Ministry of Justice

Assessing Risk of Harm to Children and Parents in Private Law Children Cases

Final Report

June 2020

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Executive Summary

1. This is the final report of the expert panel, which reflects the findings from the call for evidence, following over 1,200 responses from individuals and organisations across England and Wales, together with roundtables and focus groups held with professionals, parents and children with experience of the family courts. Most of the evidence received focused on domestic abuse.

2. This final report provides an understanding of how effectively the family courts identify and respond to allegations of domestic abuse and other serious offences, in cases involving disputes between parents about the arrangements for their children, known as 'private law children proceedings'.

3. It makes findings in relation to both the processes and the outcomes for parties and children involved in such proceedings, drawing conclusions from individual submissions from those with personal experience in private law children proceedings, including victims of domestic abuse. While the panel was unable to review individual case files, evidence from the call for evidence, roundtables and focus groups has been supplemented with a literature review and a review of relevant case law.

4. The panel makes several recommendations for next steps to be taken forward by the family justice system (chapter 11) and summarised below.

Why change is needed

5. Every day some of the most vulnerable people in our society come before the family courts, where difficult decisions are made in often highly emotive cases, and so it is crucial that the system is able to protect them from further harm and the risk of harm.

6. The legal framework set out in the Children Act 1989 requires the court to give paramount consideration to the welfare of the child. Despite this, the evidence submitted to the panel demonstrates continuing concerns around how the family court system recognises and responds to allegations of, and proven harm to children and victim parents in private law children proceedings.

7. Whilst the panel has identified some good practice and widespread good intentions from those working under increasing pressure within the family justice system, it has also unveiled deep-seated and systematic issues that were found to affect how risk to both children and adults is identified and managed.

The challenges in addressing abuse and other serious offences

8. Respondents to the call for evidence raised concerns about how family courts address domestic abuse and child sexual abuse in private law children proceedings. Submissions highlighted a feeling that abuse is systematically minimised, ranging from children's voices not being heard, allegations being ignored, dismissed or disbelieved, to inadequate assessment of risk, traumatic court processes, perceived unsafe child arrangements, and abusers exercising continued control through repeat litigation and the threat of repeat litigation. The panel found these issues were underpinned by the following key themes in the evidence that was reviewed:
    - Resource constraints; resources available have been inadequate to keep up with increasing demand in private law children proceedings, and more parties are coming to court unrepresented.
    - The pro-contact culture; respondents felt that courts placed undue priority on ensuring contact with the non-resident parent, which resulted in systemic minimisation of allegations of domestic abuse.
    - Working in silos; submissions highlighted differences in approaches and culture between criminal justice, child protection (public law) and private law children proceedings, and lack of communication and coordination between family courts and other courts and agencies working with families, which led to contradictory decisions and confusion.
    - An adversarial system; with parents placed in opposition on what is often not a level playing field in cases involving domestic abuse, child sexual abuse and self-representation, with little or no involvement of the child.

Raising and evidencing domestic abuse

9. The evidence from submissions demonstrated that in general, victims faced a number of barriers to raising domestic abuse, many of which overlap with the above challenges and include:
    - The pro-contact culture of the courts and professionals involved in child arrangement cases; submissions highlighted a resulting lack of understanding of the different forms that domestic abuse takes, and of the ongoing impacts of abuse on children and victim parents, the systematic minimisation or disbelief of abuse, and the acceptance of counter-allegations without robust scrutiny.
    - Evidencing abuse; victims reported difficulties evidencing abuse, particularly where there was a focus on single incidents or recent physical abuse, and where they encountered stereotypical views of how an 'ideal victim' should behave.
    - Silo working can result in evidence of abuse accepted in one system, for example the criminal courts, not being acknowledged or effectively engaged with in the family court.

10. There are particular barriers for victims of BAME backgrounds in raising domestic abuse; victims and the professionals supporting them perceived these barriers as involving racism, in addition to sexism and class prejudice. Male victims also face particular barriers, with some respondents highlighting that stereotypes about 'real' victims present an obstacle to being believed.

Children's Voices

11. The evidence from both research and submissions suggests that too often the voices of children go unheard or are muted in various ways where domestic abuse was raised. A large proportion of children have no direct involvement in the family court process, with parents or carers being relied upon to represent their views. There were a number of barriers to children being able to effectively communicate their views, highlighted to the panel:
    - Limited time. Whilst submissions noted that maximising the time spent with children is important to developing relationships of trust, it was reported that professionals have limited time, and where consultation does take place, this is usually brief.
    - Lack of follow up. Submissions noted that children are rarely consulted once an order has been made; often leaving them with arrangements that may not work effectively or safely.
    - Lack of resources. Inadequate resources can inhibit the extent to which children are involved in proceedings.
    - Pro-contact culture. Submissions identified a process of 'selective listening', whereby children who wish to have contact with their non-resident parent are heard but those who do not wish to have contact are not heard or pressured to change their views. Orders were reported as often prioritising a child spending time with a potentially abusive parent regardless of their particular circumstances.
    - Silo working. Submissions highlighted that courts often failed to engage effectively with organisations that had established strong relationships with a child and may have a more in-depth knowledge of their individual circumstances.
    - Complexity. Evidence noted that properly understanding and representing a child's views could be difficult, with children often being subject to a variety of influences, some of which can be contradictory. This requires both time and skill.

12. Evidence suggested that there are significant negative impacts to children being unheard during proceedings. Children can be left feeling let down or suspicious of authorities, and trust in the court system can be eroded due to a child's negative experiences.

How allegations are dealt with

13. Practice Direction 12J (PD12J) of the Family Procedure Rules 2010 provides detailed guidelines on the actions a court is required to take following allegations of domestic abuse in a child arrangements case. Evidence raised concerns that PD12J is not operating as intended and is being implemented inconsistently.

14. This included concerns about:
    - The pro-contact culture; the presumption of parental involvement, and decisions about when allegations of domestic abuse are considered relevant.
    - The adversarial process; the conduct of fact-finding hearings and perceptions of fairness.
    - Lack of resources; which affect the fact-finding process and the quality of risk assessments, a lack of judicial continuity, and serious difficulties for litigants in person in attempting to navigate the complexities of PD12J without legal advice.
    - Silo working; resulting in a lack of coordination between the fact-finding process and other proceedings.

Safety and experiences at court

15. The experience of court proceedings for victims of domestic abuse is affected by concerns for their physical safety, as well as by the trauma they have experienced as a result of the domestic abuse. Regardless of the outcome of the case, victims generally reported not feeling safe at court and the evidence submitted suggested that they often found that the court proceedings themselves had been re-traumatising.

16. Submissions reported that each stage of the journey through private law children proceedings (getting to court, in the court building itself, in the courtroom and returning to court to respond to repeat applications) brought with it specific safety issues, which involved:
    - Physical security. Many respondents noted that proceedings in the family court were often not accompanied by the adequate provision of special measures, leaving victims vulnerable to intimidation and physical attack.
    - Psychological wellbeing. Victims reported that participating in proceedings and giving evidence of their experiences can be re-traumatising; this is currently not properly addressed.
    - Litigants in person. The impact on litigants in person has been identified as particularly acute with regard to safety and security, as they lack knowledge of the available measures and the rules which provide for them, and are without legal advice which would otherwise alert them of their rights to special measures.

- Direct cross-examination. A victim may face the prospect of being cross-examined by their abuser, in cases where an abuser is representing themselves, or of having to cross-examine their abuser where they are themselves a litigant in person.

17. The evidence suggested that orders made under section 91(14) of the Children Act 1989 ('barring orders') are ineffective to protect victims from further abuse through repeated applications for child arrangements orders. Long-standing case law has established that these orders are exceptional, with the result that the threshold for obtaining an order is perceived to be too high, and the threshold for leave to apply once an order is made is perceived to be too low.

Orders made

18. The orders that the courts make in cases involving domestic abuse and other serious offences can be shaped by the systemic issues already identified. These issues in turn can be seen to give rise to four key themes in how the family courts make child arrangements orders:
    - Children should have contact. Submissions from parents who had alleged abuse as part of proceedings and professionals supporting them reported that in most cases some form of direct contact was still likely to be ordered.
    - Contact should progress. Evidence received by the panel indicated that where a court ordered restrictions to direct contact the aim usually appeared to be to 'progress' to contact on an unrestricted basis. Submissions suggested that interventions such as domestic abuse perpetrator programmes (DAPPs) and supervised contact services can be seen as stepping stones to direct contact.
    - Co-parenting is promoted. Many respondents reported that regardless of the particular circumstances, even where the most serious allegations of domestic abuse were raised, courts expected that parents would work together to facilitate contact arrangements.
    - Dependence on the court is discouraged. Submissions and previous file studies indicate that consent orders are made on a regular basis; victims of abuse may feel pressured to agree to such orders even when they do not consider them to be safe. Review hearings, which might provide a check on the workability and safety of orders, are discouraged and rarely take place.

19. Despite PD12J, respondents felt there was little difference in the orders made between cases that did and did not feature domestic abuse. The courts almost always ordered some form of contact, frequently unrestricted, and usually without requiring an alleged abuser to address their behaviour.

Harm arising from family court orders

20. Respondents felt that orders made by the court had enabled the continued control of children and adult victims of domestic abuse by alleged abusers, as well as the continued abuse of victims and children. Many submissions detailed the long-term impacts of this abuse manifesting in physical, emotional, psychological, financial and educational harm and harm to children's current and future relationships.

21. Many respondents felt that the level of abuse they and their children experienced worsened following proceedings in the family court. There were concerns that efforts to report continuing abuse were treated dismissively by criminal justice and child welfare agencies because of the family court orders. Many respondents also highlighted the negative impacts felt by children who were compelled to have contact with abusive parents, and the burden placed on mothers and children to comply with contact orders compared to minimal expectations on perpetrators of abuse to change their behaviour.

22. Many respondents felt that negative long-term impacts to children's wellbeing from continued contact with an abusive parent vastly outweighed the value of an ongoing relationship with that parent.

The way forward

23. The full list of recommendations presented by the panel can be found in chapter 11 of the report, and are summarised below.

24. The panel hopes that its recommendations will empower judges, lawyers, Cafcass, Cafcass Cymru and other family justice professionals to work to their best potential in private law children's proceedings, and above all, that its recommendations will benefit children and parents experiencing domestic abuse.

25. The recommendations range from legislative amendments to improved training. The MoJ will work with partners across the family justice system to take forward these recommendations, with initial work set out in the accompanying implementation plan. This will include piloting an investigative approach in child arrangements cases, seeking to improve coordination between jurisdictions and agencies, enhancing the voice of the child, better training, and more generally, the introduction of new design principles for private law children proceedings.

Recommendations

1. Overview

- The evidence received by the panel, together with the literature review, show there are four overarching barriers to the family court's ability to respond consistently and effectively to domestic abuse and other serious offences:
  - The court's pro-contact culture
  - The adversarial system
  - Resource limitations affecting all aspects of private law proceedings
  - The way the family court works in silo, lacking coordination with other courts and organisations dealing with domestic abuse.

2. Design principles of the family justice system

- The basic design principles for private law children's proceedings should be:
  - A culture of safety and protection from harm
  - An approach which is investigative and problem solving
  - Resources which are sufficient and used more productively
  - With a more coordinated approach between different parts of the system.
- Procedures need to be designed with the needs of children, litigants in person and domestic abuse and other serious safeguarding concerns as central considerations.

3. A Statement of Practice

- A Statement of Practice is proposed to ensure a consistent and ethical approach to cases raising issues of domestic violence and other serious offences
- The panel invites the President of the Family Division to promote this Statement of Practice, and for it to be incorporated into the Child Arrangements Programme.

4. Review of the presumption of parental involvement

- A review of the presumption of parental involvement in s.1(2A) of the Children Act 1989 is needed urgently in order to address its detrimental effects.

5. Reform to the Child Arrangements Programme

- Family courts should pilot and deliver a reformed Child Arrangements Programme in private law children cases, that is safety-focussed, trauma aware and takes a problem-solving approach.
- The Child Arrangements Programme should incorporate a procedure for identifying abusive applications and managing them swiftly to a summary conclusion.

6. Enhancing the Voice of the child

- The panel recommends that the range of options for hearing from children, together with advocacy, representation and support for children be explored more fully as part of the work of elaborating and piloting the reformed Child Arrangements Programme

7. Safety and security at court

- The provisions in the Domestic Abuse Bill concerning special measures in criminal courts for victims of domestic abuse should be extended to family courts. The Bill should also be amended to bar direct cross-examination in any family proceedings in which there is evidence of domestic abuse, or in which domestic abuse is the subject of proceedings.
- A framework of key entitlements to protect adults and children involved in family court proceedings should be developed, based on the MoJ Code of Practice for Victims of Crime, to include familiarisation visits and a robust response to breaches of safety and security.
- Barring Orders: measures to reverse the 'exceptionality' requirement for a section 91(14) order should be included in the Domestic Abuse Bill. These measures should amend, replace or supplement section 91(14) of the Children Act 1989.
- The panel makes further recommendations with regard to the provision of special measures and the availability of specialist support for victims of domestic abuse.

8. Communication and coordination

- Functioning mechanisms for communication, coordination, continuity and consistency across a range of areas should be put in place at national and local levels. The panel considers that national level mechanisms should be established under the auspices of the President of the Family Division. Local level arrangements to implement national mechanisms and processes should be overseen by Designated Family Judges.
- Urgent consideration should be given by police forces, together with the Family Court and policy representatives, as to how police disclosure may be funded where parties are not legally aided and are not otherwise able to fund it themselves.

9. Resourcing

- The panel recommends additional investment in a number of areas in conjunction with proposed revisions to the Child Arrangements Programme:
  - The court and judicial resources available for private law children's cases – including administrative and welfare support for those hearing such cases to do their job effectively
  - Cafcass and Cafcass Cymru
  - The family court estate
  - Legal aid
  - Funding for specialist assessments

- Domestic Abuse Perpetrator Programmes in both England and Wales
- Supervised contact centres
- Educational and therapeutic provision relating to domestic abuse for parents in private law children proceedings
- Specialist domestic abuse and child abuse support services.

10. Review of Domestic Abuse Perpetrator Programmes

- A review of the current provision of DAPPs to ensure they are effectively focussed on reducing harm for children and families affected by domestic abuse, and are anchored in the underlying design principles recommended by the panel.
- DAPPs should be more widely available in England and Wales and should allow for self-referral for parents in private law children's proceedings.

11. Training

- The panel recommends a wide range of training for all participants in the family justice system, including: a cultural change programme to introduce and embed reforms to private law children's proceedings and help to ensure consistent implementation; and a list of key areas of knowledge required for the effective and consistent implementation of the reformed Child Arrangements Programme.
- The panel suggests that consideration be given to training being conducted on a multi-disciplinary basis across all professions and agencies within the family justice system, to ensure a consistent approach.

12. Social Worker Accreditation

- The panel recommends that social workers undertaking assessments for private law children's proceedings in Wales are trained in domestic abuse to Group 3 Violence Against Women, Domestic Abuse and Sexual Violence National Training Framework standard;
- The panel recommends that social workers undertaking assessments for private law children's proceedings in England are nationally accredited child and family practitioners; and
- The panel recommends the content for the accredited training in Wales and the accreditation assessments in England is reviewed by domestic abuse specialists to help ensure the requisite knowledge and skills are sufficiently assessed.

13. Monitoring and Oversight

The panel recommends:

- The development and implementation of a consistent and comprehensive method of gathering administrative data on cases raising issues of domestic abuse, child sexual abuse and other safeguarding concerns.

- The establishment of a national monitoring team within the office of the Domestic Abuse Commissioner to maintain oversight of and report regularly on the family courts' performance in protecting children and victims from domestic abuse and other risks of harm in private law children's proceedings.
- The inclusion of family courts in local learning reviews (in England), child practice reviews (in Wales) and domestic homicide reviews, where the family concerned have been involved in private law children's proceedings.

14. Further research

- The Ministry of Justice should commission an independent, systematic, retrospective research study on the implementation of the current CAP, PD12J and section 91(14) in cases in which allegations of domestic abuse, child sexual abuse or other serious offences are raised.
- The Child Safeguarding Practice Review panel should conduct a statutory national practice-based review of domestic abuse cases in private law children proceedings during the next 12 months to provide a baseline, and with a 2–3 year post-reform follow-up to look at practice changes; and that the National Independent Safeguarding Board Wales commission a similar review in Wales.
- Any pilots established to test the panel's recommendations for a reformed Child Arrangements Programme should be robustly evaluated using both quantitative and qualitative research methods, including the review of court files, orders and judgments.
- The remit of the national oversight body recommended to be established above should include the commissioning and/or conduct of prospective and on-going research on the implementation of the reformed system for private law children's matters.

1. Introduction from the joint chairs

In 2019, 54,920 private law Children Act cases started in the family courts. Estimates indicate that the prevalence of domestic abuse in these cases is considerably higher than in the general population, with allegations or findings of domestic abuse in samples of child arrangements/contact cases ranging from 49% to 62%.[1] On 21 May 2019 the Ministry of Justice announced a public call for evidence steered by a panel of experts from across the family justice system, to gather evidence on how the family court protects children and parents in private law children cases involving domestic abuse and other serious offences. The aim of this work was better to understand the experiences of those involved in such proceedings, identify any systemic issues, and build a more robust evidence base to inform improvements.

In establishing the panel, we brought together a diverse range of experts, all of whom have a wealth of experience in private family law and in working with and supporting those who have been through the system. Our call for evidence sought views from an even wider range of people, and we received responses from legal and social work practitioners, judges, third sector groups, and, most importantly, those who have personal experience of going through private law children's proceedings as litigants. When we launched the call for evidence, we had planned for a short, focussed exercise to identify the key issues within the system. We received such extensive and detailed evidence in response that to do justice to this, the panel has taken longer than anticipated to produce this final report.

The wide range of expertise on the panel meant there were at times differing views, and this is also true of MoJ and our representation on the panel – we welcome the report and the robust challenge it has provided us with, but the below findings should not be read as an indication of MoJ or wider government policy. Alongside, and informed by, this report, the Government is publishing an implementation plan, outlining what action will be taken forward so that the family courts can better protect children and parents at risk of harm in the future.

We sought evidence on a wide range of harms that people in the family justice system have been, and may continue to be, exposed to – including child sexual exploitation and abuse, rape, murder and other violent crime. However, the overwhelming majority of evidence we received focused on the issue of domestic abuse, and this is therefore the focus of this report. We believe that the report materially enhances our understanding of the experiences of those who are victims of domestic abuse; we are incredibly grateful to all those who submitted evidence and to the panel members who analysed it.

[1] See the literature review accompanying this report, Table 4.1.

We recognise that, whilst the report provides an in-depth analysis of many of the issues identified, there are limits to the evidence and it will not be fully representative of all those in the system. Given the prevalence of domestic abuse in private law children proceedings, it is likely that parties and children affected by domestic abuse will have many different experiences of such proceedings. However we were satisfied that the evidence received in this review from numerous professionals, survivors and others with direct experience of private law children's proceedings was sufficiently (and indeed strongly) consistent as to allow the panel to reach confident views about the systemic problems.

In the family justice system, judges, social workers, lawyers, court staff and other professionals work incredibly hard on a daily basis to make difficult decisions on the best interests of the child, and can do so only on the basis of the information available to them. We are extremely grateful for the ceaseless dedication shown by these individuals and hope that this report and the accompanying Government implementation plan will help them in the vital roles that they perform.

We are very grateful to all panel members for the time and expertise they have shared with us in researching and producing this report. Our particular thanks go to Professors Rosemary Hunter, Liz Trinder and Mandy Burton for their dedicated and tireless work leading the drafting of the report, ensuring that the voices of all those on the panel and who submitted evidence were heard.

Most importantly, thank you to every single person and organisation who responded to the call for evidence; in particular to more than 1,000 individuals, many of whom are victims of domestic abuse, for telling the panel what has happened to them. The publication of this report will ensure that victims of harm will have their voices heard, and that someone acts upon it.

Melissa Case & Nicola Hewer,
Director of Family and Criminal Justice Policy,
Ministry of Justice

Joint Chairs of Panel

2. How the panel went about its work

This call for evidence sought to build a better understanding of how the family court identifies and responds to allegations of domestic abuse and other serious offences in cases involving disputes between parents relating to their children following separation, known as 'private law children proceedings'. We aimed to build a more robust evidence base in relation to both the process and outcomes for the parties and children involved in such proceedings.

Due to the importance and urgency of this work, we were tasked with gathering evidence within three months. In practice, the large number of responses meant that the panel needed an extra six months to ensure that the evidence could be thoroughly analysed and reviewed.

2.1 Our objectives

The overarching research question for the call for evidence was:

> "How effectively do the family courts respond to allegations of domestic abuse and other risks of harm to children and parent victims in private law children proceedings, having regard to both the process and outcomes for the parties and the children?"

The specific objectives of the call for evidence were:

- To understand how Practice Direction 12J,[2] Part 3A FPR 2010,[3] Practice Direction 3AA and section 91(14) orders[4] are being applied in practice and their impact, including the interaction of these Practice Directions with the risk of harm exception to the presumption of parental involvement;
- To understand the challenges relating to the application of the Practice Directions and section 91(14) orders;
- To explore the nature of any inconsistency in the application of the provisions;
- To understand the risk of harm to children and parent victims in continuing to have a relationship with a parent, or to be caused through contact orders to continue to have interaction with a parent perpetrator, where there is evidence of domestic abuse,

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2 These provisions are discussed in more detail in chapter 3. **Practice Direction 12J** sets out the procedure for courts dealing with child arrangements cases where domestic abuse is alleged. It also provides for special arrangements in such cases.

3 **Part 3A** and **Practice Direction 3AA** set out procedure and directions for courts to identify vulnerable witnesses (including protected parties) and to consider special measures to assist them to participate effectively in family proceedings.

4 **Orders pursuant to section 91(14) Children Act 1989**: 'barring orders' prevent a party from making further court applications without prior permission of the court.

including coercive and controlling behaviour, or other conduct that poses a risk of harm to a child or parent.
- To interpret the evidence gathered and make recommendations for next steps.

2.2 The sources of evidence

We designed the evidence gathering programme with the primary emphasis on hearing from those with personal and professional experience of relevant cases. To ensure that there was ample opportunity for individuals and organisations to contribute to the call for evidence the panel chose to:
- carry out a research review and reviews of case law relating to PD12J and section 91(14)
- issue a call for written evidence, and
- hold roundtable events and focus groups.

The panel analysed the responses to the call for evidence using a thematic framework with extensive discussion of themes, underlying issues and recommendations at the panel meetings.

2.2.1 Research review

At our request, Dr Adrienne Barnett of Brunel University led the review of available research on the risks to children and parents involved in private law children cases of domestic abuse and other serious offences, and how these risks are managed by the family court. The research review encompasses three broad themes:
- Children's and parents' experiences of domestic abuse before and after parental separation;
- Children's and parents' experiences of family court proceedings and decision making in the context of domestic abuse;
- How the family court system responds to and manages domestic abuse in private law children cases, including how the courts apply Practice Direction 12J (PD12J), enforce contact orders and manage abusive litigation.[5]

The literature reviewed included a wide variety of research studies published in research reports, monographs and academic journal articles, using a range of methodologies, both in the UK and other jurisdictions. The panel notes that there has been little research on the implementation of the 2017 amendments to PD12J[6] but otherwise, there is a substantial

[5] In relation to other serious offences, a search was conducted for literature on children conceived from stranger or acquaintance rape, but the lack of any relevant literature relating to England and Wales meant that this aspect was not pursued further.

[6] Since the completion of the literature review there have been two studies published: M Lefevre and J Damman, *Practice Direction 12J: What is the Experience of Lawyers Working in Private Law Children Cases?* (2020); IDAS, *Domestic Abuse and the Family Courts: A Review of the Experience and Safeguarding of Survivors of Domestic Abuse and their Children in Respect of Family Court Proceedings* (2020).

research base in all three areas. The full literature review is published alongside this review.

In addition, we identified two areas of case law for more detailed investigation – PD12J and section 91(14). Professor Rosemary Hunter carried out the review of case law on PD12J, Professor Mandy Burton carried out the review of case law on section 91(14) and Lorraine Cavanagh QC provided supplementary analysis. The review of case law can be found as an Appendix to this report

2.2.2 The call for written evidence

The public call for written evidence was to ensure that evidence was gathered from a broad range of individuals and organisations with experience of relevant private law cases. The call for evidence consisted of an online questionnaire made available for a six-week period.[7] The questionnaire was designed to be accessible to both members of the public and professionals.

The questions were structured in eight key sections relating to:

- Private law children proceedings in general;
- Raising allegations of domestic abuse or other serious offences in private law children proceedings;
- Children's voices within these proceedings;
- The procedure where domestic abuse is raised;
- Safety and protection at court for victims of domestic abuse and other serious offences;
- Repeated applications to the family courts in the context of domestic abuse and other serious offences;
- The outcomes for children and victim parents involved in such proceedings.
- Any other information, experiences, or recommendations that the respondent wanted to share.

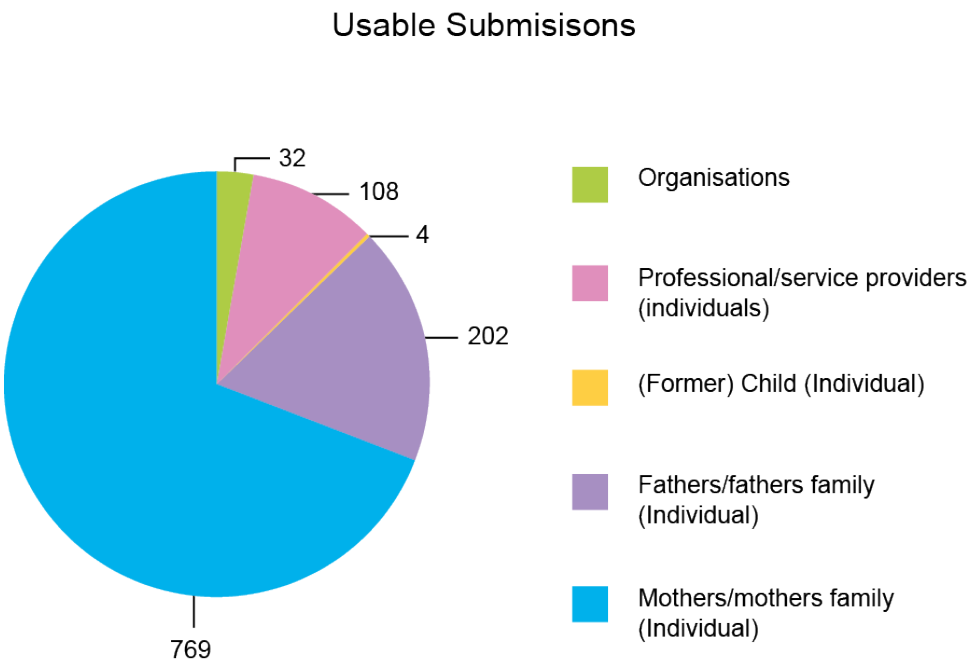
The questionnaire also asked respondents whether their experience in the family court was in 2018–19, 2014–17, or before 2014. These time periods were chosen due to different versions of PD12J being in force, from its introduction in 2008, revision in April 2014, and second revision in October 2017. FPR Part 3A and PD3AA were also introduced in late 2017.

We received 1,226 responses from individuals and organisations across England and Wales. Of these, 111 were unusable or out of scope.[8] Of the remaining 1,115 responses the vast majority (87%) were from individuals with personal experience of private law

[7] The call for evidence was available online from 19th of July to the 26th of August 2019. Copies were also made available in English and Welsh and responses were also accepted via email or hard copy in the post.

[8] Unusable or not in scope being not private law children, not England or Wales, or no response to the questions.

children proceedings – mainly mothers and their families – and 10% were from individuals with professional/practical experience in family courts.[9] The remaining 3% (32 submissions) were from organisations.[10] In analysing the responses, the panel has given due weight to the responses from organisations, reflecting the fact that they represent the collective experience of their members and service users.



