professionals and carers when considering rights and risks in sexual relationships involving people with a mental disorder states that:

*“People with a mental illness, learning disability or other mental disorder, have the same personal and sexual needs and rights as anyone else. At the same time people with a mental disorder can be at particular risk of abuse or exploitation. Balancing those rights and risks raises a host of legal and moral dilemmas to which there are no easy solutions. Whilst the motivation may be to protect, professionals and carers need to consider carefully whether any interference with an individual’s rights is ethical, lawful, necessary and in proportion to the risks” (Mental Welfare Commission for Scotland, 2010).*

For people with learning disabilities who live in residential group settings, having access to privacy in which they can conduct normal adult relationships should be the norm, not a privilege (Hollomotz, 2009). Furthermore, Hollomotz (2009) has argued that the safest way of responding to the sexual needs of people with learning disabilities is to create safe spaces that allow for privacy.

The issue of private and family life, including relationships, was raised during participation events organised by SHRC and the Equality and Human Rights Commission in Scotland on the UN Disability Convention.<sup>68</sup> Also a small number of participants in this scoping project worked in different settings with people with learning disabilities, including residential settings, and all said that they were unaware of any strategies or policies available at the local, practice level to help staff understand the right to respect for private and family life of people with learning disabilities and how they should support it:

*In supported accommodation for people with learning disabilities, I think it is often the case that they are almost seen like eternal children that they won't have any sexual thoughts or want to be in a relationship with anyone else. I have had a few experiences in accommodation where it was almost frowned upon by the staff where someone wants to spend time with someone else, or in a room together, even although it is consensual... There are no real policies at the government or local internal level to educate people with learning disabilities or help them to understand what is acceptable behaviour or what's allowed, or even telling them about contraception or anything like that. It is just like people don't want to talk about this, they just think, oh they don't have these thoughts. The policies now, the government is always pushing for more inclusive policies to help people with learning disabilities to be included in society, but I think sex and relationships is something that, yeah you can be included as long as you don't have sex, that's what it seems like. So it stops people with learning disabilities from having a normal private and family life.*

**Eric, Trainee social worker with experience in residential care of people with learning disabilities.**

Condor and Mirfin-Veitch (2010) explore issues such as knowledge of contraception, the development of parenting skills and the importance of social support within the context of adults with learning disabilities who want to become parents.<sup>69</sup> Whilst their findings are based on a very small research sample, they found that with the right family and social support, parents with an learning disability can provide a secure and loving environment for their child (Condor and Mirfin-Veitch, 2010). However, historically women with learning disabilities have been coerced into using long-term methods of contraception to prevent pregnancy or have had their child removed from their care (Condor and Mirfin-Veitch, 2010).

In an attempt to support and better prepare pregnant women and parents with learning disabilities for parenthood, NHS Health Scotland sought to make available easy read materials on parenthood. An evaluation by People First (Scotland), Parents Group, Create Consultancy and NHS Health Scotland found that these materials were well received by parents with learning disabilities but that they were not consistently given to them. The evaluation also made a series of recommendations which may be relevant for other education or awareness raising initiatives for people with learning disabilities (People First (Scotland) et al., 2011).

SCLD<sup>70</sup> works in partnership with people with learning disabilities of all ages as well as family carers in order to challenge discrimination and to develop and share good practice. In 2009 SCLD published the Scottish Good Practice Guidelines for Supporting Parents with Learning Disabilities which provides the wide legal and policy context to parenting and child protection in Scotland and practical advice to professionals in how to support parents with learning disabilities well (SCLD et al., 2009). They also raised the progress that had been made with regard to the realisation of the rights of parents with learning disabilities in Scotland, in their submission to the United Nations Universal Periodic Review (SCLD, 2011).

Participants in this scoping project, however, were still critical about what was happening in practice (as noted above). One participant who provides training on sex education for young people<sup>71</sup> didn't feel that current programmes or materials went far enough to include the diversity of the needs of young people with learning disabilities in relation to sex education:

*I add to that the complication of people with learning disabilities who are gay, bisexual or transgender, who face another hurdle altogether and when it comes to education materials, the SHARE programme which is run in Scotland – I do believe that it is the best programme that we currently have but I think we need to look at what we are doing because I can go into schools and say this is how it is and they know it – but we are still seeing the same rates of teenage pregnancy and the whole layer of learning disabilities and getting this information across to people with learning disabilities there is one resource that SHARE has that has some good exercises in it, but it doesn't go anywhere near far enough. I think that's an issue, and if you widen out to people with disabilities we are saying that people with disabilities don't have a sex life, and yes they do. Just because they have a disability they should still be able to enjoy that.*

**Jim, Sexual health worker and SHARE trainer.**

## **The rights of parents and children**

The research review highlighted a range of areas in which the rights of parents and the rights of the child are engaged in family life, where controversies have arisen in Scotland. The right to a private and family life in Article 8 of the ECHR extends to everyone (adults as well as children), and is, as we have noted, a qualified right. The right to marry and found a family, as we have also noted, is a right of those of 'marriageable age' who have the capacity to fully and freely consent. Several rights in the CRC relate specifically to the family life of children. These include:

- the general principle that the best interests of the child must be a primary consideration in all actions concerning the child (Article 3, CRC);
- the rights and duties of the parent or guardian to provide direction and guidance in a manner compatible with the evolving capacities of the child (Article 5, CRC);
- the right of the child, as far as possible, to know and be cared for by his or her parents (Article 7, CRC);
- the right to preserve family relations without unlawful interference (Article 8, CRC);

- the right of the child not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (Article 9, CRC);
- the right of the child to have their view sought and for that view to be given due weight in all matters affecting them (Article 12, CRC);
- the principle that both parents have common responsibilities for the upbringing and development of the child and that parents or legal guardians have the primary responsibility for the upbringing and development of the child, on the basis of the best interests of the child (Article 18, CRC).

Research by the *wee democracy project* (supported by the Children’s Parliament) found that, despite some recognition of the CRC in the language of service providers, for the most part, there had been little or no explicit or formal focus on children’s rights in family life and that for government and for many agencies, “*the family is still viewed as a private realm*”. There was also evidence that human rights were not thought to be relevant to families who may be struggling with other aspects of life (i.e. living in poverty) and that children’s rights are regarded as a “*middle class interest*” and not somehow relevant to the lives of all children (Morrison and Fraser, 2008).