The great majority of submissions addressed the part of the research question concerning how effectively the family courts respond to allegations of domestic abuse. Submissions from fathers were mainly from men who had faced allegations of domestic abuse. We received relatively few submissions from fathers who had been victims of domestic abuse. The predominance of submissions from mothers as victims of domestic abuse is in line with the substantial research and statistical evidence demonstrating the higher prevalence, persistence, severity and impact of abuse inflicted by men against female intimate partners.[11] Submissions from legal professionals described their experience in cases involving abuse which varied in persistence and severity, whereas most mothers described relatively severe and sustained abuse, almost invariably involving coercive control.

In relation to other risk of harm to children and parent victims, some mothers and a handful of fathers provided evidence about their experience of family court proceedings when they attempted to protect children who had disclosed sexual abuse by the other parent. We also received evidence from specialist support services for families affected by child

9 For example, Magistrates and Legal Advisers, solicitors and barristers, Cafcass officers and social workers, domestic abuse and family support workers, health professionals (psychologists, therapists, health visitors, GPs) and others practising in the field (McKenzie Friends, academics, campaigners, mediators, MPs/Welsh AMs).

10 For example, legal and domestic abuse sectors, fathers' groups and children's charities.

11 See literature review section 4.2.

sexual abuse, such as Mosac and CARA. In addition, a number of mothers raised issues of child sexual abuse as part of a pattern of abusive behaviour by the father against the children and themselves. As these submissions indicate, domestic abuse, child abuse and child sexual abuse are often interconnected rather than being separate phenomena.

No submissions provided evidence concerning other serious offences towards adult victims that did not constitute a form of domestic abuse.

Although the call for evidence covered private law children proceedings generally, almost all submissions provided evidence about child arrangements cases rather than other types of private law children proceedings.

Individual submissions covered the full range of time periods included in the call for evidence, with substantial numbers of submissions reporting experience in each time period. Respondents could select all the time periods that applied to their case and a large number of submissions spanned more than one time period. This meant it was not always possible to tell which version of PD12J had been in force at the time of specific events described. However, the majority of submissions reported recent experience in the family courts, either in the period 2018–19, or the period spanning 2014–19.

2.2.3 Roundtables

We held three roundtable events for those with professional and practical experience of family justice, particularly in domestic abuse cases. These were:

- Roundtable 1: London, members of the judiciary
- Roundtable 2: London, broader range of practitioners including those working within social care, domestic abuse support services, the third sector, Cafcass, the legal sector, and other relevant services in England.
- Roundtable 3: Cardiff, broad range of practitioners and professionals from across family justice in Wales, including legal professionals, Cafcass Cymru, domestic abuse support services and men's support services.

This approach generated discussion between representatives in different roles to gain a more in-depth understanding of the realities, challenges, and opportunities for improvement within private law children proceedings. Each of the roundtable sessions was audio recorded, and the transcripts were thematically analysed.

2.2.4 Focus groups

We also held ten focus groups across England and Wales, involving different cohorts of individuals to ensure a broad range of experiences and perspectives were captured. Sessions were held with:

- mothers who had been involved in private family law proceedings as victims of domestic abuse and other serious offences; including a session specifically for women from BAME backgrounds;

- fathers who had been involved in proceedings either as a victim of domestic abuse or as an individual who had been subject to allegations made against them; and
- children who had been the subject of such proceedings.

Due to the sensitivities involved, the focus groups were facilitated with the help of third sector organisations working within family justice who could offer specialist support to the participants before, during and after the sessions. These included Women's Aid Federation of England, Welsh Women's Aid, Respect, the Family Justice Young Peoples' Board,[12] and Southall Black Sisters. Each session was attended by a panel member for representation and oversight, was recorded and a note taken. These records were then evaluated thematically as part of the data analysis process.

2.3 Analysis

Around half of the call for evidence submissions, across all of the different groups, were initially thematically analysed by Professor Rosemary Hunter.[13] The remaining submissions were divided up and read by the other panel members. Panel members had access to all the submissions for wider consideration

Professor Hunter's initial assessment of the themes and summary of points emerging from the submissions was shared with the whole panel. We then compared and contrasted the submissions we had read individually, and added additional themes, together with specific points from the roundtable and focus group transcripts. Good practice and suggestions for change were also highlighted and identified from the submissions. We had an open discussion on the themes to build a consistent understanding of the issues and agreed the key themes.

An important observation from the analysis was the differences in experience reported in the submissions from mothers and those from fathers. Mothers' submissions wanted the abuse they had suffered to stop and to ensure their children were protected from harm. They reported that court proceedings did not provide either of these outcomes, and often made the situation worse. By contrast, fathers' submissions evidenced a higher level of experience of no-contact and indirect contact orders, and a much higher degree of familiarity with section 91(14) orders. Overall, this suggests that the responses received from mothers and fathers came from somewhat different groups of people representing

[12] The FJYPB is sponsored and its work is facilitated by Cafcass, but the Board itself is independent. Its remit covers both England and Wales.

[13] The sample consisted of 200 mothers' submissions, all fathers' submissions, all individual submissions from professionals/service providers and all organisational submissions. Thematic analysis involves closely examining qualitative data to identify common themes – topics, ideas and issues – that come up repeatedly. Each idea is given a shorthand label (aka codes) to describe its content. These codes are applied across all submissions consistently to identify similar content across multiple submissions. Similar codes are grouped together as themes. The process becomes iterative until all the common key topics, ideas and issues across all the data are coded and all the resulting themes identified. The analysis write-up will generally be structured by the final themes identified.

different kinds of family court experience. This should be borne in mind when the differences in views between fathers and mothers are noted in this report.

Even with the differences between mothers' and fathers' submissions, however, it was noticeable that there was a high degree of consistency in submissions and in the roundtables and focus groups.

In addition, there was a general continuity of reported experience over time rather than differences between different time periods. The analysis also identified continuity of issues between England and Wales. The call for evidence did not ask respondents about the geographical location of their experience, although a few submissions did mention their location or otherwise referred to factors that made their location obvious. As described above, practitioner and survivor roundtables were held in both England and Wales. There were some specific issues raised in relation to England or Wales (e.g. the provision or unavailability of domestic abuse perpetrator programmes), and where national differences were evident we have reported them as such.

2.4 Report writing and formulation of recommendations

The report writing and formulation of recommendations occurred in parallel.

Given the high degree of consistency between submissions and the clear common themes that emerged, we decided to integrate the evidence into the various chapters of the report rather than report the evidence from different groups separately. Therefore, the key themes from the whole data gathering exercise were used as the basis for the structure and content of the final report.

Themes from the research review, call for evidence, focus groups and roundtables were allocated to specific chapters to ensure all themes were covered and duplication minimised through cross-references as needed. Professors Rosemary Hunter, Liz Trinder and Mandy Burton then completed initial drafts of the chapters which were discussed by the panel and subsequently re-drafted in response to feedback from panel members, and edited for consistency of language and style, by the same authors and the Panel Secretariat. Alongside these draft chapters, we drew on suggestions for changes identified in the data gathering exercise and the panel members' considerable expertise to formulate and agree the recommendations.

2.5 Robustness and limitations of the evidence

The panel was able to draw upon a wide range of evidence to inform its conclusions, including individual submissions, roundtable and focus group discussions and the review of national and international research. We are confident that our analysis, and the recommendations that we draw from it, do present a robust picture of how family courts

deal with domestic abuse cases and cases raising other risks of harm in private law children proceedings, and the challenges in doing so.

It is important, however, to recognise the limitations of the evidence considered by the panel. Some submissions were critical of the process by which the panel gathered evidence, and identified a need for independent, quantitative and qualitative research based on analysis of court files, rather than self-reports. Due to the time limits on the panel's data gathering process and the anonymity of respondents we were unable to access court files, transcripts, judgments or orders in the cases described in submissions.

Most of the evidence collected for the panel was qualitative in nature. Qualitative evidence provides a rich body of data insights into *how* the family justice system works and on the experiences of individuals and organisations. But qualitative evidence alone is not designed to tell us how common or frequent those experiences are.

Nor can we tell how representative the submissions are of all court users and professionals. As with all inquiries, the individual and organisational submissions and engagement in the data gathering process were voluntary. There is therefore likely to be some selection bias. Individuals who are largely satisfied with the process and outcomes in the family courts may have less incentive to provide evidence. Similarly, professionals who work in the system may have more incentive to defend how the system operates.

Nor can we test the accuracy and completeness of the accounts given. It is not possible to have an 'objective' account of what occurred in each case. Qualitative evidence presents the perceptions and views of individuals and organisations that respond. These views will be influenced by the attitudes, cultural context, organisational culture, specific role in the proceedings and individual biases of those providing evidence. They can also be subject to recall bias. The panel was well aware that submissions can be based on misunderstandings, misapprehensions or deliberate distortion as well as wishful thinking.

Despite these inherent limitations, we are persuaded that the evidence gathered does identify systemic problems with how family courts deal with domestic abuse cases and cases raising other risks of harm in private law children cases. It is unlikely that the panel has managed to uncover only isolated mistakes or rare events. The evidence does point to issues affecting multiple cases across the system and with potentially serious effects, although we were also able to identify instances of good practice. There are a number of reasons for reaching that conclusion.

First, we had a very large volume of submissions from professionals, and both female and male victims of abuse, all identifying similar problems. Whilst we cannot quantify the extent of those problems, the experiences reported do not appear to be one-off or localised events.

Second, having multiple sources of evidence meant that we were able to cross-check issues and themes from different sources. Whilst we cannot assess the truth or accuracy of any individual submission, the submissions of victims of domestic abuse raised similar themes and concerns. In turn, the themes and concerns raised by victims were supported broadly by most, though not all, of the professional and organisational submissions. Importantly, those issues and concerns were highly consistent with findings from the large body of academic research that was reviewed for the panel.

Third, the panel was careful to assess the perceived authenticity of accounts. In reading the submissions, we were able to distinguish between a minority that appeared to be based on a generic template and the majority with detailed descriptions that appeared to provide authentic accounts of individual experiences. In addition, whilst the overall thrust of the evidence was negative, there were many fairly nuanced accounts, with both positive and negative experiences. Those with experience in a number of different courts gave a sense of variation in practices within and between courts and over time. Deteriorations as well as improvements over time were noted, although the strongest theme was one of continuity, with little appearing to have changed with the implementation and revisions of PD12J. In particular, some respondents described contact which happened when they were children, which may have occurred before PD12J was in force, however there was a consistency in reports through the time periods described in the totality of the data which suggests that there has not been a significant change in children's experiences over time.

Whilst recognising the need for further quantitative research (see chapter 11), we are confident that the research and case law reviews, call for evidence, focus groups and roundtable data do provide a holistic insight into how family courts deal with domestic abuse cases and cases raising other risks of harm in private law children proceedings currently, and the strengths and weaknesses of that approach.

2.6 A note on terminology and presentation

We use 'mothers' and 'fathers' in the report to reflect the submissions received, where particular reports were made or concerns were raised by one group and not the other. We use gender neutral 'parents' when points were raised by both mothers and fathers. References to 'mothers' also include views from family members of mothers, such as the maternal grandmother. Similarly, references to 'fathers' also include views from the families of fathers.

The terms 'victims' and 'perpetrators' of domestic abuse or 'abuser' should be read in context – in some parts of the report they have gendered associations while in others they are intended to be gender-inclusive. These terms are also intended to include people who are alleged to be victims, perpetrators or abusers in the context of court proceedings.

When we refer to submissions by ‘professionals’, this means that the point was made in a number of submissions from professionals, not necessarily all from any particular group of professionals. Where we refer to particular submissions, we do identify the relevant professional group, e.g. ‘a psychologist’, ‘a lawyer’, ‘a domestic abuse worker’. Individual submissions were provided on the basis of anonymity. Organisations that made submissions were asked whether they agreed to be named in the report, and all did agree to this.

When we refer to the family court, family courts or simply ‘the court’, this is intended to cover both the current Family Court and the Family Division of the High Court, as well as courts in which private law children proceedings were held in earlier years, such as Family Proceedings Courts and County Courts. References to ‘Cafcass/Cymru’ mean both organisations. When we intend only one organisation we use either ‘Cafcass’ or ‘Cafcass Cymru’.

The current terminology in private law children cases is that courts make orders for children to ‘live with’ or ‘spend time with’ a parent. Throughout the report we have retained the ‘old’ language of ‘residence’ and ‘contact’, since these were the terms overwhelmingly used in submissions and the terms that will be most familiar to non-legal readers.

Quotations from submissions have been lightly edited to remove misspellings and other obvious errors, without changing the sense being conveyed or the respondent’s individual voice. Longer narratives of respondents’ experiences which assist us to illustrate a point are presented in the form of ‘submission summaries’, which combine paraphrases of parts of the submission with some direct quotation.

The meaning of acronyms used in the report can be found in the List of Acronyms at the end of the report.

3. The Legal Framework

This chapter explains the law in relation to private law children proceedings in cases where there are allegations and/or other evidence of domestic abuse or other serious offences. The key domestic legislation is the Children Act 1989 (Children Act). The provisions of the Children Act relevant to private law children proceedings apply in both England and Wales.[14] The Family Procedure Rules 2010 (FPR) provide a set of rules of court for the Children Act and other family proceedings in the family court and High Court Family Division. The FPR are supplemented by Practice Directions which provide further directions to the court on matters of procedure. The courts must also comply with principles established in case law and certain principles of international law, usually implemented by the introduction of domestic legislation that gives effect to the relevant international treaty.

3.1 Key points

3.1.1 Private law children proceedings

Private law children proceedings are between private individuals, for example two parents, as opposed to proceedings that involve the local authority, such as care proceedings (public law proceedings). They most often relate to applications for a child arrangements order – an order made by a court under section 8 of the Children Act to regulate arrangements relating to who a child should live with, spend time with, or have any other contact with.[15] These were previously called 'contact orders' and 'residence orders'. The current terminology was introduced by the Children and Families Act 2014.

3.1.2 The welfare principle and the welfare checklist

The child's welfare must be the court's paramount consideration in any decision that a court makes about their upbringing. This is referred to as 'the welfare principle' and is contained in section 1(1) of the Children Act. When assessing the child's welfare for the purposes of making, varying, or discharging an order under section 8 of the Children Act, the court must have regard to all the circumstances of the case and in particular to the non-exhaustive list of factors in section 1(3) of the Children Act, known as the welfare checklist. The welfare checklist includes the following factors:

- the ascertainable wishes and feelings of the child (in the light of their age and understanding);

[14] Since 2014, Part III of the Children Act 1989 does not apply in Wales and has been replaced by the Social Services and Well-being (Wales) Act 2014. However, these provisions relate to Local Authorities' duties towards children in need and children at risk of harm rather than to private law children's cases.

[15] Note other private law children proceedings (FPR 12.2), include other section 8 orders (prohibited steps and specific issue orders).

- the child's physical, emotional and educational needs;
- the likely effect on them of any change in circumstances;
- their age, sex, background and any characteristics which the court considers relevant;
- any harm that they have suffered or are at risk of suffering;
- how capable each of their parents (and any other person that the court considers relevant) is of meeting their needs;
- the range of powers available to the court in the proceedings.

Harm is defined in section 31(9) of the Children Act as "ill-treatment or the impairment of health or development, including, for example, impairment suffered from seeing or hearing the ill-treatment of another." This section also makes clear that non-physical considerations are covered by the terms 'development', 'health', and 'ill-treatment'.[16]

The court must also have regard to section 1(2) of the Children Act which states that any delay is likely to prejudice the welfare of the child; and to the 'no order principle' contained in section 1(5), which states that the court must only make an order if it considers that doing so would be better for the child than making no order at all.

3.1.3 The statutory presumption of parental involvement

There is no automatic right to contact between a child and parent. However, section 1(2A) of the Children Act does require the court to presume that the involvement of each parent in their child's life will further the child's welfare, unless there is evidence to suggest that the involvement of that parent in the child's life would put the child at risk of suffering harm.[17] 'Involvement' is defined in section 1(2B) as "involvement of some kind, either direct or indirect, but not any particular division of a child's time." This presumption applies in certain private law children proceedings, including when the court is considering whether to make, vary or discharge a section 8 order.[18] Before the statutory presumption was introduced in 2014, it was already well established in case law that the involvement of both parents in a child's life will usually further the child's welfare and that compelling reasons must be demonstrated for the court to suspend contact.[19]

3.1.4 Human rights and international law

All public authorities, including the courts must comply with the rights enshrined in the European Convention on Human Rights (ECHR). The Human Rights Act 1998 also gave further effect to these rights in domestic law by placing further specific obligations on courts and other public authorities and by providing remedies to individuals for breach of

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16 Private law children proceedings may concern harm and risks of harm to children arising from various forms of parental behaviour. The call for evidence and this report focus on harm and risks of harm arising from domestic abuse and other serious offences by a parent against a child or the other parent, although these may appear alongside and be compounded by other risks and allegations of harm.

17 Children Act 1989, s1(2A); s1(6).

18 Children Act 1989, s1(4)(a); s1(7).

19 See, for example *Re C (A Child)* [2011] EWCA Civ 521; and *Re W (Children)* [2012] EWCA Civ 999.

their human rights. Of particular relevance in the context of private law children proceedings is the right to respect for family life under Article 8 of the ECHR. 'Family life' can include the relationship between a parent and a child, and the court should not interfere with this right, for example by making an order for no contact, unless it is necessary and proportionate to do so, for example to protect a child or adult victim of domestic abuse from serious harm. Also of relevance is Article 6, which protects the right to a fair hearing in determining one's "civil rights". This include disputes concerning child arrangements and other private law children proceedings. In addition, Articles 2 and 3 may be relevant in cases raising allegations of domestic abuse and other serious offences. Article 2 concerns the right to life and Article 3 concerns the right to be free from torture and other inhuman or degrading treatment. The European Court of Human Rights has emphasised that States (including courts) have a positive obligation to provide effective protection when they are aware that an individual is being subjected to or is at risk of these very serious forms of harm.[20]

The United Kingdom is also a state party to the United Nations Convention on the Rights of the Child (UNCRC), meaning that courts and the national governments must have due regard to its provisions. The UNCRC is made up of 54 articles covering all aspects of a child's life. Article 9 provides the right to stay in contact with both parents where the parents are separated, unless this is contrary to the child's best interests. Article 12 provides the right for the child's wishes and feelings to be heard and taken into account during any matters that affect them. Article 19 provides the right for the child to be protected from all forms of physical or mental violence, injury, abuse or maltreatment, including sexual abuse, while in the care of parents. These rights are reflected in domestic legislation, such as in the welfare checklist and the presumption of parental involvement in the Children Act 1989 outlined above. In Wales they are enshrined in law under the Rights of Children and Young Persons (Wales) Measure 2011.[21]

In 2012 the UK Government signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention (IC)), which provides, amongst other things, a commitment to take measures to ensure that child contact does not jeopardise the "rights and safety of the victim or children."[22]

3.1.5 Practice Direction 12B – The Child Arrangements Programme

Practice Direction 12B, known as the 'Child Arrangements Programme' (CAP) supplements the procedural rules that the family courts must follow in all child arrangements cases, which are principally found in FPR Part 12. The current version of

[20] See *Opuz v Turkey* (app no 3340/02, 9/6/09) – a case concerning the failure of criminal courts to protect victims of domestic abuse from breach of their Article 2 and Article 3 rights. See also *Bevacqua and S v Bulgaria* (app no 71127/01, 12/6/08), which found that a family court had breached the Article 8 rights of a child and mother who had been victims of the father's domestic abuse.

[21] See https://gov.wales/childrens-rights-in-wales

[22] Istanbul Convention, Article 31(2).

the CAP was introduced in 2014, and is designed to assist families to reach safe and child-focused agreements for their child, where possible out of the court setting. The CAP describes the four stages of a child arrangements case as: gatekeeping and allocation (when the court decides which tier of the Family Court the case should be allocated to), a First Hearing Dispute Resolution Appointment (FHDRA), a Dispute Resolution Appointment (DRA) and a Final Hearing. At each stage the court must encourage and assist the parties to resolve the issues in dispute between themselves where it is safe and appropriate to do so. The CAP also provides directions to the courts in dealing with applications for enforcement of a child arrangements order. Not all cases will involve all stages as a significant proportion settle at the FHDRA or the DRA.

3.1.6 Domestic abuse and Practice Direction 12J

Practice Direction 12J (PD12J),[23] originally introduced in 2008, sets out what the Family Court or High Court is required to do in all child arrangements cases where domestic abuse is an issue. It applies whether the abuse is admitted or alleged, or if there is any other reason to believe that the child or a party has experienced domestic abuse perpetrated by another party, or that there is a risk of such abuse.

Before PD12J was introduced, guidance to the court dealing specifically with the matter of domestic abuse was issued by the Court of Appeal in the landmark case of *Re L, V, M, H (Contact: Domestic Violence)* [2001].[24] This marked a shift towards a "heightened awareness of the consequences of exposure to domestic violence", and an acknowledgement that there had until then been a "tendency for courts not to tackle allegations…" or to appreciate that abuse between parents involves a "significant failure in parenting – failure to protect the child's carer and failure to protect the child emotionally."[25]

Since its introduction, PD12J has been updated twice to reflect the developing understanding of the impact of domestic abuse on children and parents, and relevant changes in the law. In 2014 it was updated to amend the definition at the time of 'domestic violence'; to provide clearer guidance to the court on the application of the Practice Direction; to provide greater clarity in relation to fact-finding hearings; and to provide stricter rules regarding the making of interim child arrangements orders. It was further updated in 2017 to make clear its mandatory nature; to change the terminology from domestic 'violence' to 'abuse'; to widen the definition of domestic abuse to include culturally specific forms of abuse; to place greater emphasis on the safety of the non-abusive parent as well as the child; and to require the court to consider carefully whether the presumption of parental involvement applies in each case.

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[23] The revised Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm is available here: https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12j

[24] *Re L, V, M, H (Contact: Domestic Violence)* [2001] Fam 260.

[25] *Re L, V, M, H (Contact: Domestic Violence)* [2001] Fam 260.

For the purposes of child arrangements orders, domestic abuse is defined in the current PD12J at paragraph 3 as follows:

> "any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment."

'Coercive behaviour' is defined in PD12J as "an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim." 'Controlling behaviour' is described as "an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour."

Where PD12J applies, the procedure set out in the CAP is extended in several ways. If the court decides it is necessary to hold a fact-finding hearing to determine disputed allegations of domestic abuse, this will generally occur after the FHDRA and before the DRA. If domestic abuse is found to have occurred, the court may further direct the abusive parent to attend a domestic abuse perpetrator programme (DAPP) and/or may direct the preparation of an expert risk assessment. PD12J also specifies additional considerations when a court is making interim orders and final orders. These are explained further below.

3.1.7 Other serious offences

This call for evidence also sought evidence on cases where 'other serious offences' are raised. This term is not defined in law, but the key circumstance, as set out in the panel's terms of reference and in the call for written evidence was that the allegation or other evidence of the serious offence created a risk of harm to the child and/or to a parent. This would therefore include circumstances where one parent has committed, or is alleged to have committed, an offence such as child abuse, including sexual abuse, murder or attempted murder, rape or sexual assault or other offences that cause or could cause a risk of harm to the child and/or a parent. To the extent that these are not forms of domestic abuse, the concept is outside of the scope of Practice Direction 12J; however, the principles contained in the Children Act, PD12B, the Human Rights Act and the UNCRC will still apply. The primary mechanism for considering these kinds of offences for the purposes of private law children proceedings is by reference to their effect on the child's welfare under section 1 of the Children Act; in particular, any harm that the child has suffered or is at risk of suffering as a result of the offence(s) Such a risk of harm is relevant

to whether the statutory presumption of parental involvement in Section 1(2A) should be disapplied.

3.1.8 The overriding objective

The FPR provide instructions on the court's overriding objective of dealing with cases justly having regard to any welfare issues involved, including ensuring that the parties are on an equal footing, and that an appropriate share of the court's resources is allocated to each case depending on factors such as demand, nature and complexity. The court must seek to give effect to the overriding objective when it exercises any power given to it by the FPR, or interprets any rule, and the parties are required to help the court to further the overriding objective.[26]

3.1.9 Making an application to the court for a child arrangements order

Section 10 of the Children Act sets out that the child's mother, father, guardian, anyone with parental responsibility, and a number of other people in specified circumstances can make an application for a child arrangements order without seeking permission from the court. Other people, for example grandparents, can also apply but they will usually need to request permission from the court before doing so. In practice this can be done at the same time as completing an application form.

Section 10 of the Children and Families Act 2014 requires that before making a "relevant family application" a person must attend a family Mediation Information and Assessment Meeting (MIAM) to consider the suitability of mediation or other ways of resolving their dispute. "Relevant family applications" are specified in FPR 3.6 and Practice Direction 3A, and include applications for a child arrangements order and other private law children proceedings. At this meeting, an authorised family mediator provides information about mediation and considers whether mediation is appropriate for resolving the case. FPR 3.8 sets out certain exceptions to the MIAM requirement, including if there is evidence of domestic violence or if the child is subject to a social services care protection plan or enquiries.[27]

The Ministry of Justice recognises that where there is evidence of domestic abuse, victims should not be compelled to attend a MIAM before being able to access the family court, and are eligible both for an exemption from attendance at a MIAM and for legal aid for representation at court. In cases where domestic abuse is alleged but the applicant does not have the required form of evidence for a MIAM exemption, there are professional standards in place that accredited mediators must adhere to, to identify whether it is appropriate to start or continue with mediation in cases of alleged domestic abuse. A mediator conducting a MIAM in such circumstances can themselves exempt the applicant

[26] FPR 1.1; 1.2; 1.3.

[27] FPR 3.8 refers the court to PD3A which details the evidence required to demonstrate an exemption. FPR 3.8 and PD3A refer to 'domestic violence' rather than 'domestic abuse'.

from any further consideration of mediation on the basis that "mediation is otherwise not suitable as a means of resolving the dispute" – FPR 3.8(2)(c).

Many individuals who do attend mediation may not have previously disclosed their domestic abuse, or indeed, may not have been aware that their experiences constituted domestic abuse. Current policy and practice guidelines therefore make clear that professionals must be well trained in identifying the signs of domestic abuse, and be able to deal with this appropriately, not mistaking domestic abuse with parental conflict, and ensuring the protection of vulnerable survivors is paramount.

To apply for a child arrangements order, the person making the application (the applicant) must complete a C100 court form and submit this to the court. In the online application process the C100 and the MIAM certification or exemption forms are combined. There is also a supplementary information form, form C1A, which may be completed by the applicant to give brief details about any allegations of domestic abuse.

Once an application for a child arrangements order is made, the court must send a copy of the C100 and any C1A to the other parent. The other parent may then complete and send to the court a C1A form of their own if they wish to do so.

3.1.10 Legal aid

In some circumstances, legal aid can be provided to help with legal costs, such as the cost of legal advice or representation in court from a solicitor or barrister, and related disbursements. Since 2013, the provision of legal aid has been governed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Decisions on legal aid are made by the Legal Aid Agency. Under LASPO legal aid is not available for private law children proceedings except where a party is a victim of domestic abuse or is seeking to protect a child from child abuse, or where the child is made a party to the proceedings (in which case the child's representation will be publicly funded but not that of the other parties unless they are eligible in their own right).

To qualify for legal aid in private law children proceedings on the basis of domestic or child abuse, the person applying must first provide evidence of abuse or risk of abuse in a form prescribed in the Civil Legal Aid (Procedure) Regulations 2012. The evidence requirements in the 2012 regulations have been amended a number of times, most recently in January 2018, which expanded the scope of evidence of domestic abuse or child abuse that victims could provide and removed time limits from evidence, making it easier for victims or those at risk of domestic abuse to meet the legal aid criteria. Applications for and grants of legal aid have increased since these changes,[28] although to what extent this has resulted from the changes is unknown. Accepted forms of evidence include evidence of a conviction, caution, or ongoing proceedings for a domestic or child

[28] https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-october-to-december-2019

abuse offence, a protective injunction or a letter from an appropriate domestic abuse professional confirming services have been sought from them by the legal aid applicant.