The Children (Scotland) Act 1995 recognises a range of parental responsibilities and rights in respect of children living in Scotland. These include a responsibility and corresponding right relating to contact with a child by the parent that the child does not live with, where this is practicable and in the best interests of the child.<sup>72</sup> Where a judicial determination of parental rights and responsibilities is necessary, the 1995 Act<sup>73</sup> provides that the welfare of the child is paramount and that decisions must be made in the best interest of the child. The Act<sup>74</sup> also provides that, so far as is practicable, the child’s view must be taken into account.

Under the 1995 Act, only the mother of a child and a father who was married to the mother at the time of conception or at a later date, automatically have parental responsibilities and rights. The Family Law (Scotland) Act 2006 provided an additional way in which unmarried fathers could acquire parental rights and responsibilities (by jointly registering the birth with the mother), but did not go so far as to provide them with automatic parental rights and responsibilities. Petition PE1362 to the Scottish Parliament reflected a degree of dissatisfaction with the operation of the law in relation to the rights of unmarried fathers and it asked the Scottish Parliament to consider action to advance equality of treatment for unmarried fathers. One of the key questions to emerge from the petition was whether the differential allocation of parental responsibilities and parental rights depending on the gender of the parent is compatible with the European Convention. This question was also at the heart of the recent decision of the UK Supreme Court in *Principal Reporter v K*.<sup>75</sup> In that case the UK Supreme Court held that:

*“The initial allocation of parental rights and responsibilities to mothers alone can be justified because of the wide variations in the actual relationships between unmarried fathers and their children; but that if an unmarried father has in fact*

*established family life with his child, it is no more justifiable to interfere in that relationship without proper procedural safeguards than it is justifiable to interfere in the relationship between a married father and his child”.*<sup>76</sup>

Scots law makes the distinction between mothers and married fathers who have automatic parental responsibilities and rights and unmarried fathers who are required to take some form of positive step to acquire them. In its submissions to the petition SHRC considered that it would not be justifiable to treat unmarried fathers who had acquired parental responsibilities and rights any differently from mothers or married fathers who had them, but that it can be justifiable to have a process to determine whether an unmarried father has in fact established family life with his child (SHRC, 2010). In reaching this conclusion SHRC cited not only the domestic case of *Principal Reporter v K.*, noted above, but also the ECtHR case of *McMichael v United Kingdom*<sup>77</sup> (which was based on the situation in Scots law prior to the 2006 Act). In the latter case the ECtHR found that the Scottish system had a legitimate aim of providing a mechanism to identify ‘merit’ (SHRC, 2010).

Some participants in this scoping project felt that following the breakup of a relationship (including a marriage), that fathers were automatically relegated by professional services to the status of a relevant adult, not an equal parent, even where shared residency agreements existed, as one father noted:

*The dentist and the school said that there could only be one main contact, so that was their mother. But I don't see why in this day in age with so many families that are separated and bringing up kids apart and both parents having parental responsibilities then I don't see why there cannot be a system where both parties can be fully involved... I am viewed as the second class parent that's got them 4 days a week! I have missed a lot of quite important elements of my children's schooling because I've not been informed about it.*

**Derek, social worker, victim/survivor of domestic abuse and a parent of children with shared residence.**

For those participants who had experienced difficulties in accessing information about their children following separation, schools were highlighted as one the most significant problem areas. The Scottish Schools (Parental Involvement) Act 2006<sup>78</sup> makes it a legal requirement for schools to keep parents routinely informed with regards to a child's education, including: providing reports and information about parents evenings, exclusions, attendance, sports days and other school events. The Guidance published along with this Act made explicit reference to situations where parents lived apart and lays an expectation that schools engage with parents on an equal basis, and that schools are obliged to devise active schemes for engaging with non-resident parents.

Current research on the involvement of non-resident parents in education by the civil society organisation *Families Need Fathers*<sup>79</sup> has collated information through freedom of information requests to all local authorities in Scotland about their policies. Early analysis shows a wide spectrum of action by authorities and schools and little reference

to the Scottish Schools (Parental Involvement) Act 2006 in any policies that did exist (Families Need Fathers, 2012).

Participants in this scoping project who were non-resident fathers described generally strained relationships with schools, which viewed them as 'absent' parents. Some noted that if they received their child's school report at all, it would generally not be received in time to go to the child's parents evening. Most noted that despite requests for information to be provided to the non-resident parent directly it was most often placed in school bags that resulted in the father never receiving the information. In a couple of cases fathers described how 'rocking the boat' by asking for further information or items such as school photographs resulted in schools becoming obstructive, as one father noted:

*I used to pick Adam up from school on a Monday, and because I picked him up one day there's a daily home school diary and I said I don't see this and my former wife used to guard info about the kids as a form of control and so one of his class teachers said ok, we'll do your own school diary so on Mondays you'll get a summary of what he has done through the week and it worked pretty well for a while and it meant I could feed back to the school. I mean, it wasn't about me, it was about how important it was that they knew what he did when he was with me, because it's what they talk about and build on in the class and I found out from them things that I didn't know he could do and then we'd build on from that with him and so it was a really important part of the exchange for his education. And I remember there was this one difficult woman, and I picked him up one day and there was a note saying that the deadline has passed for parents to request copies of the school photographs and so I went back in to the school and spoke to the headmistress and said I don't know anything about the school photographs and she said well it went home in his school bag and I said, well as you know I don't see that and it was really important to me to get a school photo and she was furious and she said that she was withdrawing my privileges and I was no longer to have my home school diary, and I didn't raise my voice or say anything rude and she was just furious and she instructed the teacher to stop doing my own home school diary.*

**Jeremy, victim/survivor of domestic abuse and a non-resident parent.**

## **Parental imprisonment**

As noted above Article 9 of the CRC protects the right to the child not to be separated from his or her parents except by competent authorities subject to judicial review. Article 9 further acknowledges in paragraph 4, that such separation may arise from the detention or imprisonment of one or both parents. Where that happens, the child should be given information about where the parent is, unless that would be against the child's interests. The Convention further upholds the child's right to maintain personal relations and direct contact on a regular basis, except if it is contrary to the child's best interests (Article 9.3).