As with all applications for legal aid, the applicant must satisfy the means and merits tests. They must show that they are financially eligible under criteria set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013. In the Legal Support Action Plan, published in February 2019, the MoJ announced that it would be reviewing the legal aid means test. As part of this review there will be specific consideration of how the means test is applied to victim of domestic abuse. They must also show that the form of legal aid to be provided to them (e.g. legal representation) has sufficient merit to warrant legal aid. There are different merits tests depending on the form of legal aid to be provided and these are set out in the Civil Legal Aid (Merits Criteria) Regulations 2013. If a party is not eligible for legal aid and does not obtain their own legal representation, they may represent themselves during the proceedings, and are referred to as a 'litigant in person' (LIP).

3.1.11 Support in court

The court has the power to grant a range of arrangements known as 'participation directions' to support vulnerable persons (parties and witnesses) during family proceedings. These may include arranging for evidence to be given from behind a protective screen, or via a video link; and the provision of separate waiting areas, or special arrangements for entering and leaving the court building.

The rules and guidance relating to the participation of vulnerable persons in proceedings were introduced in late 2017, and are located in Part 3A of the FPR, and the accompanying Practice Direction 3AA (PD3AA). The Rules place a duty on the court to consider whether a party's participation in proceedings and/or the quality of evidence given is likely to be diminished due to their vulnerability; and, if so, whether it is necessary to make any participation directions.[29] The court also has a duty to consider such directions for 'protected parties' – individuals who lack capacity under the Mental Health Act 2005. Further, PD3AA makes clear the court's duty to identify vulnerability at the earliest possible stage, and to work with the parties to ensure that each party or witness can participate in proceedings without being put in fear or distress because of their vulnerability.[30]

In considering whether a person is deemed to be vulnerable, Rule 3A.3 sets out that the court must have regard in particular to a list of matters, including consideration of the impact of any 'actual or perceived intimidation' and any concerns relating to abuse.[31] The meaning of abuse is elaborated on in PD3AA and includes domestic abuse (as defined in PD12J), and a range of other forms of abuse such as sexual abuse, human trafficking, and

[29] FPR 3A.4 and 3A.5.

[30] PD3AA, paragraphs 1.3 and 1.4.

[31] The list of matters is set out at FPR 3A.7, paragraphs (a) to (j) and (m).

certain forms of discrimination-based abuse.[32] Nothing in the rules, however, gives the court the power to direct that public funding must be made available to provide a special measure.[33]

A litigant-in-person also has a right, ordinarily, to have reasonable assistance from a lay person – sometimes called a 'McKenzie Friend'. In 2010, the President of the Family Division and the Master of the Rolls issued Practice Guidance[34] to remind courts and litigants of the principles concerning McKenzie Friends, including the scope of the assistance that they may provide.

3.1.12 Cross-examination

If one or both parties do not have legal representation, then they may be required to cross-examine the other party during the course of private law children proceedings. PD3AA obliges the court to consider making participation directions in relation to the cross-examination of a vulnerable party or witness, which can include questions being posed by the judge rather than the perpetrator or alleged perpetrator. PD12J states that the judge should be prepared to conduct the questioning of the witnesses on behalf of the parties where this is necessary and appropriate and provides that the court may take an inquisitorial approach.[35] The Domestic Abuse Bill currently before parliament contains provisions that will automatically prohibit cross-examination in person where one party has been convicted of, given a caution for, or charged with certain offences against the other party or witness (or vice versa), where an on-notice protective injunction is in force between them or where evidence of domestic abuse as specified in regulations can be adduced. The provisions will also give the court a discretion to give a direction prohibiting cross-examination in person where it would be likely to diminish the quality of the witness's evidence or cause the witness significant distress, and where it would not be contrary to the interests of justice to give the direction. The provisions also give the court a power in specified circumstances to appoint a publicly-funded qualified legal representative to cross-examine the witness in the interests of the party.

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32 PD3AA, paragraph 2.1.

33 FPR3A.8(4).

34 Practice Guidance: McKenzie Friends (Civil and Family Courts) is available here: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/mckenzie-friends-practice-guidance-july-2010.pdf

35 This provision has been elaborated in case law – see the review of case law on PD12J, section 5.3.

3.2 Considering applications for child arrangements orders where there are allegations of domestic abuse or other serious offences

3.2.1 Disputed allegations

Where there are disputed allegations of domestic abuse or other offences that could create a risk of harm to a child or a parent, the court may decide that it is necessary to conduct a fact-finding hearing to establish whether the alleged behaviour occurred.

PD12J states that the court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing with regard to disputed allegations of domestic abuse when it is considering making a child arrangements order or any assessment of risk of harm associated with contact. The Practice Direction further sets out the factors that the court should consider in making this decision.[36] The factors that should be considered include whether there is evidence available to the court that provides a sufficient factual basis on which to proceed (including admissions and evidence already provided to obtain legal aid); the evidence required to resolve the allegations; whether the allegations, if proven, would be relevant to the issue before the court; and the views of the parties and of Cafcass/Cymru; and whether a hearing is necessary and proportionate in all the circumstances of the case.

There is not an equivalent set of provisions relating to other serious offences; however, the CAP directs the court to conduct a fact-finding hearing in accordance with PD12J, where it finds that such a hearing is necessary.[37]

3.2.2 Orders for interim contact

The court may decide to make a child arrangements order before important facts have been established. This is known as an ‘interim order’. Provisions relating to interim orders in PD12J makes clear that the court should not make an interim child arrangements order unless it is satisfied that it is in the interests of the child to do so, and that the order would not expose the child or parent to an ‘unmanageable risk of harm’ (bearing in mind the impact which domestic abuse can have on the emotional wellbeing of the child, the safety of the other parent, and the need to protect against domestic abuse including controlling or coercive behaviour). In assessing this, the court must consider all aspects of the child and parent’s safety, including protection from emotional harm, and the practical implications of the proposed contact; for example, whether contact should be supervised or supported, and whether indirect contact is most appropriate. There is no automatic right to contact, and the welfare and ‘no order’ principles apply throughout the process. PD12J makes clear that the court should not make an interim child arrangements order unless it is satisfied

[36] PD12J, paras 17 and 18.

[37] PD12B, para 20.1.

that it is in the interests of the child to do so, and that the order would not expose the child or parent to an 'unmanageable risk of harm' (bearing in mind the impact which domestic abuse can have on the emotional wellbeing of the child, the safety of the other parent, and the need to protect against domestic abuse including controlling or coercive behaviour).[38] In assessing this, the court must consider all aspects of the child and parent's safety, including protection from emotional harm, and the practical implications of the proposed contact; for example, whether contact should be supervised or supported, and whether indirect contact is most appropriate. There is no automatic right to contact, and the welfare and 'no order' principles apply throughout the process.

3.2.3 Cafcass and Cafcass Cymru

The Children and Family Court Advisory and Support Service (Cafcass) is a statutory body formed in 2001 following the passage of the Criminal Justice and Court Services Act 2000. Its functions in respect of Wales were devolved in 2005 and are discharged by Cafcass Cymru.[39] Cafcass' functions and powers are set out in the Criminal Justice and Court Services Act and include safeguarding and promoting the welfare of children in family court proceedings; giving advice to the court about any application made; making provision for children to be represented in proceedings; and providing information, advice and other support for the children involved in proceedings and their families. A key role of Cafcass and Cafcass Cymru is also to communicate the wishes and feelings of the child during proceedings. In addition to the duties set out in this Act, there are also specific roles given to Cafcass and Cafcass Cymru set out in the Children Act, FPR and Practice Directions.

After an application for a child arrangements order is made, Cafcass or Cafcass Cymru conduct safeguarding checks or enquiries to identify any risks to the child that the court should be aware of.[40] These enquiries in every case involve checks to see whether either parent has a relevant police or criminal record and whether the child or family has been brought to the attention of the Local Authority children's services or children's social care. Cafcass or Cafcass Cymru will also attempt to make telephone contact with each parent (or other party) to elicit any safeguarding concerns that may not be apparent from the application or disclosed by police or Local Authority checks. The results of these enquiries are then reported by Cafcass or Cafcass Cymru via the preparation of a safeguarding report or letter which should be provided to the court prior to the FHDRA. A copy will also be provided to the parties before the FHDRA unless Cafcass or Cafcass Cymru advise the court that doing so might place the child or a party at risk, in which case the matter of disclosure will be considered by the court at the FHDRA.[41] PD12J states that the court should generally not make any orders for contact in the absence of safeguarding

[38] PD12J, paras 25, 26, 27.

[39] See the Children Act 2004, Part 4 and para 13 of Schedule 3 to that Act.

[40] PD12B para 13.1-13.7.

[41] PD12B, para 14.13(a)

information.[42] The safeguarding report or letter will often include recommendations to the court as to how the case should proceed and whether a fact-finding hearing is needed. In addition, a Cafcass or Cafcass Cymru officer will often be present at the FHDRA and may meet with the parties either separately or together, before or during the hearing, to explore ways of resolving the issues in dispute.

3.2.4 Welfare reports

Section 7 of the Children Act empowers the court to direct a Cafcass or Cafcass Cymru officer to report to the court regarding the welfare of a child involved in private law children proceedings. The FPR and Practice Directions provide further details on the court's duties in this respect, and those of Cafcass and Cafcass Cymru, including the court's duty to consider whether a report relating to the child's welfare is required, and the steps that should be followed by Cafcass and Cafcass Cymru when identifying any safety issues.[43] PD12J sets out that the court should consider directing such a report in any case where a risk of harm to a child resulting from domestic abuse is raised as an issue, unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests. The section 7 report should usually be requested after any fact-finding hearing has taken place, and the request for a report should set out clearly which matters the court considers need to be addressed,[44] including any assessment of future risk to the child and/or the victim parent. As an alternative to Cafcass, section 7 reports may be prepared by a local authority social worker if the family is already involved with children's social care. If concerns about the welfare of a child arise during proceedings, the court may order that the local authority make enquiries under section 37 of the Children Act to consider whether further steps should be taken to protect the child.

3.2.5 Separate representation of the child

Subject to the seriousness of the allegations made and the complexity of the case, the court must consider whether it is appropriate for the child who is the subject of the application to be made a party to the proceedings and be separately represented.[45] In cases where a child is joined as a party, that child may be entitled to legal aid, subject to a merits and means test. The court should be vigilant to identify the cases where a children's guardian should be appointed in accordance with Rule 16.4 of the FPR. The powers and duties of a children's guardian are set out in Practice Direction 16A – Representation of Children.

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42 PD12J, para 12.

43 FPR 12.6; PD12B, paras 13.1 and 14.13.

44 PD12J, para 21, 22, 23.

45 PD12J, para 24.

3.2.6 Final orders

When considering a child arrangements order after domestic abuse has been found to have occurred, the court must ensure that any order it makes to finalise the proceedings is in the best interests of the child and will not expose the child to an unmanageable risk of harm.[46] When considering this, the court should in particular apply the individual factors in the welfare checklist with reference to the domestic abuse which has occurred and any expert risk assessments that have been obtained.[47] In particular, the court should consider any harm that the child and the parent with whom the child is living has suffered, and any harm that they are at risk of suffering, if a child arrangements order is made. The court should consider the conduct of both parents towards each other and towards the child, and the impact of that conduct.[48]

PD12J makes clear that the court must not only consider harm to the child, but also any harm that the parent with whom the child is living has suffered, and any harm which they are at risk of suffering if a child arrangements order is made. The court should only make an order for contact if it is satisfied that "the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during, and after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse."[49]

PD12J directs the court to make clear in its judgment how any findings on the issue of domestic abuse have influenced its decision on arrangements for the child. In particular, if the court makes an order for contact with a perpetrator of domestic abuse, the court must always explain its view that the order which it has made is beneficial for the child and will not expose the child to the risk of harm.[50]

3.2.7 Abusive applications

If domestic abuse is established and the court is considering making an order for child arrangements, PD12J makes clear that the court should consider whether the parent making the application is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent.[51]

The court also has the power under section 91(14) of the Children Act to make an order to prevent an individual from making further applications without first seeking the permission of the court, where it finds that it is necessary to do so. Such orders are sometimes referred to as 'barring orders', and are available when the court is disposing of an

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46 PD12J, para 35.

47 The Children Act, s16A sets out that a risk assessment must be carried out and provided to the court where an officer has cause to suspect that the child concerned is at risk of harm.

48 PD12J, para 36.

49 PD12J, para 36.

50 PD12J, para 40.

51 PD12J, para 37(c).

application for an order under the Children Act. As with all applications relating to a child's upbringing, the child's welfare must be the court's paramount consideration in deciding whether to make an order under this section.

The leading Court of Appeal case of *Re P (A Child)* [1999][52] established guidelines on section 91(14) orders, noting that making such an order amounts to an "intrusion into the unrestricted right of the party to bring proceedings", that the power must be viewed as the exception, not the rule; and that it is a weapon of last resort to prevent repeated and unreasonable applications. If a party wishes to apply for leave while a section 91(14) order is in place, the question for the court is whether there is an 'arguable case'. However, the court will be unlikely to grant leave unless there has been a genuine and substantial change in the circumstances that led to the order being made.[53]

[52] *Re P (A Child)* [1999] EWCA Civ 1323.

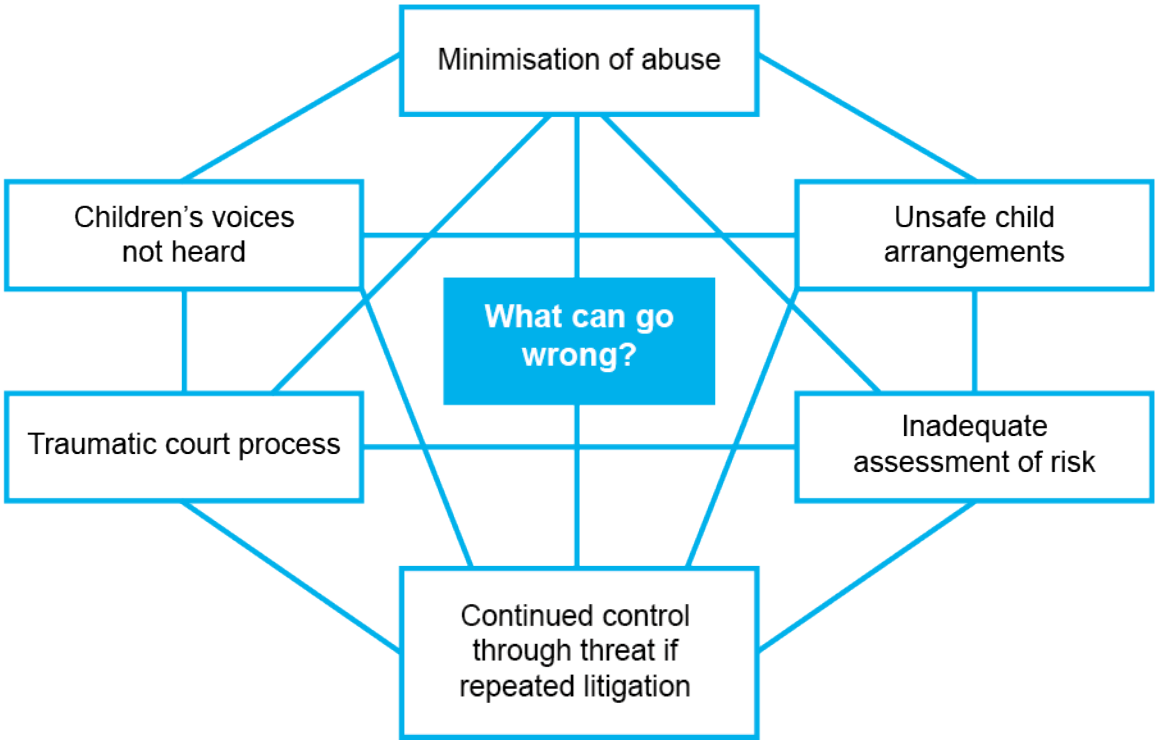
[53] See further the case law review on section 91(14) 'barring orders'.

4. Challenges in addressing domestic abuse and other risks of harm

4.1 How effectively are courts addressing abuse?

The call for evidence provided an opportunity to look at how the family courts deal with domestic abuse and other risks of harm, drawing on the review of case law and research, and on the views and experiences of professionals and users of family courts. Prior research and official statistics have shown a mismatch between the high incidence of allegations of abuse in private law children proceedings on the one hand, and low numbers of orders for no contact, supervised contact or interventions for perpetrators on the other.[54] Whilst the panel has identified some good practice and widespread good intentions, it has unveiled deep-seated and systemic problems with how the family courts identify, assess and manage risk to children and adults, which help to explain this disparity.

The evidence raised a range of concerns about how family courts address domestic abuse and child sexual abuse in private law children proceedings.



[54] See chapter 9 below.

We received many accounts of allegations of domestic abuse being minimised, ignored, side-lined, or disbelieved. Respondents reported difficulties in raising allegations of domestic abuse (chapter 5) and in having those allegations treated as relevant to the court's consideration of child arrangements (chapter 7). A strong theme in submissions was that the voices of children experiencing domestic abuse and child sexual abuse are not sufficiently heard by family courts (chapter 6).

Many submissions reported that court proceedings had not provided protection from further harm for children or adult victims of abuse, but had made things worse, with abuse being continued through court-ordered contact arrangements (chapters 9, 10). Some victims of abuse reported that they and their children had suffered long-term physical, psychological, emotional and financial harm (chapter 10).

Even where respondents reported a positive outcome, a common theme was that victims of domestic abuse experienced proceedings in the family court as re-traumatising (chapter 8). Some had experience of being repeatedly taken back to court with new applications over long periods of time, but this was rarely recognised as a form of abuse or restrained.

4.2 Barriers to effectively tackling abuse

The problems identified are not new. It has been recognised over many years that courts find it difficult to strike an appropriate balance between children's welfare interests in the ongoing involvement of both parents in their lives on the one hand, and in protection from the harm caused by domestic abuse on the other. The senior judiciary have led multiple initiatives to ensure that domestic abuse is addressed effectively, starting with a major report and guidelines in 2001,[55] the landmark Court of Appeal decision in *Re L*,[56] Practice Direction 12J[57] and revisions to the Practice Direction in 2014 and 2017. Despite this activity, the evidence gathered for this review indicates that the courts still struggle to recognise or address abuse effectively. In this section we draw on the evidence to understand why those problems continue. We set out four barriers that make it difficult to identify and address domestic abuse: resource constraints, the court's pro-contact culture, the lack of a joined-up approach (the family court working in a silo), and the adversarial process.

The four barriers are systemic issues. They are a function of how the family justice system operates, rather than being failings of individuals. Importantly too, the evidence suggests that the four factors identified all pull in the same direction, reinforcing each other in making abuse harder to address effectively. Not surprisingly therefore, the evidence

[55] Lord Chancellor's Advisory Board on Family Law: Children Act Sub-Committee, *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-Residential Parents and the Enforcement of Court Orders for Contact* (2002).

[56] *Re L, V, M, H (Contact: Domestic Violence)* [2001] Fam 260.

[57] PD12J 2008/9

suggested that these factors affect everyone working in the family justice system, including judges and magistrates, Cafcass/Cymru, local authority social workers, lawyers and experts in this field.

It is important to note that not all cases will experience the same difficulties. The panel did receive evidence of good practice and reports of positive outcomes. However, these four factors shape and limit the capacity of the family justice system to address domestic abuse as a whole. Further, some features of specific cases can make the experience even more difficult or challenging for parties; in particular racial and cultural stereotypes, geography (especially living in rural areas) and lack of legal representation.

4.2.1 Resource constraints

There was a high level of consensus, amongst professional users especially, that resource constraints hampered the ability of the system to identify and address domestic abuse at all stages of the process, from identification, to adjudication and intervention.

Submissions to the call for evidence pointed to two factors that make resource pressures appear particularly acute. The first is a high level of demand on the family justice system. This stems from the increase in public law cases over the last decade,[58] as well as the return of private law cases to the numbers seen before legal aid changes in 2013.[59] The second factor is the resource available. Despite some increases in family justice spending in the last few years, the resources available in all parts of the system, including for Cafcass/Cymru and external services, have struggled to keep up with the increasing demand. This has meant less resource available at a time when demand is at its highest. The professional consensus was that it was difficult to sustain the justice system on existing resources. This was expressed in the strongest terms by a judge at the judicial roundtable who stated, “the system’s just crumbling now, we just can’t cope with it”.

The panel believes that the shortage of resource affects the whole system, but is most concerning for domestic abuse cases, which are likely to be more resource-intensive to address than non-abuse cases. Safeguarding requires time and resources to do a detailed and careful risk-assessment; the need for special measures requires adequate court facilities; fact-finding hearings require additional judicial time; and additional interventions may be required to make any child arrangements safe. This all costs money. The scarcity of resources mean that the system finds it difficult to address the additional demands presented by domestic abuse cases:

58 Care Crisis Review, *Options for Change* (2018)

59 Family Court Statistics Quarterly https://www.gov.uk/government/collections/family-court-statistics-quarterly

> We're not providing a good service. Across the board. We're trying, but we just can't because the resources that we have and the resources we're provided with, we cannot provide a good enough service for these people who need it, be they perpetrators or accusers. **Judge, Judicial roundtable**

The reduction in resource for legal aid in particular has also introduced a further issue – the steep rise in the number of litigants in person since legal aid changes in 2013. It means that both alleged perpetrators and some victims of abuse who cannot afford to pay for a lawyer find themselves attempting to resolve disputed child arrangements and navigate complex court processes without legal advice or representation.

4.2.2 The pro-contact culture and the minimisation of abuse

The second barrier to the courts addressing domestic abuse effectively is the priority placed by the family justice system on ensuring that contact between the child and non-resident parent will occur. Previous literature has identified the 'pro-contact culture' of the family courts[60] and we have adopted this terminology as appropriate to capture the systemic and deep-seated nature of the courts' commitment to maintaining contact between children and non-resident parents. A 'culture' describes the particular set of beliefs and behaviours (sometimes unconscious or taken-for-granted) of a group of people. Most institutions develop a distinctive culture over time, and the family courts are no exception. This does not mean that all members of the institution necessarily agree with or conform to all aspects of the culture. But it does mean that there is a strong pressure to conform, and that cultural change does not happen easily.

Powerful statements of the family courts' pro-contact culture can be found in judgments of the Court of Appeal. Whilst the Court has reasserted that the child's welfare is the paramount consideration, it has defined welfare as almost invariably requiring contact with the non-resident parent. In *Re C*, Sir James Munby summarised the case law in the following terms:

- "Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
- Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
- …The judge has a positive duty to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact."[61]

[60] See literature review sections 7.1, 7.2 and 7.3.

[61] *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521, per Munby P, para 47.

Similarly, in 2012, Sir Andrew MacFarlane, current President of the Family Division stated that it is "almost always in the interests of a child to have contact".[62]

The expectations extend to ensuring that contact is face to face, rather than merely 'indirect', and is unsupervised if possible. Sir Andrew MacFarlane also stated in 2012 that if no direct contact were possible, then indirect contact was "highly desirable", with direct contact to be reinstated in due course.[63] The general principle in favour of contact, outlined in these Court of Appeal authorities, as well as others, was made explicit in legislation in 2014. The Children Act 1989 was amended to set out that the court was to presume, unless the contrary is shown, that involvement of each parent in the life of the child concerned will further the child's welfare.

There was a consistent theme from the evidence submitted to the panel that parties to private law children cases felt that the imperative of contact operated strongly in their cases. The Association of Lawyers for Children and the Transparency Project considered that family courts balance the desirability of contact and the management of risk in an appropriate way. But other professional and individual respondents expressed concern that the prioritisation of contact prevented the court from undertaking a broad or holistic assessment of the child's welfare. In particular, victims and professionals including domestic abuse specialists, children's charities and some legal professionals perceived the dominance of contact as excluding other welfare considerations, including the child's need for protection from abuse, or the child's wishes and feelings. Establishing contact appears to have been the dominant consideration in the cases described.

The evidence submitted to the panel suggested that the pro-contact culture results in a pattern of minimisation and disbelief of allegations of domestic abuse and child sexual abuse. For example, in subsequent chapters we analyse the evidence suggesting that domestic abuse may be treated as 'historic' to enable contact to occur, rather than considering whether abuse has ongoing relevance to the welfare of the child and non-abusive parent. We also explore the evidence as to how allegations of domestic abuse can sometimes be reformulated as mutual 'high conflict' or, increasingly, used by the other parent as evidence of 'parental alienation'.[64] While parents alleging domestic abuse told the panel that they felt that they were regarded as obstructive, they also felt that abusive parents were generally given the benefit of the doubt and awarded contact without evidence of change. In chapter 9 we discuss the evidence that the courts often order unsupervised contact with little or no evidence of behavioural change on the part of a

62 *Re W (Children)* [2012] EWCA Civ 999.

63 *Re W (Children)* [2012] EWCA Civ 999.

64 The panel acknowledges that 'parental alienation' is a contested concept. However, it was widely referred to in submissions and hence is used in this report to reflect the issues raised in submissions. See the literature review section 7.2.

perpetrator of abuse, which fails to protect children from further harm or support non-abusive parents.

4.2.3 The problem of silo working

Addressing the challenge of tackling domestic abuse requires all agencies and elements of the justice system, statutory services and the domestic abuse sector to take a joined-up approach. Previous research has identified that different parts of the system appear to work in silos, that is failing to coordinate or even working in contradictory ways.[65]

Submissions noted that different parts of the system adopted different approaches, did not always share information, and could reach conflicting and contradictory decisions. Thus, the same parent, typically a mother, could be treated quite differently by the different systems, with varied results for her and the child. In the criminal justice system, she would expect to be treated sympathetically as a victim of a serious crime, with her safety and that of the child paramount. In a public law case, the focus would shift to protecting the child, with the mother being a possible protector but also a potential colluder with the abuser. In a private law case, the same mother would be more likely to be treated, not as a victim or protector, but with suspicion as a threat to the abuser's relationship with the child and a possible alienator.

Those conflicting approaches lead to contradictory decisions between different parts of the justice system. The panel received multiple examples where the protective stance of other parts of the system was undermined by private family law proceedings. Examples included being treated as a high-risk victim of abuse by a MARAC (Multi Agency Risk Assessment Conference), but that assessment being ignored by the family court; children's social care threatening care proceedings if the mother did not separate from her abusive partner, but then supporting a child arrangements application by the father; and cases where mothers were ordered to do handovers with an abuser despite non-molestation orders made by the same family court.

Conversely, the panel was also told of the police refusing to act on any abuse related to contact because it involved a family court order.

A further set of problems caused by a lack of coordination concerns the exchange of information between parts of the system. The panel received multiple submissions detailing instances where information and assessments collected or conducted by other reliable agencies were not used by the family courts to inform decision-making. The panel therefore is concerned that available evidence of domestic abuse and its impacts on children is ignored by family courts, and that risk assessment processes fail to consider indicators and assessments of risk that have been made elsewhere, not least given the

[65] See, especially, the 'three planets model' identified by M Hester (2011) 'The three planet model: Towards an understanding of contradictions in approaches to women and children's safety in contexts of domestic violence', *The British Journal of Social Work*, 41: 837–53 and discussed in the literature review.

dearth of resources the hard-pressed family justice system is able to devote to individual cases.

The life-threatening dangers of poor communication and information sharing between agencies have been repeatedly emphasised in child safeguarding reviews and domestic homicide reviews.[66] By contrast, Ofsted have noted that improvements in the lived experience of children experiencing domestic abuse are usually due to effective multi-agency working.[67]

4.2.4 The problem of an adversarial system

The fourth systemic barrier to addressing domestic abuse is the adversarial court process. In theory, family justice can be an investigative process with the court proactively undertaking a wide-ranging enquiry to establish which arrangements would best promote the welfare of the child.[68] In reality, proceedings are brought by one parent and, especially where allegations of domestic abuse or child abuse are denied, are conducted on an adversarial basis where the court has to adjudicate between the two opposing parents, each trying to win the case. The adult-orientation of proceedings is exacerbated by the fact that most children have little or no involvement in the process, and only a small number are directly represented in the proceedings. This makes it very difficult to maintain a focus on the interests of the child.

The adversarial nature of the process raises additional problems for domestic abuse cases. The cornerstone of the adversarial approach is that it is the role of the judicial officer to ensure there is a level playing field between the parties, whether the parties are represented or not. This is much more challenging where the power dynamic between perpetrator and victim is likely to affect the fairness of the process. It requires the court to ensure that all victims who have experienced abuse are able to participate fully, without intimidation or control. Yet, as we explore in chapter 8, family courts appear to struggle to understand and address these power dynamics. We received evidence, for example, that requests for the use of special measures in court or for a victim to be accompanied by a domestic abuse support worker may be denied by the court on the basis that it would introduce – rather than correct – inequality between the parties.

4.2.5 Intersecting structural disadvantages

Intersecting structural disadvantages arise where an individual's experience is created by the intersection of different structural and systemic factors. How the four systemic barriers identified above operate in individual cases will not be the same for everyone. Rather,

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66 Child Safeguarding Practice Review Panel, *Annual Report 2018–2019* (2020); *Home Office, Domestic Homicide Reviews: Key Findings from Analysis of Domestic Homicide Reviews* (2016).

67 Y Stanley (2020) 'Domestic abuse: Keeping the conversation going' at https://socialcareinspection.blog.gov.uk/2020/01/07/domestic-abuse-keeping-the-conversation-going/

68 See para 28 of PD12J.

parties' experience of these barriers will be influenced by various forms of structural advantage or disadvantage. The forms of structural disadvantage intersecting with experiences of private law children proceedings that were most commonly raised in submissions were economic disadvantage leading to a lack of legal representation, being from a black or minority ethnic background, and living in a rural area. There was relatively little evidence submitted to the panel on how disability intersected with court experiences. However, previous research suggests this can also compound difficulties for litigants in person and victims of domestic abuse.[69]

The most important and frequently mentioned form of structural disadvantage was lack of access to legal representation. Following legal aid reforms in 2013, most private law children cases now involve at least one litigant in person.[70] Research has identified how challenging it is for any litigant in person to navigate family court proceedings by themselves.[71] The challenges are particularly pronounced in domestic abuse and child sexual abuse cases, where self-representation intersects with the pro-contact culture and the adversarial system. Multiple submissions from individual parents and professionals reported that equal participation is very difficult to achieve when victims of abuse and parents attempting to protect a child from abuse have to represent themselves. Victims of abuse and protective parents who appeared as litigants in person reported feeling powerless, confused, unsupported and excluded, which compounded the levels of anxiety, stress, fear and trauma they were already experiencing.

The problems caused by lack of representation also went much wider. Where a victim of domestic abuse or a protective parent is represented and the perpetrator is a LIP, participants in the professionals focus group reported that judges appeared to 'bend over backwards' to assist the LIP to have a fair trial, with examples of abusive behaviours being interpreted and excused as failure to understand the process. Conversely, individual submissions highlighted the pervasive sense of injustice felt by fathers about their inability to access legal aid when their ex-partners alleging abuse can do so, which exacerbates the adversarial nature of the system and results in particular difficulties with cross-examination from the perspective of both parties.

Although legal aid is still available for those victims of domestic abuse who can produce the required evidence of abuse, victims still need to satisfy the means test. This can penalise victims financially who may well have equity in a house, or elsewhere, but very limited available cash to afford legal representation. It can exacerbate economic abuse experienced by a victim if their assets are controlled by the abuser who blocks access to them. We had submissions from victims who re-mortgaged their home, declared

69 L Trinder et al, *Litigants in Person in Private Family Law Cases* (2014).

70 Family Court Statistics Quarterly https://www.gov.uk/government/collections/family-court-statistics-quarterly

71 L Trinder et al, *Litigants in Person in Private Family Law Cases* (2014).

bankruptcy and accrued considerable debt in an effort to have legal representation to prove their allegations of domestic abuse.

The panel received powerful evidence, including from Southall Black Sisters and the BAME focus group, on the vulnerabilities and sense of powerlessness experienced by BAME women who were victims of domestic abuse. These included within-family and within-community expectations, and pressure or blackmail not to report or talk about domestic abuse for fear of bringing shame on the family or community. Participants also reported that victims could be under tremendous social and cultural pressure to reconcile and to agree contact. Women with uncertain immigration status were most at risk of this, as they might have to choose between staying in an abusive situation or risking deportation and the possible permanent loss of their children. Other participants highlighted that victims might have additional language difficulties, be isolated and lack social and cultural sources of support for their parenting, and may be seen by the court as less credible witnesses. Some participants felt that white ex-partners had benefited from racial privilege in courts; they felt acutely ‘othered’ and belittled by the court and identified their experience as racism.

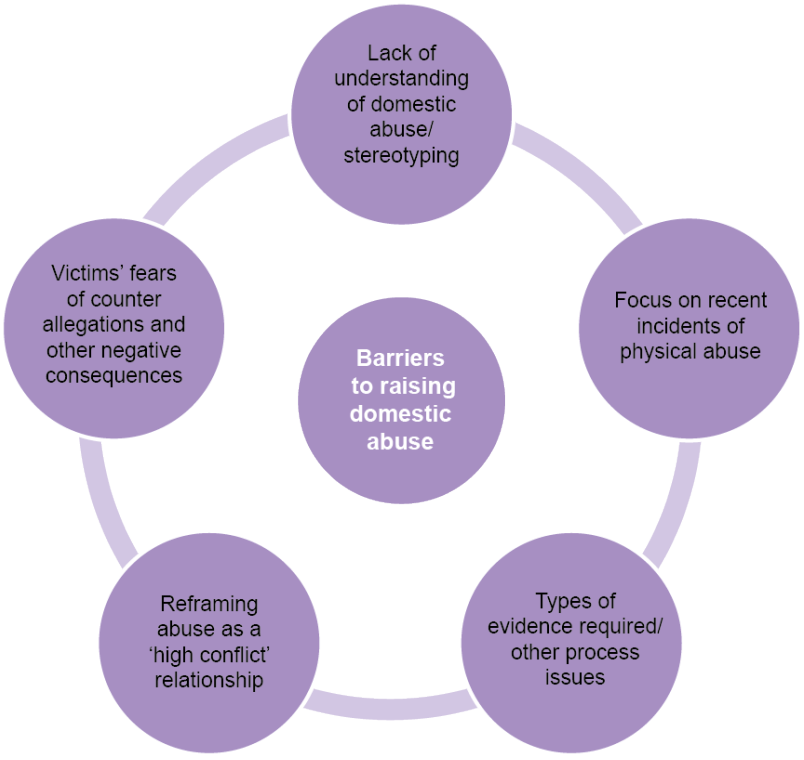
One other commonly raised form of structural disadvantage was where parties lived in a rural area, and faced specific local barriers due to lack of services and isolation. Submissions emphasised that the justice system is not monolithic, but varies significantly between courts and between areas, and raised concerns about access to legal advice, particularly via legal aid, and difficulties accessing a range of support services and interventions in rural areas. Interventions for perpetrators are generally in short supply, but the submissions suggest that coverage and accessibility in rural areas is particularly problematic. The panel received evidence about cases where abusers appeared to use rural isolation as a means of enhancing their control. These submissions doubted whether the court had recognised that tactic or had considered the enhanced vulnerabilities of victims in rural communities.

In subsequent chapters, we explore how the pro-contact culture, the adversarial approach to decision-making, resource limitations in relation to private law proceedings, and the family court working in a silo are leading to court processes that are unsatisfactory and outcomes that are potentially unsafe for children and adults.

5. Raising and evidencing domestic abuse

5.1 Introduction

Victims' submissions indicated that many felt that they were discouraged from raising allegations of domestic abuse. One of the significant barriers to raising abuse was the effects of the abuse itself coupled with the lack of understanding of that amongst professionals working in the family justice system. Until recently there has been very limited understanding in the legal system about coercive control as a component of domestic abuse. The criminal justice system in particular has been heavily focused on single incidents of physical violence and not responsive to other forms of abuse. However, the reality of domestic abuse for many victims is the micro management of their lives in multiple ways which leaves them in a state of constant fear and anxiety. It may take victims a long time to realise that they are experiencing domestic abuse and to seek help. Whilst the legal system is focused on physical abuse, victims of domestic abuse commonly say that this is not the worst type of abuse that they have experienced; it is the ongoing psychological and emotional abuse, the coercion and control, which impacts most greatly. In this chapter, the barriers to raising and evidencing domestic abuse will be examined. These barriers are summarised diagrammatically below:



5.2 Lack of understanding of domestic abuse

Challenging the paradigm of 'domestic violence' and getting professionals to recognise the full range of abuse and the ongoing effects is a common barrier to abused women and men in private law children proceedings. In the submissions there were many accounts of professionals displaying a lack of understanding of the complexities of domestic abuse and the effects of that abuse post separation on both the parent, typically the mother, and the children. The panel was told that this lack of understanding of domestic abuse and ongoing trauma resulted in the allegations being perceived as irrelevant to contact.

The literature suggests that there is a perception amongst some professionals that mothers in child arrangements cases make false allegations of domestic abuse as part of a 'game playing' exercise to delay or frustrate contact. However, research suggests that the proportion of 'false' allegations of domestic abuse is very small.[72] Whilst measuring false allegations is a difficult exercise, the notion that women fabricate allegations to frustrate contact must be understood in the context of the negative experiences women encountered when trying to tell professionals about the abuse. As this chapter demonstrates, the submissions to the call for evidence from mothers repeatedly told of being discouraged from making allegations or not being believed because they had not acted in a way that a 'stereotypical' victim would behave. Mothers and professionals and organisations supporting them perceived that the default position of many of the professionals, including children's social care, Cafcass/Cymru and the courts in child arrangements proceedings, was to treat allegations with a high level of suspicion. Many of the mothers told the panel that it felt to them that they were being accused of lying. Allegations of child sexual abuse raised particular issues relating to suspicion and perceptions of disbelief.

The 'stereotypes' which can work against raising domestic abuse include; not reporting abuse to the police or children's social care or delayed reporting to a third party, staying in a relationship with the abuser instead of accessing help or leaving the abuser, and either appearing 'over emotional' or 'under emotional' when giving evidence at court. In addition, parents experiencing mental ill health, often as a result of the trauma of abuse, felt this was used to undermine any allegations they raised. These stereotypes demonstrate a lack of understanding of domestic abuse and trauma, particularly the ongoing effects of coercive control. Finally, there were a small number of submissions from male victims and organisations supporting them stating that they encountered particular barriers to belief.

[72] Literature review, section 7.2.

5.2.1 No or delayed reporting to third parties

> 'Parents may not recognise domestic abuse or other forms of harm as relevant, or may not recognise themselves as victims or survivors of abuse. The challenge this may present within the proceedings is that the court may make welfare decisions without full knowledge of all relevant facts because a parent has not been able to put into evidence all relevant information.**' Association of Lawyers for Children (ALC)**

There may be a number of explanations why victims of domestic abuse do not report their experiences to the court or Cafcass/Cafcass Cymru or other external agencies. Some mothers told the panel that they were put off from telling professionals about domestic abuse because of previous bad experiences with the system; this was confirmed by submissions from Women's Aid Federation of England, Welsh Women's Aid and other organisations supporting victims. Some women also told the panel that when they delayed reporting they were later accused of lying, again a comment reflected in the submissions from organisations supporting victims. The Transparency Project submitted that victims may not appreciate the importance of raising allegations early and face criticism of their credibility when allegations are raised 'late'. The call for evidence received submissions from women who did not initially fully appreciate that certain behaviours were abusive, particularly so with sexual and coercive and controlling behaviours. The Association of Lawyers for Children commented that, in their view, it requires skilled professionals (domestic abuse professionals, therapists or solicitors) to assist these victims to recognise the abusive relationship and to raise and evidence it at court.

The evidence submitted to the panel therefore suggests that there needs to be fuller understanding amongst a wide range of professionals in private law children cases of the reasons why there may be no reporting or delayed reporting.

5.2.2 Not leaving the abuser sooner

The 'stereotype' that a 'real' victim of abuse would not stay with her abuser and would take the children away from the abuse much sooner is especially problematic for female victims of domestic abuse. As highlighted in chapter 4, in public law or child protection procedures, the mother may be criticised for remaining with an abusive partner because this may be seen as evidence of a failure to protect the children. Mothers told the panel that they stayed with the abuser because of fears about abuse escalating when they tried to leave. Research shows that this is a realistic fear; abuse often escalates at the point of separation. Furthermore, some mothers' submissions stated that they felt that whilst they remained with the abuser they were able to some extent to protect their children from abuse, which they feared they would not be able to do if contact was ordered when they left the household. The submissions of professionals supporting abused women emphasised that staying with an abuser should not be considered as evidence that abuse did not happen, but in reality some professionals also perceived this to be the case. Again,

the evidence submitted to the panel suggests that a better understanding of the dynamics of domestic abuse and the decisions victims make to try to protect their children is needed.

5.2.3 Appearing 'over' or 'under' emotional

Another barrier to credibility identified in the submissions to the call for evidence was how the victim presents in court. Submissions from both individuals and some professionals noted that assessments appeared to be made on the basis of the victim either appearing to be 'over emotional' or 'under emotional' when giving evidence. According to these submissions, some victims were perceived to lack credibility because they appeared to be calm and composed, whereas others were judged to be less reliable due to their 'disorderly' demeanour. In general, professional organisations offering specialist support to female victims of domestic abuse stated that there was a lack of understanding of the effects of trauma and this impacted on assessments of the credibility of victims. Refuge, a large domestic abuse service provider, carried out a survey of staff and survivors in August 2019 which informed their response to the panel. Their submission highlighted a number of issues relating to how the appearance of victims might affect assessments of credibility:

> 'Some staff members raised cases where judges questioned the truth of disclosures if survivors didn't fulfil stereotypes about a 'typical' domestic violence survivor. For example, one judge said that the survivor 'didn't look like a victim' because she wore make-up to court…Staff said that in their experience when survivors had difficulty communicating the abuse, sometimes breaking down or crying, this was looked upon negatively by the court. Some staff members perceived some judges' attitudes towards survivors as 'this is an emotionally temperamental woman' rather than 'this is an abused and traumatised woman', dismissing either the allegations, or their relevance'. **Refuge**

This statement has some resonance with the literature on rape 'myths' in the criminal justice system. If women are perceived as overly emotional then this can be judged negatively, as 'exaggerating for effect', or in contrast, if they display little or no emotion, this can also be interpreted as undermining their credibility.[73] The evidence submitted to the panel suggests that there may be work that can usefully be done to dispel domestic abuse 'myths' and to promote understanding that both heightened and flattened emotional presentation can be symptoms of trauma.

Another aspect of credibility highlighted in the submissions, relates to the appearance of the victim, when contrasted with the appearance and demeanour of the alleged abuser. The unequal power dynamics in an abusive relationship are well documented in the literature. One theme that repeatedly recurred in the submissions of mothers was how abusers were able to convey an image of respectability, which gave them credibility and

[73] L Ellison and V Munro (2009) 'Reacting to rape: Exploring mock jurors' assessments of complainant credibility', *British Journal of Criminology* 49(2): 202–19.

then helped them to convince professionals that abuse did not happen or had been exaggerated. Victims provided numerous examples of their perceptions that all types of professionals, children's social care, Cafcass/Cymru and judges, had been 'charmed' by the abuser and used their status to convince the professionals that they were not abusers. For example, one mother told the panel her ex-partner worked for the police and so, in her view 'presented well at court' and also knew how the process worked, using this to his advantage. Another mother said: 'Sometimes the judge's decision is based purely on their rapport with the abuser, their judgment based on how they talk or dress or by simply believing the persona the abuser puts on in court'.

It is perhaps easy to see how the courts and other professionals might find an abuser to be more believable when they appear calm, well presented and 'reasonable'. Some of the submissions from mothers told of how they felt seriously disadvantaged by appearing emotional and disordered, in contrast to the controlled and ordered presentation of their abuser. However, as some of the professional submissions to the panel highlighted, the 'disordered' appearance of the mother may be due to the ongoing impacts of abuse and their close proximity to their abuser, especially in the absence of protective measures.

These professional submissions also revealed the no win situation abused women may face. Thus, submissions from Welsh Women's Aid and others stated that in cases where the mother was calm, clear and articulate in court they were also disbelieved by judges. Welsh Women's Aid submitted that this was, in their view, underpinned by gendered stereotypes of how women should behave when in distress. This assessment was echoed in submissions from mothers and other professionals that there was an element of sexism and class prejudice in the stereotypical assessments of victims and abusers. This was perceived to be the case in instances where the occupations and middle-class status of certain fathers was perceived to result in undue weight being given to their evidence.

Whilst abusers may often present a calm and convincing demeanour to professionals, this is not universally the case. The submissions included some examples of abusers becoming verbally and physically aggressive in the court building and even in the courtroom itself. In some instances judges and court staff were said to have 'made excuses' for such behaviour. The panel was told of abusive behaviour being regarded as 'justified' as an understandable result of the frustration at lack of contact and the mother's perceived hostility to contact in some cases.

5.2.4 Mental health difficulties

Many of the victims of domestic abuse, both female and male, commented in their submissions on the negative impact of the domestic abuse on their own or their children's mental health. They referred to experiencing Post Traumatic Stress Disorder (PTSD) and depression. However, some victims said that they believed that their mental health difficulties were a significant factor in why they felt that the court did not believe them. For example, one mother commented that the impact of abuse on her mental health was that

she was not able to articulate her experiences as coherently as she might otherwise. She said that fear of disbelief was the 'biggest hurdle' to reporting abuse and that: 'women are perceived as unstable because they are dealing with the consequences of leaving an abusive relationship'. Another mother said that the PTSD that her child had experienced as a result of domestic abuse was instead attributed to 'poor parenting' by her. She said that the court would not investigate the allegations of domestic abuse, instead she 'felt the judge blamed me for my daughter's mental health'. These comments were echoed in some of the professional submissions from organisations supporting victims.

It is important to note that, although there were relatively few submissions to the panel from male victims of domestic abuse, mental ill health was an area where they also perceived that stereotyping was a barrier to credibility and belief.

5.2.5 Male victims

Organisations supporting male victims of domestic abuse raised the issue of additional barriers related to cultural norms and stereotypes that men cannot be victims of domestic abuse. Mankind, an organisation representing male victims, observed the difficulties for male victims raising allegations were: 'compounded by societal norms and gender stereotypes around the existence of male victims… This means that men have a fear that they will not be believed, that any allegations they make are viewed as being malicious by the Family Court/Magistrates or that when they state they are a victim of domestic abuse, they have to meet a higher 'evidence/believability' threshold than female victims'. Another organisation supporting male victims, Families Need Fathers: Both Parents Matter, stated: 'The disparity in support for men and women to assist them to recognise the abuse they are suffering and assist them to make allegations of abuse is a further barrier to men being heard and believed'.

5.3 Focus on recent incidents of physical abuse

Linked to a lack of understanding of domestic abuse, particularly coercive control, is the focus on single, recent incidents of physical violence. Many of the abused mothers' submissions and some of the abused fathers noted the difficulty they had in raising non-physical abuse. It may have taken victims a long time themselves to recognise and talk about the non-physical abuse they had experienced as the most relevant, only to be told when they did try to raise it, to concentrate on the worst or most recent incidents of physical violence. One mother observed: 'all the professionals look for actual physical abuse before they consider getting involved. The emotional and psychological impact is completely ignored'. This statement was backed up regularly in the mothers' submissions. One mother observed: 'The judges I've experienced (5 of them) have had very little understanding about domestic abuse and there is still a focus on physical damage (are you scared he will jump out and attack you) rather than the psychological impact and continued controlling behaviour.' A submission summary further illustrates this problem:

Submission Summary

The perpetrator made admissions of domestic abuse and these were documented in the Cafcass report. However, when the case was heard by the magistrates, the mother said she felt that the court were not interested in the abuse and 'attempted to bat away the issue of abuse because I did not have broken bones or physical bruises to show them.' In her view the court were 'shockingly and dangerously dismissive of serious concerns of domestic abuse'. She said that at one point during the hearing, she observed one of the magistrates appearing to collude with the perpetrator by 'sniggering' with him. Overall, she stated that the magistrates: 'validated and normalised my ex-husband's abusive behaviour…[overlooking]…glaring contradictions in his evidence'. As a result she felt that the court 'effectively made our abuser feel supported by the court and protected from further consequences'.

Evidencing non-physical abuse was viewed as problematic in some of the professional submissions:

'It may be important for a pattern of behaviours to be illustrated, particularly if there has been little or no physical violence'… [however] … 'our members highlighted how challenging it can be to provide robust evidence in cases of domestic abuse as, by definition, incidences are likely to occur when there a no witnesses present other than children.' **The Magistrates Association**

The focus on physical abuse appears to be partly a product of a system that finds it hard to evidence psychological abuse and partly a product of the adversarial process. Evidencing abuse may be particularly difficult when there has been financial abuse:

Submission Summary

One mother told the panel that she did have evidence of emotional and financial abuse but that this was ignored by judges. She said that she agreed with the decision not to hold a Fact Finding Hearing because there was no physical abuse but wanted the help of the court to stop the psychological abuse. However, as an unrepresented litigant in person against her legally represented ex-partner she felt 'unheard and ignored'. Her case went before three different judges and each time she felt that the judges appeared 'ignorant to psychological abuse'. She described one judge as 'rude' and another as 'condescending'.

The disparity of resources between the victim and her ex-partner in the above submission summary, ironically flowing from the financial abuse in the relationship, left her in a weaker position when it came to conducting the family proceedings as she could not afford legal representation whereas he could. This resource disparity was also reflected in the submissions of some of the fathers who were victims of abuse who said that they could not afford legal representation when facing their represented ex-partner. In these cases, resources and legal representation might have provided formal 'equality of arms', although there can be no certainty that this would have enabled the psychological and financial abuse to be heard. The submissions to the panel suggested that a lot also depends on the quality of the legal advice and representation and the types of evidence that the courts will hear.

A common theme emerging from the mothers' submissions was that all the agencies, particularly Cafcass/Cymru and the courts, were only concerned with incidents of domestic abuse that had occurred in recent months or weeks. 'Historical' allegations were treated as less relevant and victims were sometimes discouraged or prevented from talking about the cumulative effect of abuse going back over a number of years.

Submission Summary

One mother told the panel 'I had the same judge twice, who scared the living daylights out of me. He was not interested in reading our history or case. Instead he waved our papers at us in the courtroom and said that he hadn't read them and I was wrong'. The judge ordered contact with the father but the father then said he was unable to do it because of his other commitments. This mother was of the opinion that if the judge had read the history he would have been able to get past the 'façade' and see that her abuser was not genuinely interested in pursuing contact, only in using the process as a continuing means of abuse and control. In her opinion the judge had 'NO IDEA of coercive abuse, financial and emotional abuse at all'.

The focus on recent 'incidents' is related to the concern about the lack of understanding of domestic abuse; acknowledging a pattern of behaviour over a long period of time, not focusing on single incidents in close proximity to court action. To discount allegations going back more than a few months as 'mere history' is to profoundly misunderstand the nature of the problem, in particular the way that coercive control can build and systematically undermine the victim's personality and autonomy over many months or years. As one mother observed:

> "I was told by my solicitor that the judge would think that 'domestic abuse is historic once the father had left the home'. Domestic abuse is never historic – it continues and continues for years after the perpetrator leaves the home." **Mother**

And indeed, even if domestic abuse does cease, its psychological effects are likely to be felt for even longer.

5.4 Types of evidence required and other process issues

The research shows that only a minority of victims of domestic abuse (less than 20%) tell the police about the abuse.[74] There are a variety of reasons for this, but submissions clearly indicated that it is problematic for professionals to assume that not reporting to the police means that the abuse did not really happen. Mothers' submissions to the panel stated that they were questioned about why they had not reported allegations to the police and were either told, or got the strong impression, that they were not believed because they had not made a call to the police.

Only a small proportion of victims of domestic abuse seek help from health professionals, even when they experience physical injuries.[75] The majority of victims report non-physical effects of abuse to health professionals, most commonly 'mental or emotional problems'. However, only around one third who experience physical injury or some other effects receive medical attention, mainly from a GP, but in some instances from specialist mental health or psychiatric services, or occasionally A&E departments.[76] This research suggests that lack of supporting evidence from GPs or other health professionals should not be a barrier to being believed. However, as with lack of supporting evidence from police, victims were given the impression that their accounts were not believed in the absence of corroborating evidence from 'independent' third parties. This is problematic, especially as where GPs are able to give evidence, it will usually only relate to the injuries they have treated or seen, they cannot give evidence as to how those injuries or effects were brought about. One of the male victims in a focus group said:

> 'the court process felt like space where anyone can say anything they like and I felt like I was trying to disprove allegations against me rather than prove my case….there was never any real investigation, I was trying hard to get evidence I got letter from dentist but they really did not want to be involved and all they could say really was that I had lost a tooth but not how it happened.' **Male Victim, Focus Group**

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74 Office of National Statistics, *Domestic Abuse in England and Wales* (2018).
75 Office of National Statistics, *Domestic Abuse in England and Wales* (2018).
76 Office of National Statistics, *Domestic Abuse in England and Wales* (2018).

Mothers in one of the focus groups reported that they had tried to bring evidence other than police reports to the attention of the court but that evidence, such as from support workers, had been dismissed as irrelevant. However, even in cases where there was evidence from the police, this was not always considered to be relevant. The panel was told by several mothers that they had reported incidents to the police but when they tried to introduce this as evidence in the family courts it was dismissed or disregarded:

Submission Summary

The non-resident father was under investigation for rape and other sexual offences and the police had put in place protective measures, including alarms. However, the mother submitted the court 'dismissed this without any assessment of the evidence'. This mother had been to court on three occasions and on the last occasion her ex-partner raised false reports that her new partner had been violent towards her (which her ex-partner alleged she had reported to the police). This was untrue; the mother said that she had not experienced abuse from her new partner and so she had made no such complaints (as could have been verified by the police). The mother told the panel that although the counter allegations made by her ex-partner were unsubstantiated, the courts did not consider this. She said that she had been forced to carry out handovers for contact when, at the same time, the police had put measures in place to try to protect her from further abuse.

This submission summary illustrates the dangers of silo working. It also illustrates another 'no win' situation for victims of abuse. On the one hand, the panel has been told that evidence from the police has high value in the family courts, such that the absence of police evidence will be interpreted negatively. Yet on the other hand the panel has been told that police evidence is not always shared or taken into account when it is available. One father of an abused mother told of the many years and great expense the family had incurred trying to raise domestic abuse in the family courts. The perpetrator of the abuse in this case worked for the police, which as research shows can be an additional barrier to victims getting help and being believed.[77] This father told the panel of his frustration that: 'There is currently no system in place to share information from the family courts to the criminal courts and vice versa'.

The lack of information exchange between the systems is an issue which has been long identified as a problem. It is one of the factors which, in the past, has formed the basis for attempts to introduce an integrated domestic violence court and, yet, has also been an obstacle to integration succeeding.[78]

[77] HMIC, *Everyone's Business: Improving the Police Response to Domestic Abuse* (2014).

[78] M Hester, J Pearce and N Westmarland, *Early Evaluation of the Integrated Domestic Violence Court, Croydon* (2008).

Professionals in different systems have divergent views as to the obstacles to information sharing. In judicial submissions to the panel it was noted that the length of time it takes to obtain disclosure from the police can add delay to a case and courts do not have the resources to regularly review files and chase outstanding disclosure between hearings. It may well be that this is a resource issue for both the criminal and family justice systems, as well as an issue relating to the themes of pro-contact culture and silo working.