It is estimated that around 16,500 children in Scotland are currently affected by the imprisonment of a parent every year (Scotland's Commissioner for Children and Young



People, 2011) and the continuing increase in numbers of prisoners inevitably means that there will continue to be an increase in the number of children affected by parental imprisonment. Indeed, in the UK as a whole, it is more common for a child to experience a parent's imprisonment than a parent's divorce (Action for Prisoners' Families et al., 2007). In the ten-year period 1997-2007, the average daily prison population in Scotland increased by 19 per cent. During the same period, the female prison population increased by over 90 per cent (Scotland's Commissioner for Children and Young People, 2008).<sup>80</sup> The fact that there is only one women's prison in Scotland further means that contact between women prisoners and their children is often disrupted by lack of access (EHRC, 2010, Commission on Women Offenders, 2012). Moreover in relation to prison visits, Scotland's Commissioner for Children and Young People (SCCYP) has criticised the practice within some Scottish prisons of viewing a visit by children as a privilege of the parent (that can be withdrawn), rather than the right of the child (Scotland's Commissioner for Children and Young People, 2008, Scotland's Commissioner for Children and Young People, 2011).

Together (2012) in their most recent publication on the *State of Children's Rights in Scotland*, highlight a case study of a prisoner who had his parent-child visits removed as punishment for being caught in possession of a mobile phone. This punishment was in addition to what a prisoner without a child would have received. In the letter from the Scottish Prison Service (SPS) to the prisoner explaining why his parent-child privilege had been removed, SPS incorrectly assert that the UNCRC "*has not yet become a living charter for children of imprisoned parents*" and furthermore, misrepresent a SCCYP report as the source for minimum visiting entitlements (Together, 2012).

As well as the emotional loss of contact with a parent, children may suffer from bullying, shame, stigma, stress, financial disadvantage, the loss of a carefree childhood and a need to move house (Scotland's Commissioner for Children and Young People, 2008).<sup>81</sup> Only five per cent of women prisoners' children remain in their own home once their mother has been sentenced (HMCIPS, 2008). In a 2011 follow-up report on this issue, SCCYP found that progress had been made on some of the issues first identified in 2008, but it also highlighted that more action was required to embed a children's rights perspective into law, policy and the practice of the criminal justice system, and to ensure that those affected by parental imprisonment are properly supported (Scotland's Commissioner for Children and Young People, 2011).

To address what it found to be gaps in consideration of children's rights in the criminal justice system and penal policy in Scotland, SCCYP proposed that a sentencing judge should be obliged to consider the impact of a custodial sentence upon the human rights of the offender's children and, where there is a choice between custodial and community sentence for an offender with children, the balance should fall in favour of the community sentence (Scotland's Commissioner for Children and Young People, 2011, Scotland's Commissioner for Children and Young People, 2008).

It is worth noting that this is already the case in South Africa following the landmark ruling of the Constitutional Court in the 2007 case *S v M* (CCT53/06). The Court

addressed the precise question of the application of the best interests of the child by a court when sentencing the primary carer of minor children. The Court set out guidelines to “*promote uniformity of principle, consistency of treatment and individualisation of outcome*”, namely:

- The sentencing court should find out whether a convicted person is a primary carer whenever there are indications that this might be the case.
- The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
- If the appropriate sentence is clearly custodial and the convicted person is a primary carer, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the carer is incarcerated.
- If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.

This ruling set a precedent which requires all South African Courts to give specific consideration to the best interests of the child when sentencing a primary carer. If the proposed imprisonment will be detrimental to the child, a non-custodial sentence must be favoured, unless the case is so serious that it would be inappropriate.

## **Moving Forward**

This section, alongside the other thematic sections and the overarching contextual chapter, has highlighted gaps, and inconsistencies, as well as good practices in the realisation of human rights in practice in Scotland. Addressing these shortfalls should be a concern of all bodies with responsibilities, including Government, local authorities, other public authorities and private providers of public services.

Identifying the shared framework of responsibilities and agreeing steps to address gaps requires an inclusive process of engagement. It should result in clarity on what action such bodies will take and when concrete improvements can be expected – it should result in specific, measurable, achievable, relevant and time-bound objectives. An independent system for monitoring progress should also be agreed. In short, the report supports the conclusion that Scotland needs a National Action Plan for Human Rights. To develop this SHRC will host human rights InterActions involving a broad range of public and private bodies, civil society and individuals. These InterActions will follow a FAIR approach:

**Facts:** What are the key gaps and the good practices in the realisation of human rights in Scotland?

**Analysis of rights at stake:** Which human rights are at stake? Is any restriction on the rights justified? Is the extent of realisation of the right reasonable?



**Identify responsibilities:** What changes are necessary? Who has responsibilities for helping to make the necessary changes?

**Recall and review progress:** Independent monitoring according to agreed indicators and periodic review of progress.

This process will allow for constructive dialogue between those with responsibilities and those whose rights are affected. Further, it will clarify the steps that are required to improve human rights practice in Scotland taking a pragmatic approach to understanding financial and other constraints. It is hoped that Scotland’s National Action Plan for Human Rights will launch in summer 2013.

To inform the process of developing Scotland’s National Action Plan for Human Rights responses are requested to the following questions:

**1. Based on the evidence presented in this report, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland’s National Action Plan for Human Rights?**

**2. What specific and achievable actions do you consider would best address the concerns you identify in terms of question 1?**

Please use the form at the end of this section and send your responses to [actionplan@scottishhumanrights.com](mailto:actionplan@scottishhumanrights.com) or post it to us at Scottish Human Rights Commission, 4 Melville Street, Edinburgh, EH3 7NS

**Table 1: Key Dates**

<b>Date</b>	<b>Action</b>
May 2012	The UK Universal Periodic Review at the United Nations begins.
September 2012	The final report and recommendations of the UK’s Universal Periodic Review is anticipated
October 2012	Publication of SHRC’s Report and launch of a process of participation to shape Scotland’s National Action Plan for Human Rights
December 2012	SHRC hosts a National InterAction to address the findings of the scoping exercise and facilitate negotiation of commitments to address them
Aiming for Spring 2013	A draft of Scotland’s first National Action Plan for Human Rights is published for comment
Aiming for Summer 2013	Scotland’s National Action Plan for Human Rights will be launched
June 2014	UK’s progress on Universal Periodic Review recommendations is considered in a mid-point review. Progress on Scotland’s National Action Plan for Human Rights to feed into this process.