A number of other 'process' barriers to raising domestic abuse were identified in the submissions to the call for evidence. Mothers' submissions highlighted the difficulties that they had in finding and completing the C1A form, to provide supplemental information when making or responding to an application for child arrangements orders. In the absence of appropriate support, some mothers were not even aware of the form to be completed.[79] Even when they were aware, the evidence of women in some of the focus groups indicated that they hesitated about filling in the form because they worried it might make things worse. Both submissions from mothers and some of the professionals supporting them noted that the way that the form is designed does not lend itself to a narrative of the abuse. The form contains five boxes requesting a short description of what happened, indicating (approximately) when the behaviour started and how long it continued and space on the form is limited. Whether this fairly captures the lived experiences of victims of abuse was raised as an issue in submissions. This overlaps with concerns mentioned about Scott Schedules, dealt with in chapter 7; reducing a long and complicated history of abuse into neat and discrete descriptions is challenging and can itself result in minimisation of the abuse.

Another issue that was consistently raised in submissions was the short amount of time that was given to obtaining an account of abuse in the Cafcass/Cymru safeguarding interview. Mothers' submissions reported only having half an hour to talk to a complete stranger and being expected to give an account of abuse without having any support available in that process. Interviews sometimes took place over the telephone rather than face to face and victims of abuse found that approach was not conducive to giving a full account of their experiences and those of their children. In one of the focus groups, mothers told of the difficulties they faced in being asked to 'pull examples out of the air' and in disclosing their fears and feelings without a familiar and trusted person to support them. They spoke of the approach being insensitive, inadequate and unethical. This perspective was backed up by some of the professionals working in the family justice system. For example, one of the judges at the judicial roundtable said that litigants do not necessarily want to tell Cafcass about the abuse over the phone as it is often serious and distressing experiences that they are required to talk about. Consequently, it comes out at court rather than in the paperwork.

[79] The panel notes that the C1A form is now integrated into the online C100 service.

The limitations of the Cafcass safeguarding interview suggest that there are significant resourcing issues. In the English practitioner roundtable, participants said that Cafcass have limited resources and are under pressure to prioritise public law cases. As a result it was said, by a range of professionals, that Cafcass is 'often impatient or quick' to say that domestic abuse is not relevant to contact without giving reasons or making a proper assessment. Cafcass Cymru received slightly more favourable feedback on its performance in general from practitioners, however, that is not to say that there are no resourcing issues for them. The inadequate nature of the safeguarding interview also attracted criticism in the Welsh survivors' focus groups.

5.5 Reframing abuse as a high conflict relationship

'High conflict' relationships are to be thoroughly distinguished from relationships involving domestic abuse of one party by the other. In many instances the effects of coercive control will be such that the victim of abuse has not for many years challenged anything the abuser has done. It may take the victim many years to speak about the abuse and, as noted above, the delay in doing so may be taken by the professionals as an indication of a lack of credibility. If and when the victim does attempt to break free of the abuser's control, their resistance is not from a position of equality in the relationship. However, despite the very clear difference between 'high conflict' relationships and domestic abuse, victims and professionals told the panel that they had experiences of domestic abuse being reframed into evidence of a 'high conflict' or mutually abusive relationship, for which the solution was considered to be mutual reduction of conflict and encouragement of cooperation rather than protection of the child and adult victim from the other parent's abuse. As some of the victims feared, and were legally advised, raising any concerns about contact with an abusive partner, was perceived as evidence of hostility to co-parenting.

One **mother** said: 'I am the one who faces false allegations of parental alienation and brainwashing…the professionals don't know how to identify a real victim and are easily manipulated by the perpetrator'.

Another said: 'Women are often told if they mention abuse then they'll lose custody of their children to their abuser'.

The panel received evidence from victims and professionals that domestic abuse is often not seen as relevant to whether the abusive partner is a 'good enough' parent, and as a result, the motives of victims raising abuse may come under suspicion. Professionals and victims told the panel that victims were perceived as being motivated by a desire to turn the child against the other parent, rather than trying to protect the child from the consequences of abuse.

If the child does not want to have contact with the abuser, the perpetrator and the professionals may assume that is due to parental alienation rather than as a result of the abuse. As will be seen in chapter 6, one consequence of not listening effectively to the child is that the reasons for the child not wanting to have contact with the abuser are not properly understood or taken into account. Listening more carefully to the child may result in a better understanding of whether or not allegations of alienation have any merit.

5.6 Fears of counter allegations and other negative consequences

The submissions from victims of domestic abuse indicated that some had not disclosed abuse because of fears of negative consequences, based on previous experiences, including fears that the abuser would raise false allegations against them, including false allegations of abuse, parental alienation, instability or inadequate parenting.

Some mothers told the panel of the great lengths that their abusers went to in their efforts to undermine them and generate false evidence against them.

Submission Summary

One mother said that once she had obtained a non-molestation and occupation order against her ex-partner, he took her child to hospital during a contact visit with a fabricated infection on the pretext of telling the professionals she was emotionally abusing the child, resulting in a medical report and referral to social services. This mother commented that her husband was a well-educated professional and easily able to manipulate the experts. Her own lawyer advised her not to talk about the abuse in child contact proceedings: ‘My solicitor said that the system supported fathers and if I raised all the issues about him I would fall into his trap and seem like I was alienating and hostile’. Following early experiences of trying to raise abuse, she said she was advised to be ‘calm, kind and compliant’. She said that she felt discouraged from raising allegations because ‘anything you do raise is ridiculed, you are made out to be aggressive and resentful rather than genuinely concerned for your child’.

The above submission summary is one illustration of submissions to the panel that victims were advised by professionals, including their own lawyers, not to raise domestic abuse because the courts would take a negative view of this and it may be used against them as evidence of parental alienation or hostility to co-parenting.

> 'Almost every single survivor that responded to the [Refuge] survey raised fears of false and counter-allegations as a deterrent to disclosing domestic abuse. One survivor said that the perpetrator threatened to falsely accuse the survivor in court of being an alcoholic and misusing substances if they disclosed domestic abuse to the court. Survivors were commonly frightened that the counter-allegations might lead to them losing contact with their children. Almost every single staff member also raised concerns around counter-allegations as reasons for why some survivors are resistant to disclosing abuse to the court'. **Refuge**

Some of the professional submissions echoed the mothers' experiences in this respect. Many of the organisations who work supporting women who have experienced domestic abuse confirmed that the women they worked with had been discouraged from giving an account of their abuse because they were afraid of negative consequences.

Good legal representation can be helpful to victims raising allegations of abuse and to assist them to identify abusive behaviours. Research carried out prior to this call for evidence suggests, however, that cuts to legal aid by LASPO have resulted in a number of law firms ceasing to undertake legal aid work, meaning that there is a limited supply of experienced and knowledgeable lawyers available to provide victims with the legal support they need in family law cases.[80] In one of these studies, a lawyer responding to a request for legal advice from a victim of domestic abuse in child arrangements proceedings, recounted her dismay at being unable to advise who to turn to because of the limited availability of specialist provision. This was confirmed by submissions to the panel from individuals and a range of professionals; absence of public funding for legal representation has resulted in restricted access to specialist legal advice from family lawyers with an understanding of domestic abuse.

Some groups representing lawyers saw no problem with the level of legal support available. For example, the Association of Lawyers for Children were broadly positive as to the level of expertise that is provided in domestic abuse cases stating: 'Lawyers who are experienced in family proceedings are able to ask relevant questions of potential parties to proceedings and to help them understand the issues and matters with which the court will

[80] Amnesty International, *Cuts that Hurt: The Impact of Legal Aid Cuts in England and Wales on Access to Justice* (2016), p.22. A survey carried out by Rights of Women found that almost a third of women surveyed had difficulty finding a legal aid lawyer in their area and that cuts to legal aid had resulted in specialist solicitors no longer being available or accessible: S Shah, 'The impact of legal aid cuts on access to justice in the UK' in *Contemporary Challenges in Securing Human Rights* (2015), 99–104. The panel notes that subsequent to this research the Legal Aid Agency (LAA) has run a new civil legal aid tender which has increased the number of provider offices delivering this advice by 11% at the start of the new contract. The number of people receiving advice in domestic abuse and child abuse cases has significantly increased over the same period – in the financial year 2015–16 the LAA granted 5,935 certificates for civil representation in these cases, and by 2018–19 this had increased to 10,400. It is not known, however, whether the level of experience, knowledge and specialisation among providers has been restored.

be concerned.' However, many victims of abuse cannot afford to pay for and do not otherwise have access to experienced legal representation, and the weight of the evidence submitted to the panel identified that many lawyers need to have a better understanding of domestic abuse and the effects of trauma on the parent and the children.

The panel received a number of submissions from individual lawyers about their experiences in child contact cases. Some of these submissions indicated that lawyers have advised their clients not to raise domestic abuse because it would 'anger' the courts or be 'counter-productive'. This evidence suggests that some lawyers do encourage their clients towards settlement in such a way that minimises or dismisses domestic abuse. For example one lawyer who made a submission to the panel said: 'Victims are often persuaded by their lawyers not to mention abuse, being told the courts don't like it and it will harm their case. If it is raised, victims are often told by the courts that it's 'all in the past' or, in one case I had been 'too confrontational', or that it's not relevant. Mothers are frequently told they are lying when they talk about their abuse and that they are trying to alienate their children by making false allegations. As many mothers lose residence to the abusive father this is a huge deterrent to raising the issue of their abuse'.

Fears of false allegations of parental alienation are clearly a barrier to victims of abuse telling the courts about their experiences. Some of the fathers' submissions stated that allegations of domestic abuse were made up or exaggerated by mothers who were trying to alienate their children from them and frustrate contact. They felt that the courts were not sufficiently robust in investigating allegations of domestic abuse which they said were untrue or exaggerated.

The panel was told that perpetrators were sometimes allowed to raise counter allegations of parental alienation and that these were taken seriously, even when there was little or no supporting evidence. There was a perception that there is a lower threshold for raising allegations of parental alienation than there is for raising domestic abuse or child sexual abuse. As a matter of law, the burden of proof is on the person raising allegations and the standard of proof is the same regardless of the nature of the allegations or who makes them, but submissions indicated that victims did not perceive this to be the case in practice. In one of the focus groups carried out with female victims, participants gave examples of counter allegations of parental alienation resulting in allegations of domestic abuse being dismissed and residence transferred to the alleged abuser. Mothers in this focus group, and the mothers' submissions more generally, told of feeling that counter allegations meant that they were treated as a liar and threatened with losing residence.

The Family Law Bar Association, in the course of the English professional roundtable, raised the challenges posed by the small number of cases in which the court is satisfied that children have been emotionally abused by a parent who has made false allegations of abuse against the other parent. However, as the literature review indicates, these cases are indeed small in number in comparison to the large number of cases where mothers

fear false allegations of parental alienation. Mothers and some professionals also raised the issue of 'expert' evidence on parental alienation. They felt that the credentials of such 'experts' were not always examined or challenged by the court, although the Association of Lawyers for Children strongly disagreed with this. Women's Aid Federation of England submitted that, in their view, there is a disparity of approach to expert testimony, with the courts allowing expert testimony on parental alienation but not allowing expert testimony on domestic abuse. Submissions from some mothers and support organisations indicated that they felt that the court's approach to allegations of domestic abuse and counter-allegations of parental alienation was sexist and discriminatory.

Focus groups with male perpetrators of abuse were carried out for the purposes of this call for evidence. Male perpetrators attending these groups sometimes acknowledged that they had behaved abusively, although it appeared that some had a limited appreciation of the impact of the abuse on the mother or the children. As the literature review shows, perpetrators will often minimise abuse, justify it to themselves by blaming the victim, and blame the child's reluctance to have contact on the mother's influence rather than seeing it as a consequence of their own behaviour.[81] However, we heard from men who did have some appreciation of the impact of their abuse and who were able, after completing a perpetrators programme, to recognise the need to protect women and children from their behaviours. These men, some of whom identified as child survivors of domestic abuse themselves, were supportive of early education work in the court process and the national curriculum, which they said might have helped them to appreciate and acknowledge their abusive behaviour sooner rather than blaming the victim.

5.7 Allegations of child sexual abuse

Many mothers told the panel about the difficulties they had in trying to raise child sexual abuse in child arrangements proceedings, and this was supported by submissions from charities supporting women and child victims of sexual offences. Children's charities, such as Barnardos, told the panel that there was little understanding of the ongoing trauma that child sexual offences entail and consequently negative assessments were made about victims and the credibility of their accounts in child arrangements proceedings.

These submissions to the panel indicated a lack of understanding amongst some professionals about the ways that children respond to abuse. Specialist services noted that quite often children will be unwilling to disclose sexual abuse to independent third parties. However, both individual and organisational submissions raised concerns that if the disclosure was only to the non-abusive resident parent this was not believed. They suggested that lack of independent disclosure to a third party appears to be an obstacle to

[81] Literature review section 6.3; L Harne, *Violent Fathering and the Risks to Children* (2011).

child sexual abuse being taken seriously by the court. Abused women said they were accused of having 'fantasised' about child sexual abuse.

In the view of some of the submissions, children's social care are heavily focused on the direct impact of domestic abuse on the child and seemed to lack appreciation of the impact of domestic abuse on the adult victim, the indirect impact of this on the child, and its significance for child arrangements cases. In addition, submissions to the panel raised the impact of sexual abuse as a child and cumulative abuse in later life on the ability of adult victims to disclose domestic abuse and have faith in the system believing them. For example, Welsh Women's Aid raised the issue of non-disclosure of domestic abuse by adult survivors of child sexual abuse due to previous experiences of being ignored.

5.8 Intersecting structural disadvantages

5.8.1 BAME victims

The barriers to BAME women raising domestic abuse are multiplied by cultural stereotypes, and in this respect, as in others, the submissions to the call for evidence are supported by the literature review.[82] Southall Black Sisters told the panel there is, in their view: 'a continuing pervasive culture of disbelief, indifference and hostility towards victims of abuse'. BAME women highlighted a number of factors which were particular to their experience, including being socialised into enduring domestic abuse and not telling outsiders and being isolated in the family (with abuse being colluded and participated in by multiple family members) and fear of deportation. The barriers can be magnified when a BAME victim is in an abusive relationship with a perpetrator who is white.

Submission Summary

One mother told of a long history of domestic abuse perpetrated by her partner. She said she was from a BAME background and English was not her first language. In contrast her partner was white, well-educated and well off. She had called the police many times but her partner had always made counter allegations. Her experience of the legal system was that she would not be protected. After seeking help in both the criminal justice system and in child arrangement proceedings, she was compelled to return to the family home. She said, the 'system doesn't believe you', she was put off by 'the fear of the possibility that nothing will be done to protect you and the perpetrator will punish you even more'. She said the court demonstrated little understanding of her culture or of the needs of the children to be aware of both aspects of their cultural heritage.

[82] Literature review section 5.2.1; R Thiara and A Gill, *Domestic Violence, Child Contact, Post-Separation Violence: Experiences of South Asian and African-Caribbean Women and Children* (2012).

This submission summary indicates a number of intersecting themes identified in this chapter, including evidence from one system not being shared in another and stereotyping which this victim felt was compounded by racism, sexism and class prejudice. As an uneducated ethnic minority woman she felt seriously disadvantaged. This is just one example; other individual submissions and the focus group with BAME women, provided multiple similar accounts.

5.8.2 Victims living in rural communities

The panel received evidence that victims who live in isolated locations have less access to support services or capacity to escape an abusive relationship. This compounds the difficulties that they may face in child contact proceedings when, for example, stereotypes about why they stayed in an abusive relationship or delayed reporting are used against them. Whilst some of the same stereotypes that affect all victims are evident amongst this particular group of rurally located victims, the evidence submitted to the panel suggests that the effect of the stereotypes can be further magnified by lack of understanding amongst some of the professionals of the particular barriers facing victims of abuse in isolated locations.

5.9 Conclusion

One of the first barriers to raising domestic abuse is that the victim of the abuse must themselves appreciate that they have experienced abuse. Often it takes victims of non-physical abuse a long time to acknowledge that they have experienced abuse.

Once abuse is recognised by the victim, it is very helpful for them not to feel alone when they are trying to raise that abuse with children's social care, Cafcass/Cymru and the court. The fear of disbelief is a significant factor dissuading victims from raising allegations. However, that fear can be mitigated by appropriate support and legal advice.

Evidencing domestic abuse was problematic for many victims. The focus on recent incidents of physical abuse, minimising 'historical' allegations, was a significant barrier to providing a complete picture of abuse, especially coercive control. Lack of information sharing between the various systems created further barriers, although the panel was told that even when evidence from the criminal justice system was available, it was not necessarily taken into account.

Mothers and organisations supporting them mentioned being dissuaded from raising allegations of domestic abuse because of fears of counter allegations of parental alienation or of hostility to co-parenting. The panel was told that, on occasions, the mother's own lawyers advised them not to raise allegations for these reasons. There was evidence of domestic abuse being relabelled as 'high conflict' relationships.

Many of the issues which have been raised in this chapter are underpinned by various professionals having an inadequate understanding of domestic abuse and its effects.[83] The issue of stereotyping of certain types of behaviours, and possible 'myths' about 'real' victims of domestic abuse, was perceived to be an obstacle to both raising and evidencing abuse. In some submissions these stereotypes were perceived to be based on sexism, racism and class prejudice. There were instances where male victims felt disadvantaged by stereotyping, but in this call for evidence, the submissions were predominantly from women.

Some victims did have more positive experiences where judges allowed them to take their time and they felt well supported. However, overall the experiences of both female and male victims were negative, with positive experiences dependent on the 'lottery' of encountering better informed Cafcass/Cymru officers and judges. In chapter 11 the panel makes a series of recommendations to address the discouragements to raising domestic abuse and the barriers to belief identified in this chapter, including recommendations relating to raising awareness of domestic abuse, the availability of support services, professional training, coordination with the criminal justice system and the general approach of the family court to child arrangements cases.

[83] Such lack of understanding can have serious effects; for example, professional failures to identify and understand domestic abuse have been observed as a persistent and prominent factor in domestic homicides: Home Office, *Domestic Homicide Reviews: Key Findings from Analysis of Domestic Homicide Reviews* (2016).

6. Children's voices

6.1 Introduction

The weight of evidence from both research and submissions suggests that too often the voices of children go unheard in the court process or are muted in various ways. The panel found that a significant number of children who have experienced domestic abuse are not consulted on their views and experiences during the court process. Many submissions observed that when they happen consultations are brief, and that children are only 'heard' when they express a wish to have contact. The panel also found that children are rarely consulted on how arrangements are working for them once an order has been made.

Most groups, especially legal and social work/domestic abuse professionals, children/young people and mothers, raised concerns with how children's voices were elicited and incorporated into decision making. These concerns are consistent with findings from previous research.[84]

In contrast, some submissions from fathers' groups and some therapists suggested that children's voices were given too much attention, arguing that children can be suggestible and that the process of eliciting their wishes and feelings places them directly in the centre of family conflict. Families Need Fathers expressed the view, for example, that:

> "It is an irony that whilst family separation professionals urge parents not to put children in the middle of family conflicts, but too often the same professionals do precisely that by asking children whom they wish to live with and over-empowering them". **Families Need Fathers**

6.2 Why are children's voices important?

Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) 1989 enshrines the rights of children to have their perspectives included and taken into account in legal proceedings that affect them. Section 1(3) of the Children Act 1989 requires that the courts consider "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)" in children cases. The direct participation of young people and children in proceedings has long been emphasised in case law in England and Wales.[85] In addition, paragraph 18 of PD12B and paragraphs 24

[84] See literature review sections 7.3 and 7.5.

[85] *Mabon v Mabon* [2005] EWCA Civ 634.

and 10 of PD12J reiterate that the court should consider whether the child should be separately represented and should make special measures available where necessary to protect a child attending any hearing. The Welsh Government endorses seven Children and Young People's National Participation Standards to ensure their voices are heard in processes that will affect them.

Submissions to the panel made powerful arguments as to why children's direct participation is vital, both in ensuring the correct decision is made and to promote child wellbeing. These submissions also expressed the view that parents/carers will not always represent children's interests adequately. Nagalro and NSPCC, for example, both noted that the experiences, needs and interests of children do not necessarily coincide with those of their parents and so need to be heard separately.

Individual submissions from adults who had experienced proceedings as children and the FJYPB focus group showed that children want their wishes to be heard, even if they do not necessarily determine the outcome of the case. This echoes the research that children and young people do want to be part of the process, and to have their views taken seriously, though not necessarily to be the ultimate decision-makers.[86] This may be particularly important in domestic abuse cases.[87]

Importantly, engaging with children directly provides a more accurate idea of what individual children might want. Research shows that children have widely varied feelings and views about their fathers and spending time with them in domestic abuse cases.[88] The literature reveals that the priority for nearly all children, even those who do want a relationship with their fathers, is safety, for themselves, their mothers and the rest of their families.[89] Children interviewed in a 2012 study who reported that their fathers' behaviour had genuinely changed felt very positive about seeing them.[90] The quality of time spent with fathers who were perpetrators of domestic abuse was also very important for children. If children perceived a lack of commitment or genuine interest in them by their fathers, including being inconsistent and unreliable, spending little time with them during these sessions, or failing to engage with them actively, they found time spent with them to be an unrewarding experience.[91]

Given the variety of views and experiences amongst children, the panel considers it essential that the courts understand the views of individual children and tailor arrangements to fit them individually. This can also be helpful in correcting other cultural

86 See literature review section 7.5.

87 See literature review section 7.5.

88 See literature review section 6.4.

89 See literature review section 6.4.

90 J Fortin, J Hunt and L Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults Who Experience Parental Separation in their Youth* (2012).

91 See literature review section 6.4.

assumptions. A contributor to the FJYPB focus group noted that speaking to children directly about their experiences was important to correct unconscious bias in relation to culture and ethnicity, in their case assumptions about black men.

Aside from helping to make more appropriate decisions, the other advantage of involving children is that it can enhance a child's sense of empowerment and self-efficacy. Research has found that in domestic abuse cases, listening to and responding to children's accounts of violence validates those experiences, thereby promoting children's safety and welfare.[92]

6.3 The limited extent of consultation with children

Children's views can be sought in several ways to help inform the decision-making process in private law children proceedings:

- a Section 7 report produced by Cafcass, Cafcass Cymru or a local authority social worker
- being separately represented under Rule 16.4
- giving evidence directly in proceedings
- writing to or meeting with the judicial officer

The most common way for children to be involved is where a Section 7 welfare report is ordered by the court. In those cases if a Cafcass or Cafcass Cymru officer is preparing the report they will usually meet with the child. However, Section 7 reports are ordered in only a third of all private law cases.[93] Submissions from the Magistrates Association and ALC suggested that a Section 7 report is more likely to be ordered in a domestic abuse case. But given that successive research studies have found that at least half of cases involve allegations of domestic abuse, there is a clear indication that many children involved in domestic abuse cases will not get the opportunity to have their voices heard in the court process.

A small number of children are separately represented in private law children proceedings. Practice Direction 16A makes clear that separate representation is restricted to cases involving "an issue of significant difficulty and consequently will occur in only a minority of cases", which can include "serious allegations of physical, sexual or other abuse in relation to the child". In 2018–19, Rule 16.4 appointments were made in 2,595 cases in England

[92] M Eriksson and E Nasman (2008) 'Participation in family law proceedings for children whose father is violent to their mother', *Childhood* 15(2): 259–75; S Holt (2018) 'A voice or a choice? Children's views on participating in decisions about post-separation contact with domestically abusive fathers', *Journal of Social Welfare and Family Law* 40(4): 459–76; G Macdonald (2017) 'Hearing children's voices? Including children's perspectives on their experiences of domestic violence in welfare reports prepared for the English courts in private family law proceedings', *Child Abuse and Neglect* 65: 1–13

[93] In England, 65,378 children and young people were subject to applications in 2018–2019, but reports were ordered in only 35% of cases, involving around 20,000 children (Cafcass Annual Report 2018–2019, p. 10).

according to Cafcass data. This represents just 7% of cases opened in that year and 17% of cases in which Cafcass was required to undertake work after the first hearing.

In a very small number of cases where children are making allegations or are a witness to the allegations, the child's testimony gathered through ABE interviews conducted by the police or an intermediary will be presented to the court. There is no data on the numbers of children giving evidence or writing to or seeing a judicial officer, but the numbers are likely to be very small,[94] and confined to the minority of cases which are adjudicated, as opposed to the many in which parents agree to consent orders (see chapter 9). In 2015 the Vulnerable Witnesses and Children Working Group, appointed by the President of the Family Division, argued that the Family Court had fallen behind the criminal courts in its approach to children's evidence, and a "fresh approach to the evidence of children and young people, including the expression of their wishes and feelings … is long overdue".[95] The Working Group made a series of recommendations to strengthen the participation of children in proceedings about them, but the panel notes that these have not yet been implemented, pending wider system reform.

It is also important to point out that meeting the judge is intended to help children understand the court process. It cannot be used by the judge to gather evidence about the child's wishes and feelings. One respondent's children met the judge and had a tour of the court which she thought had been helpful for the children, noting "*it seems to benefit the child enormously to ask questions and have them answered appropriately".* However as noted by the Vulnerable Witnesses and Children Working Group, "meeting judges alone will not provide the increased role that should be played by young people and children now the family courts have entered the 21st century".[96]

6.4 The challenges of hearing children who are consulted in the process

For children in abuse cases who are directly consulted, there was criticism from multiple individual and organisational submissions of how that consultation was conducted. Nagalro, amongst others, noted the challenges of building a relationship with children who have experienced domestic abuse and the need to have sufficient time to do so:

94 See Vulnerable Witnesses and Children Working Group, *Report of the Vulnerable Witnesses and Children Working Group, February 2015* (2015), para 5.

95 Vulnerable Witnesses and Children Working Group, *Report of the Vulnerable Witnesses and Children Working Group, February 2015* (2015), para 25.

96 Vulnerable Witnesses and Children Working Group, *Report of the Vulnerable Witnesses and Children Working Group, February 2015* (2015), para 21.

> "Children who have experienced domestic abuse, find it difficult to open up, due to their divided loyalties, alignment with one parent, fear of upsetting either parent, or the resident parent in particular. They may have witnessed the abuse and may be frightened and have ambivalent feelings towards both parents … Children may not feel that they have the necessary permission from the residential parent to express what they may be genuinely worried about in terms of their own safety and that of either or both of their parents or indeed to see their estranged parent. Equally if the allegations are false, they may be influenced to repeat the allegations and refuse to see the other parent." **Nagalro**

However, Nagalro and multiple other submissions noted that Cafcass officers had limited time with each child, often restricted to a single meeting, possibly for only half an hour. Harrogate Family Law, CARA and Southall Black Sisters, together with other professional respondents and many parents, reported that the time allocated was insufficient. Nagalro also argued that Section 7 reports were "superficial" due to a lack of time. Mothers expressed concern that their children's future rested on a one-hour meeting with a stranger, and that accounts of children's views were not updated in long-running proceedings.

Cafcass has developed a number of digital apps for working with children and families, including Voice of the Child. This Much! and Backdrop are two other apps available to Cafcass officers for direct work with children. These have been rated as 'outstanding' by Ofsted, but none of the apps were mentioned in any of the submissions to the panel.

There were also concerns raised about how child interviews are conducted. Cafcass policy is that children should be interviewed in the presence of a parent only in exceptional circumstances and the reasons for this should be recorded on the case file. Nevertheless, Barnardos and Rights of Women both raised concerns about interviews with children only being conducted with a parent present, which may inhibit children's ability to express their views. A domestic abuse worker pointed out that an assessment of a child with the alleged abuser may give a false impression as the child may be compliant and often overly interactive to manage the abuser and avoid punishment. Parents, too, gave accounts of children being too frightened to speak, especially in the presence of or in close proximity to the abusive parent, and reported that their children had found the interview process traumatic. The PSU submitted that Cafcass interviews exposed children to the risk of further abuse and invited them to relive previous trauma without specialist support. In addition, some mothers criticised what they perceived to be Cafcass's generic approach of exploring children's feelings indirectly through play, even when children were old enough to be asked and to answer direct questions.