## PARTICIPATION FORM

### SCOTLAND'S NATIONAL ACTION PLAN FOR HUMAN RIGHTS

Views are sought from all individuals and organisations who have experience or expertise which can help to shape Scotland's National Action Plan for Human Rights.

The Scottish Human Rights Commission will be collecting and analysing all responses receive before the **29 March 2013**. Early responses are encouraged.

Unless respondents request that their views remain confidential or anonymous all responses will appear online with the organisation or individual named as the respondent. Contact details for the respondent will not appear online.

- Please tick this box if you do not wish your response to appear online:
- Please tick this box if you are happy for your response to appear online but not your name or organisation's name to appear:
- Please tick this box if you would prefer we did not link to your website:

Name: \_\_\_\_\_

Organisation: (where appropriate) \_\_\_\_\_

Website: \_\_\_\_\_

Email address: \_\_\_\_\_

Contact telephone number: \_\_\_\_\_

This form can be returned by post to: Dr Alison Hosie, Scottish Human Rights Commission, 4 Melville Street, Edinburgh, EH3 7NS, or sent as an electronic or scanned document to [actionplan@scottishhumanrights.com](mailto:actionplan@scottishhumanrights.com)

You can also fill out this form online at [www.scottishhumanrights.com/actionplan](http://www.scottishhumanrights.com/actionplan)

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**1. Based on the evidence presented in the report *Getting it right? Human rights in Scotland*, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland's National Action Plan for Human Rights?**

**2. What specific and achievable actions do you consider would best address the concerns you identify in your response to question 1?**

**Thank you for sharing your experience or expertise and helping to shape  
Scotland's National Action Plan for Human Rights.**

Contact point: Dr Alison Hosie / [actionplan@scottishhumanrights.com](mailto:actionplan@scottishhumanrights.com) / 0131 240 2989 /  
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## Appendix 1: Prioritisation criteria to select Phase 2 issues for further study

**Occurrence:** Number of Phase 1 sources commenting on a particular issue in relation to the Right being examined.

**Devolved competence:** Allows scoring according to whether an issue is reserved and wholly beyond the powers of devolved government, partly within the powers of devolved government, or fully within the powers of devolved government to address.

**Gravity:** Score reflects the nature of the rights at stake:

Category 1. Qualified & limited Rights, Economic, Social & Cultural Rights, the Right to an Effective Remedy, Non-discrimination in the Exercise of Rights

Category 2. The Right to Life, Retrospective Criminal Law and Absolute Rights (Right to be Free from Torture & Inhumane and Degrading Treatment and Prohibition of Slavery).

**Imprint:** Score reflects the extent to which the issues raised in a particular category would affect a large number of people

**Vulnerability/ Marginalisation:** Score reflects the extent to which the issues raised affect vulnerable or marginalised groups/communities.

**Added value:** Scores reflect whether the issue contributes to the human rights culture of Scotland without duplicating research work already being done by other bodies (or within the clear remit of other organisations)?

**Opportunity:** Scores reflect whether the issue creates/ensures the establishment of positive, supportive interaction and understanding between the SHRC and institutions or individuals where previously this did not exist?

## Endnotes

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1 Further details on the methods and methodology of this scoping project can be found in the main report which can be accessed at: <http://www.scottishhumanrights.com/actionplan>

<sup>2</sup> The data sources collated and analysed in the first phase included:

An annotated bibliography of published and “grey” social research. DRIVER, S., LAMB, M. & WILSON, C. 2010. Annotated Bibliography of Published and Grey Non-Legal Literature on Human Rights in Scotland since 2006. London: The Crucible Centre and Social Research Centre, ROEHAMPTON UNIVERSITY.

See also Hosie & Lamb (2013 forthcoming) for further information on the methodology of this aspect of the research <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8685263>

Three legal literature reviews exploring specific Conventions/Acts in relation to the law in Scotland.

(Convention against Torture, Inhumane and Degrading Treatment, International [CAT] SMITH, R., TAIT, L., BALES, K., MCCONNELL, L. & RABAN-WILLIAMS, R. 2010. Mapping the Law of Scotland in Relation to International Human Rights Treaties: CAT & CPT. Newcastle: Northumbria Law School, *ibid.*,

International Convention of Economic, Social & Cultural Rights [ICESCR] FLANIGAN, D. 2011. Mapping the Law of Scotland in Relation to Economic, Social & Cultural Rights. Glasgow: Scottish Human Rights Commission, *ibid.* and Human Rights Act/ European Convention of Human Rights] NORMAND, A. &

WEBSTER, E. 2010. Mapping the Law of Scotland in relation to International Human Rights Treaties – Civil and Political Rights. Glasgow: University of Strathclyde.

An analysis of all individual enquiries received by SHRC and all general intelligence on systemic human rights issues in Scotland collated by SHRC (2008-2010). Whilst only those inquiries received between 2008 and 2010 were analysed as part of Phase one of this scoping project, the mapping project continued to collate and review inquiries during 2011 as part of Phase two. All responses to SHRC's 2009 national consultation. The original consultation document can be accessed at

<http://www.scottishhumanrights.com/ourwork/publications/article/reportofthenationalconsultation> Initial Scottish data from the development of a “Human Rights Measurement Framework”. The HRMF is a new tool for evaluating the human rights position of individuals and groups in England, Scotland and Wales. It was developed by the London School of Economics and Political Science, CASE and the British Institute for Human Rights within a partnership project of EHRC and SHRC. More information can be found here:

<http://personal.lse.ac.uk/prechr/>

3 During this process SHRC also developed a Stakeholder Database of third Sector organisations involved to some degree in the promotion of human rights in Scotland. This database provides SHRC with a greater understanding of the range of groups and organisations which view part of their work to be promoting human rights in Scotland and provided a sampling framework for groups to approach to participate in the primary data collection of this scoping project. This database is available to the public [<http://maps.scottishhumanrights.com/>] For further information on this project see: CRAIG, G. 2011.

Mapping human rights organisations in Scotland. Durham: University of Durham, School of Applied Social Sciences.

4 Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Appendix 1) in order to determine which would be explored in the focus groups. Other issues that arose from the scoping project that did not reach the threshold for prioritisation were:

Familial abuse, including abuse of the elderly and chastisement of children (although the issue of abuse of the elderly within care is covered in the thematic section on Dignity & Care): for example see BIGGS, S., TINKER, A. & MCCREADIE, C. 2007. Elder Abuse. London: Comic Relief and the Department of Health CHRISTIE, L. 2007. SCOTLAND 'LEADING WAY' IN SUPPORTING ABUSED WOMEN. Scottish Press Association, November 28, 2007 ; THE HERALD. 2006. Perceptions of the elderly are at the root of abuse. The Herald, June 16, 2006, EHRC 2011. Close to home: An inquiry into older people and human rights in home care. London: EHRC.; AGE CONCERN 2003. Elder Abuse and the Law in Scotland Edinburgh: Age Concern, THE HERALD. 2009. Age-old problem. 12 OCTOBER 2009, STV NEWS. 2009. Shocking figures show rise in complaints for care of the elderly. 12 October 2009. AGE SCOTLAND 2012. At home with Scotland's older people: Facts and Figures 2011-12. Edinburgh: Age Scotland.; NORMAND, A. & WEBSTER, E. 2010. Mapping the Law of Scotland in relation to International Human Rights Treaties – Civil and Political Rights. Glasgow: University of Strathclyde, SMITH, R., TAIT, L.,

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BALES, K., MCCONNELL, L. & RABAN-WILLIAMS, R. 2010. Mapping the Law of Scotland in Relation to International Human Rights Treaties: CAT & CPT. Newcastle: Northumbria Law School.; CARVEL, J. 2008. Dossier prepared for UN details grim plight of many young people in Britain: Widespread flouting of human rights, says report: Youth justice and attitudes to young 'have got worse'. The Guardian, June 9, 2008 Together 2012, Committee on the Rights of the Child (2008). Concluding Observations: United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/ CO/4). No 42a, b. 70 United Nation Human Rights Council (2012) Report of the Working Group on the Universal Periodic Review United Kingdom of Great Britain and Northern Ireland

Right to family life – Asylum and family separation, for example see: UNISON & BRITISH ASSOCIATION OF SOCIAL WORKERS. 2006. Asylum in Scotland - child's welfare paramount? A guide for members from BASW and UNISON Scotland. Available: <http://www.unison-scotland.org.uk/socialwork/asylumbooklet/asylumbooklet.pdf>.; SCOTTISH REFUGEE COUNCIL. 2010. Maintaining Family Unity throughout the Asylum Support System in Policy and Practice. Available: [http://www.scottishrefugeecouncil.org.uk/news\\_and\\_events/latest\\_news/748\\_new\\_report\\_reveals\\_catch\\_22\\_for\\_families](http://www.scottishrefugeecouncil.org.uk/news_and_events/latest_news/748_new_report_reveals_catch_22_for_families). Relevant cases include: Other relevant cases from the last few years include Beoku-Betts [2008] UKHL 38, Chikwamba [2008] UKHL 40, and EB (Kosovo) [2008] UKHL 41; ZH (Tanzania) (FC) v Secretary of State for the Home Department [2011] UKSC 4; (MH (AP) v the Secretary of State for the Home Department 2011).

The impact of family separation on grandparents and the rights of grandparents: for example see GRANDPARENTS ASSOCIATION 2009. Beyond the Nuclear: Including the Wider Family Harlow: Grandparents Association ; GRANDPARENTS PLUS 2009. Rethinking Family Life: exploring the role of grandparents and the wider family. London. SCOTTISH EXECUTIVE 2006a. Family Matters: Charter for Grandchildren. Edinburgh: Scottish Executive .

Fit to parent? BUCHANAN, J. & CORBY, B. 2005. Problem drug use and safeguarding children: a multi agency approach. In: CARNWELL, R. & BUCHANAN, J. (eds.) Effective Practice in Health and Social Care: A Partnership Approach. Maidenhead: Open University Press. BARNARD, M. 2003. Between a rock and a hard place: the role of relatives in protecting children from the effects of parental drug problems. Child and Family Social Work, 8, 291–9. BANCROFT, A., WILSON, S., CUNNINGHAM-BURLEY, S., BACKETT-MILBURN, K. & MASTERS, H. 2004. Parental Drug and Alcohol Misuse: Resilience and Transition Among Young People. York: Joseph Rowntree Foundation. made to a number of BUCHANAN, J. & YOUNG, L. 2000. The war on drugs - a war on drug users. *Drugs: Education, Prevention Policy*, 7, 409-22, SCOTTISH EXECUTIVE 2006b. Good Practice Guidance for working with Children and Families affected by Substance Misuse: Getting our priorities right. Edinburgh: Scottish Executive.

<sup>5</sup>Since 1999 the way the United Kingdom is run has been transformed by devolution - a process designed to decentralise government. Devolution essentially means the transfer of powers from the UK parliament in London to the Scottish Parliament and the Scottish Executive (officially referred to as the Scottish Government since August 2007) in Edinburgh. The Scottish Parliament is a legislation-making body, passing bills in various areas of its many devolved responsibilities. The Scottish Parliament also has the power to raise or lower income tax (as changed by the Scotland Act 2012). Devolved areas of legislative competence to the Scottish Parliament include agriculture, forestry & fishing, education, environment, health, housing, justice, policing and courts, local government, fire service, economic development, some transport responsibilities and human rights. The UK government is responsible for national policy on other powers which have not been devolved - these are known as "reserved powers". These include the constitution, defence and national security, foreign policy, energy, immigration and nationality, social security and some transport responsibilities. Many themes in this scoping project engage equality legislation in relation to combating discrimination. Equal opportunities is a reserved matter (under Schedule 5 of the Scotland Act 1998 (Reservation - L2)), however, the reservation incorporates an exception in so far as the Scottish Government and the Scottish Parliament can impose certain duties which allows for scope for positive steps to be taken in relation to equality despite limitations on the powers available to the devolved administration.

6 Section 149 of the Act.

7 *"The public sector equality duty requires equality to be considered in all the functions of public authorities, including decision-making, in the design of internal and external policies and in the delivery of services, and for these issues to be kept under review. The public sector equality duty is set out in*

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sections 149-157 and schedules 18 and 19 of the Equality Act. The general equality duty covers all public authorities named or described in Schedule 19 – Part 3 of the Equality Act 2010 together with those listed in the Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2010. The specific duties were created by secondary legislation in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. These specific duties came into force on 27 May 2012. Under the specific duties each listed authority is required to assess and review policies and practices i.e. impact assess". See <http://www.equalityhumanrights.com/scotland/public-sector-equality-duty/non-statutory-guidance-for-scottish-public-authorities/> for further details.