More generally, there was criticism of a lack of empathy for children's experiences where there had been abuse. A contributor to the FJYPB focus group commented that more thought should be given to the allocation of FCAs to ensure they can establish a positive

and trusting relationship with the young person. In that young person's case, a very tall "burly bloke" had been allocated as FCA, without consideration about whether that might be intimidating given the children's experience of domestic abuse by their father.

There were some positive comments from both mothers and fathers about how children are involved in the process. In a focus group of men attending a perpetrator programme, some thought that their children's views had been heard.

Some professionals were also keen to encourage more children being separately represented. One judge commented that he would appoint a guardian in every case if he could. The Association of Lawyers for Children also argued that separate representation would enable more children to have their voices heard, particularly where both parents are litigants in person. However, some other professionals and mothers noted that guardians too are affected by time pressures and can have limited engagement with children.

6.5 The limited weight given to children's views

The issue that attracted the most comment and criticism in submissions was the weight given to children's views. A very strong theme from multiple submissions was that children's views are frequently disregarded, primarily in cases where children are stating that they do not want to spend time with an abusive parent. Previous research studies have found a pattern of 'selective listening' where Cafcass and courts react positively when children express a wish to spend time with a parent, but treat those who do not as problematic and obstructive, even when they expressed fear of their parent due to experiences of violence or abuse.[97]

Submissions from Barnardos, Refuge, PSU, CARA, Mosac, Women's Aid Federation of England, Welsh Women's Aid and SafeLives, as well as hundreds of individual submissions, all raised concerns that children's expressed wishes against spending time with an abusive parent were being overridden or ignored. Some professionals also observed that children living with an abusive father were ignored when they said they wanted to see their mother more frequently, or to live with her.

The panel received evidence that Cafcass/Cymru could ignore, dismiss or sometimes misrepresent or manipulate children's views:

[97] See literature review section 7.3.

> "I remember one contact we went on and they [FCA] took me to one side at one point and asked me lots of questions. Quite repetitive. And she was asking "how long do you want to spend with your dad?" So, [I said] "I don't want to see him". [Answer] "Are you sure about that? He's come all this way"…. So I was feeling I had to say yes, so I said "Half an hour then". So they said "Oh ok then, so you do want to see him"… So that went into the report that I once said that, I said that I wanted to see him. And I know I'm not the only one who's had that kind of thing happen to them." **Young Person, Focus Group**

This account was far from an isolated instance in the submissions, including submissions from child victims of domestic abuse, and is consistent with research findings that Cafcass officers can make considerable efforts to persuade children to spend time with a parent, or to increase the amount of time they are already spending with them.[98]

The result, however, is that children's experience of abuse can be ignored, dismissed or minimised. Barnardos noted that their research had shown that Cafcass recommendations were "often at odds" with advice from Barnardo's services which had been working directly with victims. This is of particular concern, as Refuge noted, given that Cafcass recommendations are likely to be followed in the majority of cases.

Younger children were particularly likely to have their wishes and feelings overridden if they did not want to spend time with an abusive parent. Refuge noted that there were "particular difficulties" in the case of young children who were frightened of the perpetrator and who told Cafcass they did not want to spend time with them.

> "Parents report that the younger a child is, the less likely their voice is to be heard. According to reports from parents that Mosac supports, the child's voice or wishes are rarely taken into account, unless the child has reached an age when they can no longer be physically taken to, or forced into, contact with the alleged abusive parent." **Mosac**

Further, submissions noted that for very young children, the child's voice can only be heard via their primary carer, but that parent's knowledge of the child tends to be disregarded or automatically dismissed as self-serving. As well as difficulties for young children, British Autism Advocate noted difficulties for children with learning difficulties in having their voices heard in family court proceedings.

Finally, a number of submissions addressed the scenario in which the child's wish not to spend time with their abusive parent was accurately reflected in a Cafcass/Cymru or Local

[98] See literature review section 7.3.

Authority report, but the court did not follow those wishes and the associated recommendations. A submission from an individual Cafcass officer noted:

> "At times Courts take the impact [of domestic abuse] upon the child into consideration. At other times, the Court appears to ignore my concerns in its quest to resolve contact issues between non-resident parent and the child as expeditiously as possible…" **FCA professional**

6.6 Limited review and follow-up

The fourth area where submissions suggested that children are not being heard adequately is in relation to post-order support. Paragraph 38 of PD12J sets out that where the court decides that spending time with a parent will be safe and beneficial for the child, the court should consider also whether "it will be necessary, in the child's best interests, to review the operation of the order".

In practice, reviews of child arrangements appear uncommon, even in domestic abuse cases. This is despite all the research that indicates that spending time with an abusive parent can result in the continuing abuse of children and/or their non-abusive parent.[99] Welsh Women's Aid also noted that a child's wish to spend time with an abusive parent may be based on having been substantially protected from the effects of abuse by their non-abusive parent, but the experience of spending time with them unsupervised without that protection may be different from what they expected.

Without a review, and in the absence of further applications, the child may be left in arrangements that do not work for them. A participant in the FJYPB focus group gave a compelling insight into the feeling of powerlessness for children and young people who are not asked about how things are for them once the court has handed down a final order:

> Up until I was 18 I had to follow the same court order as when I was 7. … If someone had asked me I'd have said "Yeah, he [father] pins my arms down and screams at me". I could have said that, but no one ever asked me…. We left court and basically for ten years that was just my life. Quite literally it. Never heard from anybody again. Never did and there's no check-up, and especially if there's some abuse in the case. Even if it's only once a year you could go back and ask "Is this ok? Do you need this changing? And does something else need to happen?". **Young Person, Focus Group**

[99] See literature review section 6.3.

Another contributor to the focus group recalled writing a letter to the judge in the case, but got no response at all.

6.7 Impact of children being (largely) unheard

Submissions identified a range of issues that resulted from children's voices being muted or unheard.

The first was a sense of children feeling undermined and let down. ALC referred to the risk of children feeling not listened to should the court fail to make findings. Participants in the focus group conducted by Women's Aid Federation of England noted that experiences of proceedings had left their children with severe distrust of authorities, as disclosures of abuse and clear articulations of their views were not listened to and action not taken to keep them safe. Similarly, SafeLives referred to the negative impact on children being left unable to understand why they were being made to spend time with someone who had abused them and/or their other parent. An FCA also referred to the risk to the child's confidence in the court process if they feel that the court has not listened to them. A stark account was given by a contributor to the FJYPB focus group who commented that:

> "I never felt that I was listened to by Cafcass or … Didn't feel that any of them respected me… felt that I was just another case number, just another robot that they could control and I guess to an extent manipulate what their expectations were regarding the presumption of contact. The only person I felt really listened to me was the headteacher at my primary school. She made a point of telling them what I'd told her. But it wasn't put in any report … to the court." **Young Person, Focus Group**

The other consequence of not listening to children's views and experiences is that it can undermine the quality of the court's decision-making and result in orders that do not promote, or undermine, the child's welfare, a problem that was raised in multiple submissions.

6.8 Barriers to hearing children – resources

As in other areas, resource constraints were an important reason for some of the problems identified above in hearing children's voices. Multiple submissions referred to a shortage of resources that both limited the extent of children's involvement in the process and also hampered the ability of family justice professionals to undertake the very skilled task of eliciting and interpreting children's voices.

Multiple submissions referred to the resource constraints that limited the involvement of Cafcass or Cafcass Cymru, in terms of how many children were seen, for how long and the lack of reviews after orders were made. They noted that Cafcass and Cafcass Cymru

are usually only involved at the initial safeguarding stage where they do not meet or speak with children. Lawyers also raised concerns that so few children are separately represented. A LIP support service noted that courts would not appoint guardians unless they were specifically asked to do so, and LIPs had no idea they could make such a request.

There were also concerns that resource constraints meant that consultations with children were very brief. An IDVA noted that "children are expected to open up to Cafcass or social workers who are too busy to spend adequate time to build rapport and trust" despite the sensitivity of the issues involved. An individual FCA commented that the volume of work meant that they typically only had time to see a child once in a private law case, possibly twice. They noted that that did not allow for building "any sense of trust or a relationship".

Resource constraints were also the background to criticism of a lack of understanding or training. The Transparency Project highlighted the importance of report-writers being well-informed about domestic abuse, whilst others were critical of both report writers and guardians in this regard.

> "[Cafcass and social workers] have inadequate training and knowledge of DA leading to inappropriate recommendations and expectations such as parents working together to sort out contact arrangements, handovers etc. Completely inappropriate with DA." **IDVA**

Women's Aid Federation of England, Rights of Women and many others, including individuals, argued that much more needs to be done to ensure that both Cafcass/Cymru and family court professionals understand the impact of domestic abuse on children and are able to identify legitimate fears and concerns, whether expressed verbally or through other behaviours. Participants in one of the Welsh focus groups considered that Cafcass Cymru officers held stereotypical views of how children should react if they had witnessed or been the subject of abuse, and if they did not behave according to the stereotype their claims of abuse were disbelieved.

Organisations and mothers also raised concerns about the failure to adequately consult younger children. The research literature indicates that the older the child, the more likely it is that their views may be determinative.[100] However, some researchers have found that very young children are capable of understanding, participating and expressing a view if provided with age-appropriate environments and tools to meet their communication needs.[101]

[100] See literature review section 7.3.

[101] See literature review section 7.3.

6.9 Barriers to hearing children – the pro-contact culture

The most commonly cited reason for why children's voices go unheard in domestic abuse cases is the pro-contact culture. Two specific factors were raised repeatedly in submissions: the idea that the court already knew what children needed and allegations of parental alienation. Both meant that children's wishes and feelings were not elicited or were heard only if they expressed a wish for contact.

6.9.1 Reliance upon general ideas about what children want or need

A wide range of professional groups as well as mothers, children and some fathers noted that the strength of the pro-contact culture meant that the views of individual children were given limited, if any weight. Barnardos noted that all professional groups involved in the child arrangements process start from a position in favour of contact and "make considerable efforts to bring this about".

A participant in the FJYPB focus group was concerned that these generalised ideas about what children need could operate at the expense of children's wishes and welfare:

> "The presumption of contact, it's not helpful at all. I mean it's putting parents' rights above children. At the end of the day unless children can look after themselves and defend themselves, it's putting them in a situation where they are at risk of harm, emotional and physical". **FJYPB**

Those views were echoed by some professionals, including a therapist who commented:

> "In some cases there appears to be a presumption that the parental rights of the father override the wishes and feelings of the child. In several cases, CAFCASS workers and social workers have seemed to regard it as their role to persuade the child to agree to contact with their father, irrespective of the father's behaviour (this includes cases where the father has been convicted of offences related to domestic abuse) and of the stated wishes of the child." **Therapist**

Similarly, Rights of Women said:

> "We are informed [by service users] of Cafcass officers making recommendations for unsupervised contact with a perpetrator of abuse that they are unwilling to sit in a room with because they present a risk to the Cafcass officer." **Rights of Women**

The fathers' groups were somewhat divided on this issue. Mankind, for example, reported that its IDVAs thought that social workers and Cafcass officers did not listen or take into consideration the wishes of children. However, other fathers' groups were more likely to make the same generalisations about what children want and need, and preferred that children were not directly consulted.

> "Most children who had good relationships with both parents prior to their separation simply want things to go back to how they were as soon as possible – or at least as near to how things were as is practical when their parents live in different homes. Children should not be involved unless their evidence proves important. Probably after initial findings involving the adults…." **Families Need Fathers**

6.9.2 Pro-contact culture and alienation

'Parental alienation'[102] is based on an idea that children's wishes and feelings have been influenced by the 'alienating' parent, and therefore should be discounted.[103] Multiple submissions argued that the increasing use of the term 'parental alienation'[104] could silence children. If children have been alienated, then their wishes and feelings are seen as contaminated. Submissions also observed that an allegation of 'parental alienation' meant that the parent who is the subject of the allegation will be treated as an 'alienator', rather than as a protective parent with well-founded fears around abduction or violence. This potentially leaves children who have experienced domestic abuse in a very vulnerable position, unless there is some 'objective' evidence of the abuse or an independent agency with influence. Welsh Women's Aid, for example, cited one of their service users who had that experience:

> "Nobody wanted to hear my children's voice as they were convinced I had manipulated the children into not wanting their father. Until the children disclosed to the school the damage their dad had been doing while I was under an order to send my children or risk imprisonment or losing them." **Welsh Women's Aid**

A number of submissions raised concerns about professionals jumping to a conclusion that a child refusing to spend time with an abusive parent had been alienated, rather than

[102] This definition of parental alienation is not recognised as one which is utilised, or applied, by the Family Court, by all of the panel members, in particular those for the Association of Lawyers for Children and judicial panel members

[103] See, e.g. the widely-cited paper by K Weir (2011) 'High conflict contact disputes: Evidence of the extreme unreliability of some children's ascertainable wishes and feelings', *Family Court Review* 49(4): 788.

[104] See A Barnett (2020) 'A genealogy of hostility: parental alienation in England and Wales', *Journal of Social Welfare and Family Law* 42(1): 18–29; literature review section 7.2.

considering the refusal to be a result of an abusive parent's behaviour. Refuge argued that Cafcass officers were prioritising the risk of parental alienation of the father over the impact of domestic abuse on the wellbeing of the survivor and their children.[105] Others noted that professionals were too ready to see signs of alienation, and so silencing children, rather than assessing further what the child may have witnessed or experienced. This was particularly evident where allegations of sexual abuse had been raised.

> "In cases where children have disclosed sexual abuse or displayed behaviour that might indicate sexual abuse by their father, there is very little focus on capturing children's voices in family court proceedings. The primary focus seems to be on the parents, with often intense scrutiny of mother's motivation for making allegations of sexual abuse. In cases we are aware of: Children have made clear, sometimes graphic, disclosures of sexual abuse to professionals and/or to parents and carers, but despite this, the Judge has ruled that the sexual abuse did not happen." **CARA**

In contrast, several submissions from fathers drew a distinction between the child's expressed and real wishes and feelings and argued that expressed wishes against contact should not be taken literally. Some fathers in the DVIP focus group said they had also thought that their children's reported views must have been influenced by their mothers, as those views did not accord with the narrative they had in their minds (e.g. the children were in bed, had heard nothing, were very young, would not remember…). They admitted they had previously had no understanding of the impact of their abuse on their children, but taking the course had helped them understand the trauma caused even to the very youngest children from living with abuse.

Thus, while 'alienation' may have become a common counter-allegation, submissions highlighted the very real dangers of accepting this as the default explanation for children not wanting contact.

6.9.3 The difficulty of ascertaining wishes and feelings

Submissions acknowledged that ascertaining children's wishes and feelings, particularly those of younger children, is a challenging process. Some submissions from therapists noted the difficulties faced by some children "due to 'torn loyalties' and other complex (e.g. emotional, psychological) factors".

[105] The panel notes that Cafcass and Cafcass Cymru have adopted different practice guidance on parental alienation. See Cafcass, Child Impact Assessment Framework: https://www.cafcass.gov.uk/grown-ups/professionals/ciaf/; Cafcass Cymru, Children's resistance or refusal to spend time with a parent: practice guidance: https://gov.wales/childrens-resistance-or-refusal-spend-time-parent-cafcass-cymru-practice-guidance. Cafcass Cymru has also commissioned a review of research and case law on parental alienation: J Doughty, N Maxwell and T Slater, *Review of research and case law on parental alienation* (2018).

> "It is evident in my assessments and therapeutic work with children that they often find it difficult to express their wishes and feelings for fear of repercussions. They fear upsetting one or other parent. Depending on their situation, they may give contradictory responses depending on the context and environment in which their views are sought. In some situations children can be incongruent – the views they express are not matched by their observed body language or actions. Any such incongruence needs further exploration." **Counselling Psychologist, call for evidence**

Equally, as Welsh Women's Aid noted, when a child has experienced coercive control from an abusive parent "the voice initially heard by professionals may have been significantly influenced by the perpetrator, rather than expressing the child's true wishes and feelings".

Some fathers' groups suggested that children should not be consulted given these difficulties:

> "The vast majority of children do NOT wish to participate in court proceedings. Where they do their voices are usually the same as the parent they live with. Generally, they want a decision to be made about their future by an adult who cares about what happens to them. They generally cannot and do not wish to engage with the evidence and take sides." **The National Association of Alienated Parents**

Despite this, research and the evidence of the Cafcass FJYPB focus group does suggest that children want to be consulted, and that their voices should not be dismissed as simply reflecting the views of their resident parent. A common response in the call for evidence was to highlight the need for skilled assessments that start with an open mind, rather than a fixed hypothesis of what is going on which may lead to entirely inappropriate conclusions. That skilled assessment should assess all the circumstances of an individual case to help the court to determine what is in the best welfare interests of the child, but this obviously has resource implications.

6.10 Barriers to hearing children – lack of coordination and silo working

A consistent theme amongst domestic abuse and social work organisations and young people was that the courts operated without reference to other agencies and jurisdictions, and therefore failed to gather or to value evidence from those with direct experience of working with the children or family. Organisations including Barnardos, Safelives, Women's Aid Federation of England and Welsh Women's Aid noted that the court process, particularly in the preparation of Section 7 reports, failed to draw upon the expertise of

their specialist children's services staff who knew the family. Not only did Cafcass/Cymru FCAs and guardians have limited engagement with other professionals, but it was also observed that judges gave greater weight to the views of Cafcass/Cymru officers who had spent very limited time with the child, than to those of professionals who had worked with the same children and developed a relationship with them over an extended period. Barnardos argued strongly that family courts need to work more closely with organisations which have been working directly with child and adult victims to improve decision making and they proposed that Cafcass and the courts should be made aware of domestic abuse and/or children's agencies or charities who had been supporting the family.

Mothers also raised concerns that Section 7 reports were prepared without reference to other services.

> My doctor knows me, believes what I've gone through. He [ex-partner] intimidates me by coming to my work, and they know about this. My employer and doctor are supportive. The police know. Were they asked? My child had a welfare officer at school [because of the abuse] and they weren't asked anything." **Mother, call for evidence**

However, there were positive examples of when this had happened. One mother said:

> "My daughter was heard by the court and the order is based on her wishes and feelings as she is almost 10. Cafcass, her school and GP were all supportive of both her and I." **Survivor Focus Group participant**

The FJYPB focus group endorsed the need for wider information gathering and greater coordination with other services.

> "I think they do need to be more open to evidence from people close to the child, from professionals in places like that who know the family and know the children. Schools know very well…. I think most schools know what's happening. Most teachers can work out what's worrying the child and what the family situation is". **Young Person's Focus Group**

However, the group also emphasised the need for any wider enquiries about the child's wishes and feelings to be child-led. One participant noted that a teacher in whom the child had confided had immediately phoned the abusive parent to report what had been said. There was general agreement in the group that asking the child who the Cafcass officer should talk to would be the best approach to get a well-rounded picture.

6.11 Barriers to hearing children – the adversarial processes

The final point is that the adversarial process, by definition, excludes children from an active role other than in the rare cases that they are made a party to proceedings. In the even more rare cases where children are directly involved in proceedings, the adult-centric nature of the process is even more evident. The panel received very little evidence about such cases, given their rarity. However, one domestic abuse worker highlighted just how inappropriate the process can be for children giving evidence. They reported a case where the alleged abuse was dismissed due to inaccurate or conflicting evidence as "the court process made it difficult and stressful for the child to get across accounts of events". The worker reported that the child was left with "immense guilt that they had 'done it wrong' in court and their father had got away with physically and emotionally abusing his mother and [sibling]".

6.12 Conclusion

The Children Act 1989 and the UNCRC make very clear that children and young people should have their wishes and feelings taken into account in court proceedings that concern them. Research and submissions to the panel, most notably from young people themselves, have highlighted how important it is that children's voices are heard, not least to ensure that the right decisions are made. However, the evidence reviewed by the panel shows that a large proportion of children are not directly consulted in private law cases involving domestic and child abuse, and that those whose views are elicited often go unheard.

A range of reasons were given for why the voices of children and young people are excluded or muted. These included the pro-contact culture which meant that it was assumed that children would benefit from contact even where individual children had clear and justifiable reasons for wishing to avoid contact with an abusive parent. Submissions also raised the importance of resource constraints which limited the number of children who could be directly consulted as well as the ability of Cafcass/Cymru to devote sufficient time to build a relationship with the child. Submissions also referred to the lack of consultation with other agencies. In particular, domestic abuse and children's charities noted that Cafcass/Cymru and the courts failed to draw on the knowledge and expertise of specialist children's workers who were already working with families.

A number of consequences of failing to hear the views of children and young people were flagged. These included children feeling let down and, perhaps of greatest concern, a perception that by not listening to children's accounts of fear of and harm from abusive parents the court was failing to protect children from future harm.

The panel's recommended reforms to child arrangements proceedings in chapter 11 have as one of their key aims to promote the needs and wishes of children experiencing

domestic abuse or other serious offences. Specific recommendations for enhancing the voice of the child in these cases can be found in section 11.6.

7. How allegations are dealt with

7.1 Introduction

This chapter discusses the procedure used by family courts in responding to allegations of domestic abuse in child arrangements proceedings. In this chapter the panel looks at the evidence received of how Practice Direction 12J (PD12J) is implemented in practice.

The evidence raised concerns that PD12J is not operating as intended. There were concerns that it is implemented inconsistently, and is not effective in protecting some children and adult victims of abuse from further harm.

This evidence is consistent with the findings of previous research on PD12J, both before and after it was amended in 2014.[106] There has been no systematic empirical research on the 2017 revisions to PD12J.[107] We received varying evidence on the effects of the 2017 revisions. For example, participants in the judicial roundtable and Rights of Women suggested that more fact-finding hearings were being held since 2017. On the other hand, Welsh Women's Aid reported: "A number of specialist support workers have told us they have not seen Practice Direction 12J consistently applied since its review in 2017 and could not give any examples of how it has improved outcomes since the changes." Overall, the evidence received from parents whose experience in the family courts was only in 2018–19 was not noticeably different from the evidence regarding earlier time periods.

The underlying barriers identified in chapter 4 help to explain why successive revisions of PD12J might not have made much difference in practice. The evidence the panel received identified how those underlying barriers operate to undermine the effectiveness of PD12J.

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[106] M Coy et al, *Picking up the Pieces: Domestic Violence and Child Contact* (2012); R Hunter and A Barnett, *Fact-finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (2013); A Barnett (2014) 'Contact at all costs? Domestic violence and children's welfare', *Child and Family Law Quarterly* 26: 439–62; A Barnett (2015) '"Like gold dust these days": Domestic violence fact-finding hearings in child contact cases', *Feminist Legal Studies 23: 47–78; M Harding and A Newnham, How do County Courts Share the Care of Children Between Parents? Full Report* (2015); Women's Aid Federation of England, Nineteen Child Homicides (2016); J Birchall and S Choudhry, *What About My Right Not to be Abused? Domestic Abuse, Human Rights and the Family Courts* (2018); R Hunter, A Barnett and F Kaganas (2018) 'Introduction: Contact and domestic abuse', *Journal of Social Welfare and Family Law* 40(4): 401–25; J Harwood, *Child Arrangements Orders (Contact) and Domestic Abuse – an Exploration of the Law and Practice* (PhD thesis, Warwick University, 2019); see literature review section 9.

[107] Research conducted since the 2017 revisions includes M Lefevre and J Damman, *Practice Direction 12J: What is the Experience of Lawyers Working in Private Law Children Cases?* (2020), based on a survey of practitioners in Sussex; and IDAS, *Domestic Abuse and the Family Courts* (2020), based on surveys, focus groups and workshops with victim/survivors, support workers and service providers, including the judiciary and Cafcass.

Concerns about resource constraints were particularly prominent in this regard. Judicial and practitioner respondents were unanimous in agreeing that resource constraints are a major impediment to the effective implementation of PD12J, including the inability to provide judicial continuity, and the large number of LIPs now appearing in private law children cases. Individual respondents also commented on courts having too little time for each case, just processing cases without engaging with the parties, insufficient time being allocated for hearings, judges and magistrates not having read documents filed before hearings, and difficulties of communication between the court and litigants. The evidence also showed how the court's pro-contact culture, the adversarial process of fact-finding and the silo working of the family courts operate to limit the effectiveness of PD12J. Unless the problem of insufficient resources and the other underlying barriers are addressed, they will continue to have an adverse effect on the implementation of the Practice Direction.

7.2 General observations on PD12J

PD12J sets out in detail what a court should do when allegations of domestic abuse are raised in a child arrangements case. Most submissions gave evidence about specific aspects of the PD12J process rather than the practice direction as a whole. Those who made general comments about PD12J addressed three aspects: the drafting of PD12J, the effectiveness of PD12J when it is applied, and; And the implementation of PD12J generally.

There were relatively few comments on the drafting of PD12J. Some professional respondents argued that PD12J was poorly drafted, too long and complex, open to varying interpretations, and was not user-friendly for non-lawyers. Some fathers expressed concerns about the fact that it is framed in terms of the non-resident parent being the alleged abuser and the resident parent being the alleged victim. This fails to cater for the situation where it is the parent with whom the children are living who is the alleged abuser. Most concerns raised about PD12J, however, were not to do with the drafting.

The majority of professionals who responded held the view that PD12J is effective, as long as it is followed. For example, Nagalro submitted: "Practice direction 12J, where implemented, is very effective in protecting children and victims of abuse. However, Nagalro understands that the implementation is hampered by the lack of resources in the courts and lack of legal advice available to the parents."

As this quotation indicates, the key theme of submissions was that there are serious shortcomings in the implementation of PD12J. Respondents perceive there to be a substantial gap between the 'law in the books' of the Practice Direction and the 'law in action' of how it operates on the ground.

A number of individual parties gave evidence about the application of PD12J in their case or described procedures which indicated that PD12J had been applied. But many

individual parties claimed that PD12J was not mentioned, was never raised or brought to their attention, or was disregarded by judges and lawyers. Individual and some professional respondents identified a lack of awareness or familiarity with PD12J on the part of some Magistrates, Cafcass officers and local authority social workers in particular. But concerns about the non-application of PD12J appeared to relate less to lack of judicial or professional awareness and more to the respondent's perception that the court had ignored, refused to listen to or dismissed allegations of domestic abuse they had raised, and refused to order a fact-finding hearing. For instance, one mother reported: "I reminded the Judge of 12J, and asked him why he hadn't ordered a fact finding, he said and I quote, listen young lady – don't you tell me about the law. And ignored it". The following case provides a more extended example:

> I was requested to attend a FHDRA court hearing in March 2019. … [As] a single parent on a low income, who had evidence of domestic abuse perpetrated by the father of my child since 2016, I was entitled to get legal aid. However, because I was only given a month's notice there was insufficient time for the funding to be arranged, so I was forced to represent myself as a Defendant and Litigant in person. … During [conciliation] with the CAFCASS officer, I said that I was requesting a fact-finding enquiry into the allegations against me [of 'parental alienation' and potential child abduction'] and my own allegations of domestic abuse along with a Section 7, and that my son would like to have a voice in what decisions were going to be made on his behalf. The CAFCASS officer turned to me and said in a derogatory tone, "Yeah, that's not gonna happen". … The information and evidence which I had provided to the court regarding domestic abuse, including a history of controlling and coercive behaviour, psychological abuse and gas-lighting towards me and damage of my personal property, and emotional intimidation and physical abuse towards my son was completely ignored by the CAFCASS officer and the Court – simply ignored, unaddressed and swept under the carpet, as though they were completely insignificant and didn't matter. I had also highlighted the father's alcoholism, and this was equally ignored. Yet comments like "Let's see what we can get for Dad" were stated by the Court Adviser and the Magistrates. **Mother, call for evidence**

A small number of individual respondents reported positive experiences with the Practice Direction:

> "I am lucky that I have a judge who has massively understood the 12J direction and has been amazing with me, but has also given my abuser way too many chances as he does not produce documents that she orders him to! Perhaps she would be a good judge to help other judges to understand as I know 100% I am one of the very few lucky ones that have this understanding." **Mother, call for evidence**

Such positive experiences, however, were in the minority among those who gave evidence to the panel.