<sup>8</sup> This report refers to domestic abuse in recognition of the fact that not all domestic abuse is violent. Where the term violence is used this was the language used by the original authors. Within the pre-existing literature the term domestic violence is often used instead of domestic abuse, however the term domestic abuse is more than and does not always involve, physical violence. Domestic abuse can also encompass alone or in combination: emotional, financial and psychological abuse. Where the terms domestic violence and violence against women (which also excludes men as potential victims) are used, this is the terminology used by the original authors.

<sup>9</sup> For a detailed discussion of the definition of domestic abuse/violence, see HEARN, J. & MCKIE, L. 2010. Gendered and Social Hierarchies in Problem Representation and Policy Processes: "Domestic Violence" in Finland and Scotland. *Violence Against Women*, 16, 136-158.

<sup>10</sup> It is worth noting that more recently police initiatives such as the creation of the Strathclyde Police Domestic Abuse Task Force have sought to focus explicitly on all aspects of abuse including physical, sexual and emotional abuse and neglect. See [http://www.strathclyde.police.uk/about\\_us/force-overview/priorities/public\\_protection/](http://www.strathclyde.police.uk/about_us/force-overview/priorities/public_protection/) For further information.

<sup>11</sup> *Bevacqua and S. v. Bulgaria*, (Application no. 71127/01), 12 June 2008, para 83.

<sup>12</sup> *Kontrovà v. Slovakia*, (Application no. 7510/04), 31 May 2007. See also *Opuz v. Turkey*, (Application no. 33401/02), 9 June 2009 and *Branko Tomaši and Others v. Croatia*, (Application no. 46598/06), 15 January 2009.

<sup>13</sup> *Opuz v. Turkey* (Appl.no. 33401/02)

<sup>14</sup> Alongside the specialist court, the support services (Association of Service Solutions in Scotland - ASSIST) are available to support people before, during and after cases go to court. To ensure consistency dedicated judges (sheriffs) and public prosecutors (procurators fiscal) deal with all cases of domestic abuse.

<sup>15</sup> More information on the requirements of the Convention is available here:

[http://www.coe.int/t/dghl/standardsetting/convention-violence/default\\_en.asp](http://www.coe.int/t/dghl/standardsetting/convention-violence/default_en.asp)

<sup>16</sup> The Equalities and Human Rights Commission published guidance that emphasised the importance of addressing 'violence against women' to complying with the Gender Duty .

<sup>17</sup> Relevant statutes include the Domestic Abuse (Scotland) Act 2011, Matrimonial Homes (Family Protection)(Scotland) Act 1981, the Protection from Harassment Act 1997, the Protection from Abuse (Scotland) Act 2001, the Housing (Scotland) Acts 1987 and 2001, the Children (Scotland) Act 1995 and the Legal Aid (Scotland) Act 1986.

<sup>18</sup> Kenneth Norrie, "Families in Fear", *The Journal*, 18 July 2011.

<sup>19</sup> *Ibid.*

<sup>20</sup> In 2000, the Scottish Partnership on Domestic Abuse produced the National Strategy to Address Domestic Abuse to ensure that women, children and young people who had experienced domestic abuse received a consistent service throughout Scotland. A National Group to Address Domestic Abuse was subsequently established to oversee the implementation of this strategy. In 2003, the group's remit was extended to include all forms of violence against women. The National Group subsequently established an expert group to look at developing an approach to tackling violence against women. The report of this group and the subsequent consultations led to the later development of DONNELLEY, R. 2009. *Safer Lives: Changed Lives A Shared Approach to Tackling Violence Against Women in Scotland*. Edinburgh: Scottish Government. In addition, the National Domestic Abuse Delivery Group for Children and Young People was established in 2006 to specifically review policy and practice in relation to children and young people affected by domestic abuse in Scotland and to report to Ministers.

<sup>21</sup> Domestic abuse in Scotland has been the subject of a government-led communications campaign since 1998. The main objective of the campaign is to reinforce public opposition to, and condemnation of,

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domestic abuse as totally unacceptable behaviour. Research to monitor the awareness and effectiveness of the campaign has been conducted annually since the inception of the campaign, see SCOTTISH GOVERNMENT 2009. DOMESTIC ABUSE 2008/09: POST CAMPAIGN EVALUATION REPORT Edinburgh: Scottish Government.. This style of campaign has been criticised, however, for not presenting a gender-fair view of domestic abuse AMIS 2011. Annual Report: 2010-2011. Dunfermline: Abused Men In Scotland. This issue is explored in more detail later in this section.

22 The Domestic Abuse Court in Glasgow was established in October 2004. A 2007 review of the pilot exercise found overwhelming support for a specialist court approach to domestic abuse and that the court had had a positive impact upon almost all of its original aims. It was found that the pilot domestic abuse court was more expensive than a 'traditional' sheriff summary court but that, as domestic abuse has a high cost for victims and society, the extra level of cost may be justifiable. The review did not reach a conclusion in relation to recidivism. REID HOWIE ASSOCIATES 2007. Evaluation of The Pilot Domestic Abuse Court. Edinburgh: Reid Howie Associates.

23 SCOTTISH GOVERNMENT 2008b. National Domestic Abuse Delivery Plan for Children and Young People. Edinburgh: Scottish government. (Scottish Government 2008a)

24 DONNELLEY, R. 2009. Safer Lives: Changed Lives A Shared Approach to Tackling Violence Against Women in Scotland. Edinburgh: Scottish Government.

25 SCOTTISH EXECUTIVE 2004. Domestic Abuse: A National Training Strategy. Edinburgh: Scottish Executive.: A National Training Strategy

26 Scottish Women's Aid for example provides a high degree of scrutiny of government policy (both local and central) on the issue of domestic abuse, undertaking analyses of Local Authority Gender Equality Schemes and Single Outcome Agreements (See SCOTTISH WOMEN'S AID 2010. Analysis of Local Authority Gender Equality Schemes. Scottish Women's Aid, SCOTTISH WOMEN'S AID 2009. Analysis of Single Outcome Agreements 2009. Scottish Women's Aid.) Scottish Women's Aid is also a commissioning body in relation to research into domestic abuse (see, for example, STAFFORD, A., VINCENT, S., SMITH, C. & GRIMES, M. 2009. Evaluation of the Scottish Government Children's Services Women's Aid Fund: Main Report. The University of Edinburgh/NSPCC Centre for UK-Wide Learning in Child Protection.), which examined the experiences of young people forced to move house as a result of domestic abuse) and as such has an influential role in shaping government policy and practice.