7.3 The presumption of parental involvement

The presumption of parental involvement was added to the Children Act 1989 in 2014. On one level it added little to the existing case law which promotes the continuing involvement of both parents in their children's lives after separation.[108] But on another level it gave it a statutory foundation which limited the possibility for further, more nuanced development of case law, and reinforced the notion that any exceptions to the norm of contact should be read narrowly. Paragraph 7 of PD12J requires the court in every case to consider carefully whether the presumption applies, considering in particular any allegations or evidence of harm or risk of harm from domestic abuse.

Professional respondents expressed widely varying views on the impact of the presumption. Some agreed with it and found it a helpful reminder; others said it was meaningless and never mentioned. British Autism Advocate submitted that it had been disastrous: "It can give a controlling abusive ex 18 years free reign to abuse/control not only the ex-spouse but also the children themselves without protection".

Mothers, too, felt that it gave the abusive parent power over the non-abusive parent and the children and a legal weapon the abuser could use at will. They considered that the presumption put a misplaced emphasis on the child's right to a relationship with both parents and the father's right to family life, above the child's welfare and right to be safe from abuse and its effects:

> "This is a very dangerous piece of legislation. The father of my children is a harmful, aggressive, controlling man. … This needs to be looked at carefully. It is not correct to assume, before investigation, that somebody will further a child's welfare just because they share his/her genes" **Mother, call for evidence**

Mothers argued that the presumption resulted in cases being judged generically rather than based on the individual child, courts not looking at the facts and children's voices being lost. Mothers in one of the focus groups said they had been told by their lawyers that their abusers would be granted contact and there was nothing they could do about it.

[108] F Kaganas (2018) 'Parental involvement: A discretionary presumption', *Legal Studies* 38: 549–70; literature review section 7.1.

> "My lawyer totally empathised and said I totally understand but the system is how it is, and your husband would have to be a murderer to not get contact with his children… I was confident because of previous ABH they wouldn't hand over my children and she said, 'I'm not being funny love but I've seen fathers who have multiple records of ABH who have unsupervised contact, you're not going to win this case today'." **survivor focus group participant**

Fathers expressed divergent views on the presumption, complaining both that it had not been applied in their case when it ought to have been, and that it had been applied to the benefit of the mother when it ought not to have been. One men's focus group participant reported:

> "my solicitor said to me: either way, if I admit it or deny it, I'm still going to see my kid. The solicitor said I'm not a major risk to not see my kid so either way they're going to let me see my kid."

On the question of the circumstances in which the presumption would be disapplied, professional respondents again varied across the spectrum, from saying that it was disapplied in appropriate cases, disapplied inconsistently, only disapplied in extreme cases to never disapplied. A number of professionals reported that the presumption would be applied unless there was an injunction in place, there were serious safeguarding concerns or there was a definitive finding of domestic abuse. Surviving Economic Abuse maintained that victim-survivors needed legal advice and representation in order to rebut the presumption effectively.

Overall, the evidence received by the panel suggests that the presumption is implemented inconsistently and is rarely disapplied. To the extent that the courts' pro-contact culture operates as a barrier to addressing domestic abuse, it serves to reinforce that culture.

7.4 The early stages of the case and deciding about fact-finding

The procedure specified by PD12J falls into distinct parts. This section discusses the early stages of a case, including consideration of mediation and conciliation, the decision as to whether alleged domestic abuse is 'relevant' and whether there should be a fact-finding hearing. The following sections deal separately with fact-finding hearings, and with the procedure after fact-finding.

7.4.1 Mediation and Conciliation

PD12J specifies that where any information is provided to the court indicating that there are issues of domestic abuse which may be relevant to the court's determination, the court must ensure that the parties are not expected to engage in conciliation or other forms of dispute resolution which are not suitable and/or safe.[109] There is a risk that conciliation or mediation in such cases may sustain and further unequal power relationships, cause psychological and emotional harm to the victim and trigger traumatic memories.

Many mothers responding to the call for evidence reported being advised and, they felt, required or directed to engage in conciliation by Cafcass/Cymru at court or to attend mediation, and being criticised for not attempting mediation, despite having provided information about domestic abuse. This appears to be contrary to para 9 of the Practice Direction. The mother whose case was described at the beginning of this chapter, for example, was required to conciliate at court with the other party and the Cafcass officer.

> "When I stated to the CAFCASS officer at the end of [the conciliation session] that it had been incredibly difficult to sit in a room with an abusive ex-partner, she looked surprised as though she had no idea about the abuse – had she even read the applications?" **Mother, call for evidence**

Another mother who had been in a same-sex relationship reported:

> "I was offered no protection and given two choices – go to mediation with my abusive ex or have my child live with my ex whom isn't related to my child";

and a father stated:

> "I was forced into mediation with my abusive ex-wife. This was never going to work but always advised that a judge looks favourably on this to happen. No consideration was given to my circumstance only because I was trying to put my children first at every stage." **Father, call for evidence**

The panel received evidence from domestic abuse charities about unsafe mediation and community dispute resolution practices, and the importance of the formal legal system for protecting the human rights of vulnerable survivors of abuse.

[109] PD12J, para 9.

Given that conciliation and mediation are usually considered – and para 9 of PD12J falls to be implemented – at the first hearing before allegations of domestic abuse have been determined, the court should take a precautionary approach unless there is positive evidence that alleged abuse has been acknowledged and addressed and that parties are able to speak and negotiate freely on their own behalf.

7.4.2 Deciding whether to hold a fact-finding hearing

PD12J requires the court to ascertain at the earliest opportunity whether domestic abuse is raised as an issue which is likely to be relevant to any decision of the court relating to the welfare of the child.[110] Only if the alleged abuse is likely to be relevant to the kind of order the court might make must the court consider holding a fact-finding hearing with regard to disputed allegations.

Individual submissions to the panel generally described experiences of serious domestic abuse. We acknowledge, however, that courts are faced with a spectrum of behaviours in making decisions about relevance and fact-finding. Some legal professionals asserted that courts make the right decisions and fact-finding hearings are held when they ought to be, while others thought that fact-finding hearings were held too often. But most submissions either described decision-making on relevance and the need for fact-finding as inconsistent and unpredictable between different judges and benches of magistrates, or maintained that courts fail to hold fact-finding hearings when they should. This is consistent with the limited research on the frequency of fact-finding hearings prior to the 2017 amendments to PD12J.[111] As noted at the beginning of this chapter, some respondents considered that there has been an increase in the number of fact-finding hearings following these amendments, but most submissions from individual professionals and organisations did not give a sense that fact-finding hearings had increased. A family member of a victim of domestic abuse whose experience in the family court spanned the years 2016–19 responded to the question in the call for evidence about the effectiveness of PD12J:

> "Ineffective, after 3 years of litigation we were only just made aware of this direction and when raising it the judge said where is the evidence and why had there never been a fact finding case? Good question as domestic abuse had been cited in all the mother's case history." **Family member, call for evidence**

[110] PD12J, para 14.

[111] Studies of case files consistently found that fact-finding hearings were held in less than 10% of cases: J Hunt and A McLeod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (2008), M Harding and A Newnham, *How do County Courts Share the Care of Children Between Parents? Full Report* (2015), Cafcass & Women's Aid Federation of England, *Allegations of domestic abuse in child contact cases* (2017); literature review section 9.4.

PD12J requires the court to record on the face of a court order the reasons for deciding that a fact-finding hearing is not necessary. To date there has been no review of court orders to analyse whether and if so what reasons are given by the courts. However, respondents offered a range of explanations why courts might decide that allegations of domestic abuse were not relevant, and hence there was no need for a fact-finding hearing.

Some legal practitioners pointed out that judges are often required to decide on relevance at the outset of a case with only limited evidence available. If the judge decides at that stage that the allegations are not relevant, the opportunity to produce further evidence will also be limited. More generally, respondents detailed a range of reasons given by courts for not holding fact-finding hearings which they considered systematically minimised the relevance of allegations.[112] These included:

- Applying generalised assumptions about the seriousness of the allegations rather than assessing the actual impact of alleged abuse on the child and non-abusive parent; for example discounting allegations of 'emotional' (as opposed to physical) abuse, so-called 'historic' abuse, abuse which did not occur in the presence of the children, abuse where contact had occurred since the last 'incident', or abuse which was not so severe as to be likely to result in indirect or no contact
- Discounting allegations due to insufficient evidence without any opportunity for fact-finding
- Dismissing or disbelieving evidence provided to substantiate abuse
- Limiting the material the court would consider in deciding on relevance; for example simply following Cafcass/Cymru's recommendation in the safeguarding letter without looking at other evidence
- Accepting limited admissions to avoid the need for a fact-finding hearing
- Delegating the decision on relevance or whether abuse has occurred to Cafcass/Cymru or an expert
- Ignoring or refusing to deal with allegations a priori, on the basis that they would make no difference as contact would happen anyway.

Respondents further suggested that courts may consider fact-finding hearings unnecessary in many cases because only findings of very serious domestic abuse would displace the assumption of direct contact.

[112] See also literature review section 9.5 for similar reasons found in pre-2017 research on this issue.

> "The Judge and opposing barrister said that my case had little chance of succeeding. I was told that my evidence was "weak" and just a "string of isolated incidents". Written into the Child Arrangements Order was a line which stated that even if proved, none of the allegations I raised of domestic abuse with supporting evidence and police disclosure, would lead to a restriction of child contact, including unsupervised contact and overnights." **Mother, call for evidence**

A second explanation for a reluctance to hold fact-finding hearings links to the resources barrier identified by the panel. Judicial and practitioner respondents were unanimous in agreeing that resource constraints are a major impediment to the effective implementation of PD12J, including delays caused by listing pressures and the court being unable to dedicate proper time to individual cases. Fact-finding hearings are both time-consuming and resource intensive. It would simply be impossible for the court to hold a fact-finding hearing in every case in which domestic abuse is alleged with the current resources. Many respondents commented on the lengthy delays involved if a fact-finding hearing is scheduled, including preliminary procedures in preparation for the hearing, obtaining a hearing date, the work involved after the hearing, and scheduling further hearings if the matter does not settle.

Some submissions offered a third explanation: that judges may decide not to list a fact-finding hearing because to do so would heighten animosity between the parties. This links to the adversarial barrier identified by the panel. A fact-finding hearing is highly adversarial, and may damage or destroy the possibilities for a cooperative relationship between the parties in co-parenting their children. This rationale assumes that safe contact can occur and that a cooperative co-parenting relationship remains possible despite the alleged domestic abuse, rather than investigating whether this is the case. But it does point to another drawback of the fact-finding process which may influence courts' decision-making.

> "The judge who handled my first hearing was fantastic – they ordered a finding of fact and drug and alcohol testing and then advised me to apply for my second non-molestation order". **Mother, call for evidence**

The submissions did not suggest that fact finding hearings should be mandatory in every case or that the discretion of the court should be removed. However, they did highlight the importance of procedural justice for litigants, in particular the need to feel that they had been heard. There were examples in the evidence of good practice.

By contrast, many mothers felt that their concerns had not been taken seriously, while fathers also expressed concerns that they had not been afforded the opportunity to test the

allegations against them. Some lawyers and judges also took the view that if allegations are not 'put to bed' by means of early fact finding, they will continue to 'simmer' under the surface and return to cause problems later. By contrast, fathers in the DVIP focus group said that although they had found the fact-finding process hard, it had had a positive impact as a means to force them to confront their behaviours and to stop denying that they were abusive.[113]

7.5 Fact-finding hearings

As already noted, a fact-finding hearing is a highly structured, technical and adversarial process. The party alleging domestic abuse is required to provide sufficient detail of the allegations so that the other party knows what case they have to answer, and to provide evidence to support the allegations. The other party is required to respond to the allegations and to provide their own evidence in support of their own account of the facts. The evidence of both parties is then tested at the hearing though cross-examination. The evidence that we received suggested that the structure of a fact-finding hearing, and the strategies courts have adopted to manage fact-finding hearings within their limited resources, are not well-suited to determining allegations of domestic abuse, particularly long-term abuse, emotional abuse, coercive control, and child sexual abuse. Nor, according to this mother, are they well suited to identifying the primary perpetrator or accurately identifying false allegations:

> "Fact-finding is almost worthless if it is never applied to the responsible parent. Anything negative that came up was presented as parental or if it was highlighted that one parent was an issue then something else was found even if it was minor to put against the other parent. Any severity of any act was muted, minor things were promoted." **Mother, call for evidence**

7.5.1 Scott Schedules

Scott Schedules are a mechanism used by family courts to assist in the fact-finding process. They require the person making allegations of abuse to itemise each of the separate allegations, to provide brief details of each allegation and to indicate the findings sought. Further details of the allegations are provided in the party's witness statement. The Schedule is sent to the other party who briefly indicates their response to each allegation and again provides further details in their witness statement. The completed Scott Schedule enables the court to identify the scope of the allegations, the points in dispute between the parties and what the party making the allegations will need to prove.

[113] We note that the DAPP delivered by DVIP focuses on participants taking responsibility for their behaviour. Not all DAPPs share this focus. Fathers in another focus group who had undertaken DAPPs from a different provider did not make this acknowledgement.

Submissions to the panel raised several serious concerns about the use of Scott Schedules for fact-finding hearings.[114]

First, Scott Schedules are a tool designed to be used by lawyers. Professional respondents observed that litigants in person find them very difficult to comprehend and comply with, which means they are not able to represent their experience of abuse fully or accurately. PD12J attempts to cater for this to some extent by suggesting that the court should consider whether it would be practicable to complete the schedule at the first hearing (FHDRA) with the assistance of the judge.[115] However, it appears this option is rarely invoked, and one regional group of lawyers noted that it is impossible to do so when the FHDRA is conducted by a Legal Adviser alone.

Secondly Scott Schedules were designed with a focus on discrete incidents as opposed to patterns of behaviour. When the definition of domestic abuse in PD12J was amended in 2014 to incorporate coercive and controlling behaviour, there was no corresponding attention given to how this could be established to the court's satisfaction. PD12J simply says that in giving directions for a fact-finding hearing, the court should consider "what evidence is required in order to determine the existence of coercive, controlling or threatening behaviour, or of any other form of domestic abuse".[116] In practice, Scott Schedules continue to be used, with little or no adaptation to facilitate evidence of emotional abuse or coercive control. Rights of Women, for example, pointed to varying judicial practices with regard to what might be alleged in a Scott Schedule and accompanying statement, with some judges allowing allegations of actions over a period of time and a narrative about the perpetrator's controlling behaviour. But others were very strict in insisting that allegations relate only to discrete incidents.

Thirdly, in response to the limited availability of judicial resources and hearing time, Scott Schedules appear to have become the primary mechanism for restricting the scope of fact-finding hearings. Parents making allegations may be directed to confine their Scott Schedule to a limited number of allegations (4–6 allegations appear to be commonly specified). Alternatively, after the Scott Schedule is filed, the court may direct that it will only hear evidence on a small number of the itemised allegations. This saves time for the court, but limiting fact-finding to a small number of allegations is arbitrary and undermines the purpose of fact-finding. It does not enable the court to establish an accurate factual basis on which the case can proceed, or to properly identify the risks of future abuse faced by the child and the non-abusive parent. Nor does it provide procedural justice for the parties.

Many respondents noted the adverse effects of such limitations. They pointed out that fact-finding becomes focused only on those individual incidents which are deemed most

[114] See also the literature review section 9.8.

[115] PD12J, para 19(c).

[116] PD12J, para 19(d).

'serious', usually involving physical violence, or which are the most salacious or vicious. This leaves out the more mundane and repeated forms of abuse which might have had the greatest psychological impact on the victim and/or the children. "The real damaging stuff is the stuff you can't put on the Scott schedule" (survivor focus group participant). It also strips away the wider context for those 'serious' incidents, making them appear isolated and hence more easily dismissed as 'out of character' or 'one-off' events with no ongoing significance.

A survivor focus group participant reported that her whole experience of abuse was dismissed as 'too much', the court could not consider it all, and so her child's entire future and safety came to rest on the four selected allegations. Another recounted that the magistrates had said of her Scott Schedule: "'This is a tad too long. I counted 15 points!' They laughed at me." Southall Black Sisters provided the following submission summary account of the experience of one of their service users to whom they gave the pseudonym 'Salma':

Submission Summary

At the first court hearing regarding the children in 2018, Salma was told to keep her 'Scott's Schedule' to six incidents only and advised by the court not to go into too much detail. Salma was also told 'please don't make it emotional'. … Salma felt incredibly insulted by the minimisation of her history of abuse to just six incidents that did not allow her to demonstrate the extent of her husband's manipulation and control of her and the children. Serious experiences, including attempts to strangle her, were minimised or discounted. … [When it came to the fact-finding hearing] "The magistrates decided which one of the six that they should disregard and ignored anything older than one year. Anything to do with the children was taken out completely. 'Oh so you were abused here but so were the children as well, we have to take that out because the children are not here'."

We also received accounts of victims complying with the limits imposed on the number of allegations and the length of their statement and then being criticised for providing insufficient detail, and one survivor focus group participant said she had been subjected to a £1,000 costs order because her Scott Schedule was too long.

A further effect observed by practitioners of using Scott Schedules and limiting the number of allegations is that the court is not generally exposed to the more subtle and persistent patterns of behaviour involved in coercive control, harassment and stalking. As a consequence, family courts do not gain a full awareness of the extent and nature of abuse that might be present in the cases coming before them.

7.5.2 The burden of proof and binary outcomes

The person who makes an allegation bears the burden of proving it. However, parents making allegations of domestic abuse or child sexual abuse perceived that this burden was too difficult. As well as the problems of evidencing coercive control and emotional abuse just described, it appeared from many responses that courts often look for corroborating evidence in order to find allegations proven. This can be an insurmountable obstacle in many cases of domestic abuse – particularly adult and child sexual abuse and coercive and controlling behaviour – where abuse occurs behind closed doors and remains invisible to the outside world. In other contexts where corroborating evidence is unavailable, courts are able to assess the credibility of each of the parties and decide which party's account they prefer. Submissions from parties and organisations on the issue of child sexual abuse allegations suggested that courts impose even higher corroboration requirements, not accepting expert opinions from those who have worked with the child and sometimes requiring a criminal conviction in order to find allegations proved.

In addition, parents and organisations supporting them felt that they were hampered by the court's pro-contact culture.[117] The following quotation relates to a fact-finding hearing held in 2018–19:

> "Although a Fact Finding was held in my case, it was a travesty. The Family Court Magistrates were biased against mothers and were ignorant about domestic abuse. Despite all the physical evidence [photos, medical records, social services reports, police records and logs, a Non Molestation Order] they preferred to believe that no abuse was happening. I was not treated with respect or as a vulnerable witness. My husband had no evidence and yet his word was taken over all the evidence and ALL the professionals' opinions. … The Magistrates had pre-judged the case and I did not receive a fair hearing or justice." **Mother, call for evidence**

The ability to prove allegations is particularly important since the adversarial process results in black and white outcomes; there is no room for shades of grey. Case law directs that family courts must find allegations either to be proved or not proved – if they are proved, the facts are taken to have occurred; but if they are not proved, the facts are taken not to have occurred.[118] The case then proceeds on the basis of abuse (or some abuse) found or no abuse found. If no abuse is found, there will be no risk assessment, and the

[117] See also literature review section 9.8.

[118] *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35 per Lord Hoffman: "if a legal rule requires a fact to be proved…a judge…must decide whether or not it happened. There is no room for finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not."

orders made will offer no protection against future abuse. Many individual submissions expressed horror at such outcomes.

This could occur not only when a fact-finding hearing was held, but also when the parent making the allegations opted not to have a fact-finding hearing. In some cases, mothers said they had been advised by their lawyer not to proceed with a fact-finding hearing, but had not been advised that the consequence would be that their case would be treated as if the alleged abuse had not happened. Other submissions noted that if a victim of abuse cannot face the prospect of a fact-finding hearing because it will entail further abuse, trauma and counter-allegations, the court will conclude that the abuse did not occur and make orders accordingly.

As discussed in chapter 5, many of the submissions by mothers alleging domestic abuse or child sexual abuse referred to the fact that counter-allegations of parental alienation had been made against them. These counter-allegations are also decided at the fact-finding hearing. There is therefore a risk that if the mother is not able to prove her allegations of abuse, the court will find not just that the abuse did not occur, but that she has deliberately lied about the abuse to disrupt the children's relationship with the other parent. Even in the absence of counter-allegations, submissions indicated that mothers risk an unfavourable response if they are unable to prove their allegations on the balance of probabilities, as the court might conclude that they have needlessly obstructed contact. This links with the concerns expressed by mothers, noted in chapters 4 and 5, about victim-blaming, negative stereotypes and sex discrimination.

PD12J does not require that allegations of abuse should always be dealt with at a separate fact-finding hearing. It is possible for them to be decided as part of the final welfare determination (although that also has its drawbacks). However submissions suggested a widespread practice of treating a fact-finding hearing as an all-or-nothing option, which gives parents alleging abuse an unwelcome choice. They can either endure the trauma of a fact-finding hearing, with the risk of facts not being found or counter-allegations being upheld, or withdraw their allegations with the consequence that the case proceeds on the basis of no abuse. In this context, Nagalro observed that 'findings' are sometimes agreed at court, particularly by parents who are not legally represented, which bear little relation to reality, often do not resolve the situation between the parents, and have limited value in assessing harm and risk to the children and/or the adult victim of abuse. But they are a pragmatic response to the risks of fact-finding and avoid its stark win-lose effects.

The panel has been unable to assess the many concerns raised about fact-finding hearings against data on the outcomes of such hearings, because no systematic data is

available, either from the family courts or from previous research.[119] We do not know what proportion of allegations of domestic abuse and what proportion of counter-allegations are proved in fact-finding hearings. This is an area which requires further research.

7.6 After fact-finding: support services and risk assessment

When courts did make findings of domestic abuse or child abuse, respondents often expressed disappointment at what followed. PD12J provides that where domestic abuse has occurred, the court should obtain information – either itself or via Cafcass/Cymru or the parties – about the facilities available locally (including local domestic abuse support services) to assist any party or the child.[120] The evidence suggested that this provision is not being applied. Submissions recorded an absence of follow-up for those who had been found to be victims of abuse and no referrals to domestic abuse or child abuse services. Survivors were left with the impression that the court was now more interested in 'moving on' and, often, restoring contact (as discussed in chapter 9) than in acknowledging the harm they and their children had suffered and their need for recovery.

PD12J further states that following any determination of the nature and extent of domestic abuse, the court must consider if it would be assisted by an expert safety and risk assessment and if so, make directions for any such assessment to be undertaken.[121] The Court of Appeal has made it clear that in almost all cases where domestic abuse has been found, an expert risk assessment is likely to be essential in order to understand the ongoing risk to the child.[122] Decision-making based on poor risk assessment has been repeatedly found by safeguarding reviews and domestic homicide reviews to be a prominent factor in cases where children have died or been seriously harmed and in adult domestic homicides.[123]

In the many cases in which a fact-finding hearing was not held or allegations had not been proven, our respondents reported that no risk assessment was conducted. This is another example of the adversarial barrier in operation. While the court proceeded on the basis that alleged abuse was not relevant or had not occurred, this was seen as a problem, since the absence of findings did not mean an absence of risk. In the lived experience of respondents, they and their children remained at risk irrespective of the court's findings or non-findings. The absence of risk assessment compounded their sense of not being heard

[119] Hunter and Barnett, *Fact-finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (2013) conducted survey research on this question, and a recent survey has also been conducted by M Lefevre and J Damman, *Practice Direction 12J: What is the Experience of Lawyers Working in Private Law Children Cases?* (2020), but there has been no large-scale analysis of case files; see literature review sections 9.4, 9.8.

[120] PD12J, para 32.

[121] PD12J, para 33.

[122] See *Re P* [2015] EWCA Civ 466 [30] per King LJ; *Re W* [2012] EWCA Civ 528 [19] per Black LJ.

[123] Child Safeguarding Practice Review Panel, *Annual Report 2018–2019* (2020); Home Office, *Domestic Homicide Reviews: Key Findings from Analysis of Domestic Homicide Reviews* (2016).

or believed, and meant that the orders made by the court would not address that risk (as detailed in chapters 9–10). Cafcass also acknowledged this as a problem where the court had made only limited findings of fact:

> [It] can sometimes be [difficult] for Cafcass post fact finding, often when some of the facts have been found but not others. This then ties our hands in terms of assessment because the courts have found the facts which are different to the woman's experience. The Scott Schedules can add to this difficulty. I think there are ways around this and we need to look at ways to support victims through this process so we know what sort of information the court wants to have. **Cafcass, Practitioner roundtable**

But even in relation to abuse that had been established through fact-finding, a number of respondents considered risk assessment processes to be inadequate.[124] Respondents provided examples of courts by-passing risk assessment altogether and simply ordering supervised contact. Other respondents described a number of ways in which they considered risk was minimised so as to maximise the possibilities for contact. These included:

- assessing the ongoing risk for the child but not the ongoing risk for the non-abusive parent;
- only present risk being assessed without consideration of potential future harm;
- risk for one child not being considered in relation to other children;
- risk to the non-abusive parent not being considered also as a risk for the child;
- no consultation with children in the process of risk assessment.

The pro-contact culture thus appears to affect the process of risk assessment. Submissions gave the overall impression that the court and Cafcass/Cymru strained to assess the parent who had been found to be abusive as not presenting a risk to their children, or at least not presenting enough of a risk to prevent direct (ideally unsupervised) contact. In some cases, Cafcass/Cymru assessments and recommendations on risk were reported not to have been followed by the judge, who made their own assessment that the abusive parent posed a lower or no risk and ordered contact to take place.

Effective assessment of future risk in order to ensure that orders are safe and protect against future harm requires both time and expertise. But this element is also affected by resource limitations.[125] Risk assessments are usually undertaken by Cafcass/Cymru officers as part of section 7 reports. A number of organisations (including Nagalro and the PSU) submitted that Cafcass is not adequately resourced to undertake risk assessments.

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[124] Instances of inappropriate or non-existent risk assessment after fact-finding have been the subject of a number of successful appeals in PD12J cases: see review of PD12J case law and literature review section 9.9.

[125] See also literature review section 9.9.

These respondents considered that Cafcass officers are not sufficiently trained to assess risk, that not enough time is allowed to investigate the circumstances of the family, and that risk assessments in section 7 reports are too brief and superficial, and do not adequately identify or respond to the effects of domestic abuse on the child and the non-abusive parent.

> "I rarely saw any differentiated consideration of the type of domestic violence with a nuanced assessment of risk of harm. As such, mutual domestic violence, situational couples violence, coercive controlling violence often resulted in similar child arrangements orders – some of which may leave a child at risk of harm due to ongoing perpetration of violence, others which leave the child at risk of harm through a diminished relationship with a good enough parent." **Psychologist, call for evidence**

There were also concerns about long delays in the production of risk assessments by Cafcass and by local authority social workers.

The alternative but under-used option to risk assessment by Cafcass/Cymru or the local authority is for the court to seek a report from a domestic abuse expert witness. There are a handful of well-regarded agencies undertaking this work (for example DVIP, PAI). Some respondents argued that to assess the risk of harm from coercive control requires expert evidence – but this is costly, and sources of funding are limited. Submissions noted that an expert domestic abuse risk assessment is unaffordable on legal aid rates, and litigants in person are also unlikely to be able to afford to pay for such an assessment. Respondents generally commented on parties' inability to afford drug and alcohol tests and psychiatric or psychological assessments, and the lack of resources to cover these costs in any other way.

7.7 General issues with the PD12J process

Submissions finally identified a handful of issues which applied generally throughout the PD12J process. These related to judicial continuity, LIPs and legal aid, and discontinuities between private law children's case and other proceedings.