<sup>27</sup> For further information see: [http://www.strathclyde.police.uk/about\\_us/force-overview/priorities/public\\_protection/](http://www.strathclyde.police.uk/about_us/force-overview/priorities/public_protection/)

28 This study was commissioned in response to rising incidents of domestic abuse reported to the police in North Ayrshire in the period 2002/03 to 2007/08 (a trend replicated in every local authority area in Scotland). In 2007/08, North Ayrshire Police recorded a higher rate of domestic abuse incidents than the Scottish average and only three other local authorities in Strathclyde Police area reported a higher rate (West Dunbartonshire, Glasgow and Inverclyde).

<sup>29</sup> See SCOTT, M. 2008. Older women and domestic violence in Scotland - update 2008 *In*: MORTON, S. (ed.). University of Edinburgh Centre for Research on Families and Relationships.

30 For example see WISE WOMEN 2010. Violence Against Disabled Women Survey. Wise Women. This scoping project found that all of the 62 women surveyed had a direct experience of violence and abuse with 73 per cent experiencing domestic abuse. See also SCOTTISH GOVERNMENT 2012c. The Scottish Social Housing Charter. *In*: GOVERNMENT, S. (ed.). Edinburgh: Scottish Government.

31 While there is less evidence available in relation to the experiences of minorities, it has been reported that women who are members of ethnic minorities tend to suffer domestic abuse for a longer period before reporting it. Estimates show that it may take a minority ethnic woman ten years to leave a violent partner DONNELLEY, R. 2009. Safer Lives: Changed Lives A Shared Approach to Tackling Violence Against Women in Scotland. Edinburgh: Scottish Government.

32 See ZIMMERMAN, C., HOSSAIN, M., KISS, L., HOEY, J., WENEDEN, K., WATTS, C., BHATTI, S., CHRISTIE, G. & BAILLOT, H. 2009. Asylum-Seeking Women, Violence & Health: Results from a Pilot Study in Scotland and Belgium. London School of Hygiene and Tropical Medicine, Scottish Refugee Council. A survey of 46 women seeking asylum in Scotland found that 70 per cent had experienced physical and/or sexual violence in their lifetime.

33 A Scottish Women's Aid report No Recourse to Public Funds refers to a finding by Amnesty International that highlighted the plight of women with no recourse to public funds (women who, because of their insecure immigration status, are not entitled to welfare benefits or temporary or permanent local



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authority housing). The Scottish Women's Aid survey found that 176 women with no recourse to public funds requested support from Women's Aid groups in Scotland between 1 April 2007 and 31 March 2008. Most of those seeking refuge were not accommodated because the groups could not access funding. Some local authorities were able to accommodate the child but not the mother, contrary, in the view of Scottish Women's Aid, to the best interests of the child and the principles of the Children (Scotland) Act 1995. SCOTTISH WOMEN'S AID 2008. No Recourse to Public Funds Survey Report Scottish Women's Aid.

34 The particular needs of young people affected by domestic abuse have been intrinsic to government policy on domestic abuse and are themselves the subject of a considerable volume of specific literature. A useful summary of the preceding research on domestic abuse commissioned in the Scottish context and key UK research on children and domestic abuse specifically can be found here: STAFFORD, A., STEAD, J. & GRIMES, M. 2007. Support Needs of Children and Young People who have to move because of Domestic Abuse The University of Edinburgh, NSPCC Centre for UK-wide Learning in Child Protection (CLiCP). *ibid*, WEAVER, L. 2006. Mapping service responses to children and young people affected by domestic abuse and other gender based violence in Glasgow. Keeping Children & Young People Safe Group, Glasgow Community Safety Partnership, Glasgow Violence Against Women Partnership, Glasgow City Council.

35 See for example: There are a range of comprehensive literature reviews on the subject, including, for example, within SCOTTISH GOVERNMENT 2008b. National Domestic Abuse Delivery Plan for Children and Young People. Edinburgh: Scottish government. Also see BRUNNER, R. 2010. A Baseline Study of Domestic Abuse Prevention Activities in Seven Local Authorities in Scotland. University of Strathclyde, National Children and Young People's Prevention Network, HURLEY, N., KENNEDY, K., WILSON, L. & HENDERSON, S. 2007. Mapping of Education and Training Addressing Violence Against Women. Blake Stevenson Ltd, REID HOWIE ASSOCIATES 2007. Evaluation of The Pilot Domestic Abuse Court. Edinburgh: Reid Howie Associates, SCOTTISH EXECUTIVE 2004. Domestic Abuse: A National Training Strategy. Edinburgh: Scottish Executive, SCOTTISH GOVERNMENT 2009. DOMESTIC ABUSE 2008/09: POST CAMPAIGN EVALUATION REPORT Edinburgh: Scottish Government, SCOTTISH WOMEN'S AID 2009. Analysis of Single Outcome Agreements 2009. Scottish Women's Aid, TNS SYSTEM THREE 2006. Domestic Abuse Post-Advertising Research, Wave 9 – 2006,. TNS System Three, UHI POLICY WEB 2006. Policy Brief: Developing Gender Research in Rural Scotland. *PolicyWeb, policy brief*,. University of the Highlands and Islands.

36 "In Scotland, the terms transgender people and trans people are used as equivalent inclusive umbrella terms encompassing a diverse range of people who find their gender identity does not fully correspond with the sex they were assigned at birth" (ROCH, A., MORTON, J. & RITCHIE, G. 2010. Out of sight, out of mind? Transgender People's Experiences of Domestic Abuse. Edinburgh: LGBT Youth Scotland & Equality Network."

37 45 per cent had experienced physically abusive behaviour; 47 per cent had experienced some form of sexual abuse; 37 per cent said that someone had forced, or tried to force them to have sex when they were under the age of 16; 46 per cent said that someone had forced, or tried to force them to engage in some other form of sexual activity when under the age of 16 and ten per cent stated that someone had forced, or tried to force them to engage in sexual activity for money.

38 Similarly, Dempsey refers to the "hostility of some elements of the feminist and Women's Aid movements towards trans people" (Dempsey 2010, page 209).

<sup>39</sup> BBC News, "Domestic abuse against men rises in Scotland", 6 October 2011.

<http://www.bbc.co.uk/news/uk-scotland-15189695>

40 Currently there are approximately 7,500 dedicated spaces in refuges in England and Wales for women fleeing domestic abuse, with 23 dedicated spaces for men. In Scotland and Northern Ireland there are no dedicated spaces in refuges or safe houses that exist specifically for male victims MAYS, J. 2010. Domestic Violence: The Male Perspective. Ascot: Parity.

<sup>41</sup> See <http://www.abusedmeninScotland.org/>

<sup>42</sup> This was based on research involving 33 children and young people whose mothers (no fathers) had suffered domestic abuse. A group of these young people continues to work with the Equality Unit and have a website and produced a DVD for young people. Neither the website nor the DVD mentions male victims or female abusers (Voice Against Violence).

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43 The Cedar Project originated in Canada and provides a therapeutic 12 week, group-work programme for children and young people who have experienced domestic abuse (involving their mother). This runs alongside a concurrent group work programme for their mothers.

<sup>44</sup> UN Doc. CEDAW/C/UK/CO/6.

<sup>45</sup> See <http://www.scotland.gov.uk/Resource/0039/00394135.doc> for details of projects being funded.

<sup>46</sup> Universal Declaration of Human Rights, 1948, Article 16, UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, article 1, The Right to Marry: article 12 of the European Convention on Human Rights; article 9 of the European Union Charter on Fundamental Rights.

<sup>47</sup> Cheall v United Kingdom (1985) 42 DR 178, at 185.

<sup>48</sup> Liberty, Liberty's Briefing: Forced Marriage (Civil Protection) Bill, January 2007.

<sup>49</sup> Previously, up to around 10 per cent of the cases dealt with by the Forced Marriages Unit involved victims from Scotland TAYLOR, L. 2010. SPICe Briefing Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill. Edinburgh: SPICe.

<sup>50</sup> "Force" in this context is wider than the use of coercion, and includes knowingly taking advantage of a person's incapacity to consent or to understand the nature of marriage (s 1(6))." Norrie, "Families in Fear", The Journal, 18 July 2011.

<sup>51</sup> Ss 3-4.

<sup>52</sup> S 2(1).

<sup>53</sup> Ministry of Justice, 2009 cited in TAYLOR, L. 2010. SPICe Briefing Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Bill. Edinburgh: SPICe.

<sup>54</sup> Seven EU countries have recognised in law the equal right of same sex couples to marry. These are Belgium, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden.

<sup>55</sup> Schalk and Kopf v Austria [2010] 30141/04

<sup>56</sup> Schalk and Kopf v Austria [2010] 30141/04

<sup>57</sup> Schalk and Kopf v Austria [2010] 30141/04

<sup>58</sup> See for example, The Church of Scientology Moscow v Russia [2007] ECHR 258

<sup>59</sup> The term learning disabilities is used in this report. It is, however, acknowledged that some other terms are preferred by others. For example, the UN Disability Convention refers to 'intellectual disabilities' and the disabled people's organisation People First (Scotland) prefers 'learning difficulties'.

<sup>60</sup> In 2008 the Scottish Consortium for Learning Disability eSAY team began collecting national data of people with learning disabilities for the Scottish Government. In 2010, 32 local authorities provided data on 27,391 adults across Scotland ESAY 2010. Statistics Release: Adults with learning disabilities - implementation of 'The same as you?' Scotland 2010. Glasgow: Scottish Consortium for Learning Disability.

<sup>61</sup> Scottish Government, Adults with Incapacity (Scotland) Act 2000: a short guide to the Act, 2008.

<sup>62</sup> Ibid.

<sup>63</sup> Shtukaturov v Russia (application no. 44009/05) decision of 27 March 2008.

<sup>64</sup> This includes: ALTRUM, Alzheimer Scotland, Coalition of Care and Support Providers in Scotland (CCPS), Down's Syndrome Scotland, ENABLE Scotland, Inclusion Scotland, In Control Scotland, Independent Living in Scotland, Learning Disability Alliance Scotland, Long Term Conditions Alliance Scotland (LTCAS), People First (Scotland), Sense Scotland, Values Into Action Scotland (VIAS).

<sup>65</sup> Campaign for a Fair Society, Coalition Stakeholder Submission, Universal Periodic Review 2012, para 4.2.1.

<sup>66</sup> SHRC, Submission to the Scottish Government on a Mental Health Strategy for Scotland 2011-2015, February 2012.

<sup>67</sup> Under the 2009 Act, a "mental disorder" has the same meaning as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (i.e. any mental illness, personality disorder or learning disability).

<sup>68</sup> SHRC and EHRC, Being Part of Scotland's Story under the Disability Convention, April 2011, p36.

<sup>69</sup> The research is based on the New Zealand rather than the Scottish experience.

<sup>70</sup> SCLD is a charity that is made up of [12 Partner Organisations](#) (with funding from the Scottish Government) who work together to help people make the changes set out in 'The same as you?' [SCOTTISH GOVERNMENT 2000. The Same as You? A review of services for people with learning disabilities. Edinburgh: Scottish Government]. The Same as you? was the product of collaborative work

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with people with learning disabilities, their family carers as well as people who plan and provide services and support. It contains 29 recommendations to improve the lived experience of people with learning disabilities.

71 Under the SHARE programme <http://www.sphsu.mrc.ac.uk/research-programmes/sh/ev/share.html>

72 One Parent Families Scotland, a charitable organization that works to ensure that all families, particularly those headed by a lone parent, have the support, information and confidence needed to play a full part in Scotland's economic and social life, has produced a short guide for lone fathers (both those with care and non-resident parents) (OPFS 2010).

73 Section 11(7) (a).

74 Section 11(7) (b).

75 United Kingdom Supreme Court 2010. Accessible at [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2010\\_0128\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0128_Judgment.pdf), accessed on 14th March 2012.

<sup>76</sup> Principal Reporter v K [2010] UKSC 56, para 53.

<sup>77</sup> (1995) 20 EHRR 205

78 <http://www.legislation.gov.uk/asp/2006/8/contents>

79 See <http://www.fnf.org.uk/>

80 See the thematic section entitled Living in Detention for further information about women in prison.

81 Children may also feel relief at the imprisonment of an abusive, threatening or criminal parent or may, where the imprisoned parent played no part in the child's life, be unaffected.