7.7.1 Judicial continuity

The limited availability of judicial time for private law cases, and the family courts' reliance on part-time judiciary (magistrates, DDJs and Recorders) means that the "objective" of judicial continuity in child arrangements cases[126] can be very difficult to achieve. This is particularly so at Tier 1 where it may be impossible to schedule all hearings before the same bench of magistrates or even the same bench chair, and the only form of continuity may lie with the Legal Adviser. PD12J places particular emphasis on the importance of

[126] FPR 2010 Practice Direction 12B, para 10.

judicial continuity between the fact-finding hearing and subsequent hearings in the case, but there is a very wide exception allowed where this would result in delay and the detriment to the welfare of the child (from the delay) will outweigh the detriment to the fair trial of the proceedings (from the lack of judicial continuity).[127] Even if judges do reserve cases to themselves following a fact-finding hearing, there may have been a lack of continuity prior to fact-finding. This is far from the end-to-end judicial oversight, continuity between previous and subsequent proceedings, or 'one judge one family' model which is considered best practice for domestic abuse cases.[128]

Evidence from parents consistently reflected a lack of judicial continuity. This resulted in the feeling that no-one in the court had an in-depth understanding of their case.[129] It also meant that parties did not know who or what to expect when they attended the next hearing, as one mother commented: "I have never found anything consistent about any of my visits at court other than the constant threat of having a child removed". In addition, victims of abuse felt compelled to repeat their stories and to relive the trauma of abuse many times over, and abusive behaviour by the perpetrator in relation to court proceedings was not identified or addressed consistently. For example this mother was in private law children's proceedings for two years from 2017–2019:

> My ex has convictions … in the criminal court of assault by battery [against me]. He had restraining orders and breached all. Same with non mol – 7 breaches but convicted on the 7th one! When in family court I had to prove and spent 2 years in court proceedings as he dropped them and then resumed. I had to self represent for a year until my legal aid was finally approved.

…

> My Women's Aid [supporter] was refused entry into the magistrates court … even though security had been previously called when my ex had verbally abused myself and the judge and was very aggressive! Apparently they decided having not read any of my history it was not needed.

…

[127] PD12J, paras 20, 31.

[128] See R Hunter and S Choudhry (2018) 'Conclusion: International best practices', *Journal of Social Welfare and Family Law* 40(4): 548–62.

[129] See also literature review section 9.14.

> Most hearings were completely different judges or magistrates so no continuity or deeper understanding of the case.

…

> Through the process I have had to relive memories and explain things to total strangers over and over again due to the court process. **Mother, call for evidence**

By contrast, mothers commented that when there was judicial continuity, the judge became familiar with the behaviour of the abuser over time and saw through his façade. Examples of good practice cited in individual submissions often included situations where a judge had understood and taken personal responsibility for a case, reserved future hearings to themselves, and hence provided a consistency and reliability of response which was greatly appreciated. For example this mother had endured three protracted sets of proceedings over four and a half years from 2015–19, during which two section 91(14) orders and a large costs order had been made in her favour:

> Our Judge since we moved to [location 1] has been District Judge [name]. He retained our case when the family court in [location 1] closed down and he took the case to [location 2] with him. He has been nothing short of amazing despite the repeated times we have had to be in front of him and dealing with the very complex, difficult, plausible and manipulative man that my ex husband is. **Mother, call for evidence**

On the other hand, we received evidence of a potential down-side of judicial continuity, with both mothers and fathers giving accounts of judges who they felt were prejudiced against them taking hold of the case and dealing with it in a way which left them feeling they would never get a fair hearing.

7.7.2 Litigants in person and access to legal aid

As noted in chapter 4, many individual submissions reflected the enormous difficulty of attempting to represent yourself in the family court. The experiences reported by LIPs included feeling unheard, disregarded, unsupported and bullied, unable to follow the court's processes and acutely conscious of the inequality of arms between themselves and opposing lawyers. In the context of PD12J, both mothers and fathers commented on the near-impossibility of convincing the court to hold a fact-finding hearing as a litigant in person when the other party's lawyer did not want one.

Professional respondents commented more generally on the challenges of implementing PD12J with litigants in person.

> "Our experience is that, provided the court follows this practice direction, holds a fact finding hearing as soon as possible (as a split hearing), undertakes a risk assessment before final decisions are made and both parents are legally represented then Practice Direction 12J is effective. However, most parties are litigants in person who are not in a position to present/respond to evidence in a way which enables the court to conduct the case properly or fairly. We are of the view that the scope cuts to legal aid, under LASPO have directly contributed to children being exposed to risk as a result of the lack of legal representation for the adult parties. This, in our view, has caused great challenges for the court to manage these highly sensitive and often difficult proceedings because there is a limit to the extent to which litigants in person can realistically assist the court."
> **Association of Lawyers for Children**

Specific problems identified in implementing PD12J with litigants in person included:

- Working out whether a fact-finding hearing is needed – with respondents noting the courts' tendency to press on in the hope that it will not be necessary, and to try to get contact arrangements in place as soon as possible;
- LIPs' inability to cope with the complex, technical process of fact-finding – including statements, responses, counter-allegations, Scott Schedules, arranging witnesses, third party disclosure – and being significantly disadvantaged where the other party is represented;
- Parties' inability to pay for police disclosure;
- Lack of court staff time to produce litigant in person bundles;[130]
- The quality of the evidence on which courts determine the facts depending on "how [LIPs] present their cases, how intimidated they are by the process" (judicial roundtable).

Mosac noted the very difficult position of parents whose children have disclosed sexual abuse by the other parent, but who lack the 'objective' evidence required for a grant of legal aid. These parents bear the full burden of attempting to protect the child by bringing court proceedings, without legal representation, and often also being a victim of domestic abuse themselves, resulting in intolerable levels of stress and fear.

Professionals also commented on the adverse consequences of denying alleged perpetrators of domestic abuse any access to legal aid. The practitioner roundtable observed that the unavailability of legal representation takes alleged perpetrators down a litigious path, where they feel they have to deny the abuse and fight to get contact with

[130] Bundles are collections of documents required for a trial. They must be compiled, indexed, copied and provided to the other parties and the court in accordance with Practice Direction 27A. Para 3.1 of that Practice Direction states that where both parties are litigants in person, neither of them shall be required to produce a bundle unless the court directs otherwise. In some courts, court staff will be asked to prepare the bundle for the court and the parties. But many courts lack the resources to do this and continue to direct one or both of the parties to prepare the trial bundle.

their children rather than being supported to acknowledge their behaviour, gain insight and engage with help. A participant in the judicial roundtable sought to quantify the benefits to the court of legal representation for perpetrators as well as for victims of abuse:

> "Just taking figures for [county] we have 900 applications made a year … and… even if two thirds of those having an issue of domestic abuse raised, that's not surprising. And that's 600, 600 cases a year where there's abuse allegations. If you end up with finding of fact hearings … if that's a two-day list, that's 1200 District Judge days. That's more than the District Judge complement we have in [court location] … well, for nearly the whole of [the county]! … And you could halve those figures quite easily by automatically giving people who are accused of or subjected to domestic abuse lawyers, you'd halve that. **Judicial roundtable**

Overall, the limitations on court and legal aid resources result in costs being shifted to parents and children. We received many submissions detailing the huge emotional, physical and economic impact of court proceedings on litigants in person, and the crippling depletion of their personal resources occasioned by their encounter with the family court.

7.7.3 Silo working

Finally, submissions pointed to some of the ways in which lack of coordination between the Family Court and other courts, proceedings and agencies impacts on the way allegations of domestic abuse and other risks of harm are dealt with.

There was general concern that while local authority child protection social workers are familiar with public law procedures in the family courts, they are not familiar with private law procedures. Thus, for example, they tend not to be aware of the CAP or PD12J, don't know how to recommend a fact-finding hearing, and don't have the necessary training to undertake domestic abuse risk assessments. These problems arise in cases in which social work input is provided to the court by the local authority rather than by Cafcass/Cymru.

Many submissions noted disconnects between the fact-finding process and other proceedings. These included:

- If a non-molestation order is in place and effectively protects the victim and children from further abuse, the abuse will be classified by the family court as 'historical' and hence not relevant for child arrangements proceedings
- Victims of abuse experience a disorienting contrast between the criminal justice system, where they are supported by the police, CPS and witness service, and the family court, where the entire burden of establishing the same abuse falls on the shoulders of the victim
- Criminal convictions may be re-litigated in the family court

    - abusers who pleaded guilty in the criminal court may be allowed to deny the abuse and insist that the victim prove it in the family court
    - the fact that abuse has previously been proved beyond reasonable doubt in criminal proceedings may be ignored in the family court and the abuser effectively given a retrial, reinforcing the victim's feeling that she is not believed
- When fact-finding in the family court runs in parallel with criminal investigations and proceedings:
    - the police are unable to provide supporting information for the fact-finding hearing because their investigation is incomplete
    - details of criminal investigations have been released to perpetrators in the family proceedings, damaging the criminal case and preventing access to justice in either forum
- Risk assessment processes in the family court fail to take into account indicators and assessments of risk made elsewhere, such as MARACs, restraining orders, breaches of non-molestation orders, evidence of domestic abuse against previous and subsequent partners, disclosures about offending history made through the Domestic Violence Disclosure Scheme, and risk assessments conducted by probation officers following convictions for child sexual abuse

The following submission summary encapsulates many of the problems of the lack of coordination between the family courts and the criminal jurisdiction:

Submission Summary

A mother's former husband was jailed for rape of her and child abuse offences. He was described by the criminal court as a dangerous man but, she felt, "the family court seemed to bend over backwards trying to accommodate him in his bid to get to see the children". Given his convictions she expected the family court process to be straightforward, but he was able to prolong the case for more than five years, at a cost to her of more than £50,000 in legal fees. In court she was not automatically given a screen and had to ask for one each time. She described how "many of the family court hearings were heard in the same criminal court where I had given evidence at the rape trial. I was visibly shaking because of this and nobody in the court system seemed to care." She was also concerned that there was no reference to the police or the criminal court to explain the risk her ex-husband posed. She felt that "if the two courts had actually done some joined-up thinking and shared information then there would have been no need for a lot of the family court hearings." She also felt that because her ex-husband was "middle class and eloquent", he was given more leeway by some of the judges. "I don't think that they thought that I could have been that much of a victim, given what he looked and sounded like – but … had they had access to the police files they would have immediately understood just how vulnerable I really was." She concluded, "Please think about streamlining criminal courts and family courts – it would really help. The two are linked and we as victims should not have to go through these things twice." **Mother, call for evidence**

Conversely, Mosac noted that if there has been *no* child abuse conviction in a criminal court, the family court is most likely to find that no abuse occurred, despite the different standards of proof in criminal and civil proceedings. This illustrates the effect of the interaction between silo working and the pro-contact culture. All of the instances of silo working identified operate to the advantage of the allegedly abusive parent and in favour of a result that would enable contact to occur. By contrast, a more joined up approach would be less likely to minimise abuse and more likely to protect children and adult victims from further harm.

7.8 Conclusion

The evidence received by the panel identified multiple problems and sources of dissatisfaction with the way in which Practice Direction 12J is implemented in practice. These included concerns about the impact of the presumption of parental involvement, when allegations of domestic abuse are considered relevant, the conduct of fact-finding hearings, the quality of risk assessments, lack of judicial continuity, lack of coordination between the fact-finding process and other proceedings, and the difficulties experienced by litigants in person in attempting to navigate the complexities of PD12J. Many of these

issues in turn are related to the four themes outlined in chapter 4: the court's pro-contact culture, limited resources, the adversarial system and silo working. These same barriers appear to have hindered previous efforts to strengthen PD12J.

Several submissions and focus group responses suggested that fine-tuning or tweaking would not solve the problems identified, and that there is a need to consider alternative models of family justice and take a more fundamental approach to reform in order to address the underlying barriers. The panel agrees. In chapter 11 we put forward a new model for child arrangements cases and make further recommendations intended to address these barriers comprehensively, including a proactive rather than reactive approach by the family courts to domestic abuse and other risks of harm to children, an investigative rather than adversarial approach, improved coordination with criminal justice processes, police, and statutory and third sector services working with families, and the redirection of resources into more effective ways of working.

8. Safety and experiences at court

‘If you reach agreement at an earlier stage because you are too frightened to continue, the perpetrator is not required to give evidence or substantiate his claims / be cross examined. He uses the family court to intimidate and further abuse you and your child. I will never be able to express the fear and indescribable stress of going through the court process with someone I was so terrified of.’ **Mother, call for evidence**

8.1 Introduction

This chapter discusses the experiences of parties to private law children proceedings at court. The evidence shows that the experience of court proceedings for victims of domestic abuse is affected by concerns for their physical safety. In addition, their experiences are fundamentally affected by the trauma they have experienced as a result of the domestic abuse. The literature shows that this trauma may have physical, psychological and cognitive effects. The effects may include the victim being constantly fearful of their abuser, having uncontrollable physical or emotional reactions to being in close proximity to the abuser (or in anticipation of that occurring), being unable to recall or describe events clearly or in chronological order, and experiencing flashbacks or re-traumatisation when recounting or being questioned about the abuse. Submissions received to the call for evidence suggest that it is important that this context is appreciated by all participants in the court process, so that the process is trauma-aware.

A key point which emerged from the submissions is that family court proceedings do not always adequately provide for the physical safety of victims of domestic abuse and frequently disregard their psychological wellbeing. Regardless of the outcome of the case, many mothers who responded to the call for evidence said that they did not feel safe at court and found the court proceedings themselves re-traumatising. In the mothers’ submissions there were many accounts of the ordeal that victims reported experiencing when attending court and giving evidence; many described it as the worst experience of their lives, using terms such as ‘horrendous’. Mothers’ submissions were strikingly consistent on this point.

Submissions from professionals suggested that the family courts have fallen behind the criminal courts in recognising and addressing the risks for victims of abuse and the barriers to victims giving their best evidence. The professionals agreed that whilst in theory measures to protect victims were in place, in practice these were not always available or used effectively. Sometimes the logistical set up of the courtroom or resourcing issues meant that measures were not available to safeguard victims in the courtroom setting.

Other times it appeared that the pro-contact culture was preventing victims' trauma and vulnerability from being appropriately addressed. The adversarial approach was an aggravating feature in frustrating victims' ability to give their best evidence.

This chapter will examine how the experiences of victims can be influenced by the presence or absence of special measures, such as separate waiting areas or screening in the courtroom. It will also consider the impact of the availability of a supporter or legal representation, and the way in which repeated applications to court by perpetrators of abuse can be used to continue abuse with little restraint. The journey through the court and the difficulties victims can experience in some cases can be broken down in the following ways:

Getting to court	• Anxiety/fear in the days and weeks leading up to the court hearing • Not knowing about the availability of special measures or being discouraged from seeking them • Travelling to court presenting a potential safety risk
The court building	• No separate entrances/exits • No separate waiting areas or those available are unsuitable/unsafe • Court staff not aware of the risk and ill prepared to respond • Inadequate responses to incidents of intimidation or abuse of victim and/or professionals
The courtroom	• No screens or video link • Absence of support from specialists (e.g IDVAs) • No legal representation • Inequality of arms • Inappropriate and retraumatising cross examination
Repeat applications	• No effective restraint on use of repeat applications and continued abuse

The cross-cutting themes of culture, silos, the adversarial system and resources were evident in both the individual and professional submissions relating to court experiences. It should also be noted that the concerns identified in this chapter were very largely raised in submissions from mothers and professionals. A small proportion of fathers' submissions commented on the availability and use of special measures, the issues of direct cross-examination and repeat applications, but in general fathers said little with regard to safety

at court and instead concentrated on how their rights should be respected in proceedings. This is consistent with the literature which shows that in child contact proceedings fathers often construct their arguments in terms of their rights while abused mothers rarely do so.[131]

8.2 Getting to court

Victims' concerns about safety begin many days and weeks before the court hearing. Mothers' submissions described their experiences leading up to their appearance at court based on their anticipation of what they would face. As many mothers had experiences of repeated court hearings, a matter examined in more detail below, they knew what to expect and in many cases what they expected was not good. Individual submissions contained detailed accounts of the stress, anxiety and dread many mothers experienced ahead of court hearings, including overwhelming fear, sleeplessness, panic attacks, and being physically sick.

One of the factors which can make victims feel unsafe is the fear of being abused whilst travelling to and from court. This was especially true for abused mothers living in rural areas where public transport links are poor. This intersecting structural disadvantage is related to the broader theme of resources. Court closures have resulted in longer journeys to court and victims said they feared sharing trains and buses with their abusers on the way to court. In rural communities the nearest court can be many miles away with only one or two trains or buses a day. Even in cases where the parties are travelling from nearby the prospect of confrontation and intimidation outside the court building induced fear and anxiety.

The dread of court proceedings in the weeks leading up to a hearing can be partially mitigated by the availability of special measures, however many victims appeared not to be aware that these were available or had been actively discouraged from seeking them. Some litigants in person reported feeling especially disadvantaged in this respect; having no one to explain to them what special measures are and advise them of the process for seeking protection. Again this links with the resources theme, but it is also related to the pro-contact culture, with its tendency to minimise domestic abuse and to regard allegations sceptically, and to training of court staff. The submissions told of requests for special measures being ignored, or, being acknowledged but mothers turning up at court and finding that no one knew about the request and nothing had been arranged.

[131] C Smart and B Neale, *Family Fragments* (1999); J Birchall and S Choudhry, *What About My Right Not to be Abused? Domestic Abuse, Human Rights and the Family Courts* (2018).

‘Whilst there are laws in place to protect people who are victims of domestic abuse, sadly the courts are not well equipped to help vulnerable victims on a practical level. There is often not enough space for a separate room to be allocated to a victim so that they are kept apart from the abuser. This should happen as a matter of course’, **Lawyer, call for evidence.**

8.3 Safety at Court

Many individual mothers in their submissions noted that they were worried about being confronted by their abuser at court when they were obliged to be in the same building and enter or exit that building at the same or similar times. Not all courts have separate entrances and exits; the submissions suggest many do not. Whilst court closures may have resulted in some poorly equipped courts disappearing from the infrastructure those that remain are not necessarily well equipped to deal with the ideal scenario of separate entrances and exits and separate waiting areas. It is sometimes possible for arrangements to be put in place for victims to use a separate entrance or exit, in line with the Family Procedure Rules, Part 3A discussed below. However, this requires that court staff be aware of the potential risk and communicate effectively to ensure that separate entrances can in fact be used. Mothers were concerned that when they left the court building in close proximity in time to their abusive partner, they might be followed to their transport or even all the way home. In some instances this made it difficult to keep their address secret and opened up further opportunities for ongoing abuse.

Both the individual and professional submissions described instances of abuse occurring whilst cases were waiting to be called. In the individual submissions of mothers and their families there were numerous accounts of being verbally abused and attacked on court premises. It was not only the women who were targeted for this abuse; the victims’ lawyers and other professionals involved in the case were also sometimes threatened or abused, as professional accounts verified. Most court buildings have security staff who are present or who can be deployed but there were accounts of confrontations taking place within the waiting areas without anyone available to intervene or protect the vulnerable person or their representatives.

Some of the fear of confrontation or abuse within the confines of the court building can be mitigated by the availability of suitable separate waiting areas. Whilst prior to fact-finding allegations have yet to be tested in court, it is beneficial to everyone to ensure that the parties can wait separately and safely prior to the case being called. In some courts there may be no separate rooms, or if such rooms are available, they may not be sufficiently private to provide reassurance. A suitable option would be a locked/keypad operated room which does not have visibility or access onto the main waiting area. Individual submissions told of open areas or rooms with unshielded windows directly onto the main waiting area

with no access to toilet facilities without traversing the main waiting area. Intimidation can take place by looks or gestures, so if victims are to feel genuinely safe in the court setting they need to have a space where they can wait without fear of their abuser appearing at any moment or visibly threatening them from nearby. Protection in the waiting area is partly a resource issue but it is also a communication and culture issue; court staff need to be aware of the importance of protecting parties whilst waiting for their case to be called and to use the facilities available effectively. Individuals and professionals both gave evidence that the presence of security guards who were aware of the issues and the availability of secure separate waiting areas were very helpful.

If there are incidents of intimidation or abuse in the court building, then it is important that these are addressed appropriately by the judge. The call for evidence received submissions describing incidents of abuse of mothers and professionals which were not dealt with immediately by the judge. For example, in one instance a Cafcass officer had received threats of physical abuse if the case did not go the way that the father felt it should, and the mother's lawyer was then physically attacked by the father at court. The attack was witnessed by the court security guards but the judge was reported to have set it aside, stating that it could be 'dealt with later if necessary'. On the face of it, this is a scenario where more robust action should have been taken by the judge immediately. If a criminal offence of assault has taken place in the court building, then addressing that should be the first priority. In the many instances of assault described to the panel it appears that the court could have initiated committal proceedings to hold the perpetrator in contempt of court.

Submissions also told the panel about instances where the parties were left alone together in the courtroom for long periods in the absence of the Legal Adviser or were put into a small room together to negotiate prior to the court hearing. Accounts of this type of unsafe practice came from both individuals and professionals. In one of the focus groups with professionals there were reports of parties being required to negotiate outside the courtroom, even in cases where the abuser had criminal convictions and a restraining order in place. This illustrates the general theme about the family courts operating in a silo. In the panel's view, private law children proceedings should never undermine the orders of the criminal courts or non-molestation orders by putting victims in the position where they are forced to have unsafe interaction with their abuser.

8.4 The court proceedings: the experience of recounting abuse

Many of the individual submissions of mothers described their experiences in the courtroom as traumatising. There are a number of factors which evidence from the literature review and submissions suggest work together to make the experience of the court hearing traumatic for victims, some of which are related to the adversarial system. In the adversarial approach, as noted in chapter 4, the parties are 'pitted against' each other

and the judge acts as a neutral decision maker who does not descend into the ‘arena of conflict’. The adversarial approach depends on an ‘equality of arms’ principle; it assumes that the parties are both equal and in particular that they are equally resourced, for example they both have legal representation and the other means available to them to present their ‘best evidence’. The reality of child arrangement cases, as the submissions reveal, is that a number of these assumptions are flawed and the adversarial model itself is not working well to achieve a safe or fair process.

8.4.1 The effects of abuse on victims’ credibility

The call for evidence received multiple accounts from individuals which indicated that they found the experience of reliving their abuse in court distressing, dehumanising and humiliating. As was noted in the introduction to this chapter, many mothers described the experience as horrendous and the worst of their lives. Many recounted that they found it difficult to concentrate or speak in the presence of their abuser. Many said that the responses of judges and magistrates to their allegations of abuse, and to their distress at court, left them feeling belittled, berated and demeaned. There were reports of confidential information being inappropriately disclosed, for example information about sexual assault counselling, which in the criminal setting would be prohibited under rules of evidence. This highlights once again the different approach of the family and criminal courts and the broader theme of silo working.

A number of mothers reported their impression that the judge was not familiar with their case and had not read the file before the hearing. As discussed in chapter 7, both the professional and individual submissions highlighted the issue of cases being dealt with by different judges on different days, so there was no sense of judicial continuity which can, as research in the literature review reinforces, help to alleviate some of the problems of having to recount and relive experiences afresh each time to a judge who appears to have little knowledge about what has gone before. Judicial continuity is obviously a resourcing issue. Although it may not always be possible to provide ‘one judge for one family’, a cost-benefit analysis supports that approach.

Inevitably, giving an account of abuse requires the victim to relive some of her experiences in ways that can be painful. Mothers indicated in their submissions that they felt they had to endure this in order to try to ensure their children would be safe. However, the way that this retelling is required to be done can make the experience more or less traumatic. The individual accounts of the mothers who responded to the call for evidence made for harrowing reading. Some of the mothers expressed the view that their accounts had not been believed by the judges or magistrates in their case and felt that there was little or limited understanding of what amounts to coercive control and the impact that it can have. Many of the professionals responding to this call highlighted a good understanding of domestic abuse, particularly coercive control, as an essential component of judicial responsiveness in the courtroom.

The impacts of domestic abuse in all its forms have been discussed elsewhere in this report and highlighted in the literature review, which refers to the work of Stark (2007) and others on coercive control in particular. The influence of coercive control and trauma on the capacity of the victim to appear as a credible witness has been discussed in relation to the criminal justice system, where it is recognised that the victim may need a variety of different approaches to overcome some of the obstacles to giving best evidence.[132] The traumatic experiences of coercive control may impact upon memory and potentially significantly impair the victim's ability to come across as a credible and reliable witness. Traumatised victims may have a memory for details which is vague, incomplete and disordered and consequently makes them the antithesis of what stereotypically is viewed as a 'good witness'. They may also 'go blank' when pressured to recall particular incidents, episodes or examples of abuse.[133] What is true in the criminal justice context, is also relevant in the family justice context where the adversarial approach is adopted.

The submissions of individual mothers provided accounts of being drilled on details of abuse with little account taken either of the possible effects of trauma on their ability to provide the expected level of clarity and confidence in their responses, or of how traumatic it was to speak about the abuse in the presence of the abuser. Some mothers told the panel that they felt further disempowered by the court process as they were compelled to tell the abuser about the effectiveness of various techniques of control used as part of the domestic abuse. In this context, detailing the abuse to which they have been subjected and its effects is likely to increase the victim's sense of powerlessness and perception of danger, but self-protective reflexes such as being vague or minimising the abuse and its effects reduce their capacity to appear as a credible witness.

Even when victims said that they had felt able to tell their story, a number of respondents reported finding it distressing that their allegations seemed either not be believed or to be minimised. The submissions of many of the mothers revealed the impact of the feeling of not being believed. One mother said: 'I was told that I needed to move on and get over what had happened. This kind of comment belittles the abuse and leaves the victim feeling worthless'. Another remarked that she had the impression that the court thought that she was 'lying or deluded about the abuse' and in relation to the mental abuse she had described 'had the feeling that it didn't matter'.

One woman, whose partner had been charged with the criminal offence of grievous bodily harm, said she withdrew her complaint due to pressure from the extended family not to criminalise her abuser. She found that when the case came before the family courts the family judge relabelled the incident as 'self-harm'. In several submissions victims

[132] C Bishop and V Bettinson (2018) 'Evidencing domestic violence: Including behaviour that falls under the new offence of 'controlling and coercive behaviour', *International Journal of Evidence and Proof* 22(1): 1–27.

[133] For a useful description of the effects of trauma on memory and evidence see https://vimeo.com/380211656; https://vimeo.com/380211441.

described their accounts of abuse being explained away by the court, leaving them feeling not only disbelieved but in the words of this particular mother 'helpless'. Many women who had been in coercive controlling relationships spoke of their partners trying to undermine their reality by a process of redefining events, sometimes referred to as 'gaslighting'.[134] It was particularly distressing for victims to have this experience replicated in court. As one mother stated: 'I was left feeling that I am not telling the truth and that I should stay quiet.' This is a specific example, but the consistent accounts of mothers showed that many found it very upsetting to be branded a 'liar' or to be 'exaggerating' the abuse.

Whilst mothers understood that the evidence had to be tested, they also felt that the odds were stacked against them; that the abuser was given every opportunity to try to undermine their account but they were not afforded the opportunity to tell their story in full, without interruption and intimidation. Mothers often said that they felt that the abuser had credibility in the eyes of the court and professionals because they appeared well dressed, well behaved and sometimes had good careers and other such trappings of credibility. As one mother observed in her submission: 'He appeared respectable but if the judge had asked the right questions he would have been able to get past the façade'. Another mother spoke of her belief that judges in her case were easily 'taken in' or 'manipulated' by an abuser who had high professional standing. In contrast to the research which shows that domestic abuse can occur in any kind of relationship and cuts across all social groups and professions, some of the mothers felt that the accounts of their professional partners were believed because of the polished and composed demeanour they were able to portray. Mothers who were abused by partners who were themselves legal professionals felt especially vulnerable and disadvantaged. One woman whose abusive partner was a lawyer said: 'he used his legal knowledge and resources to claim it was self-defence'.

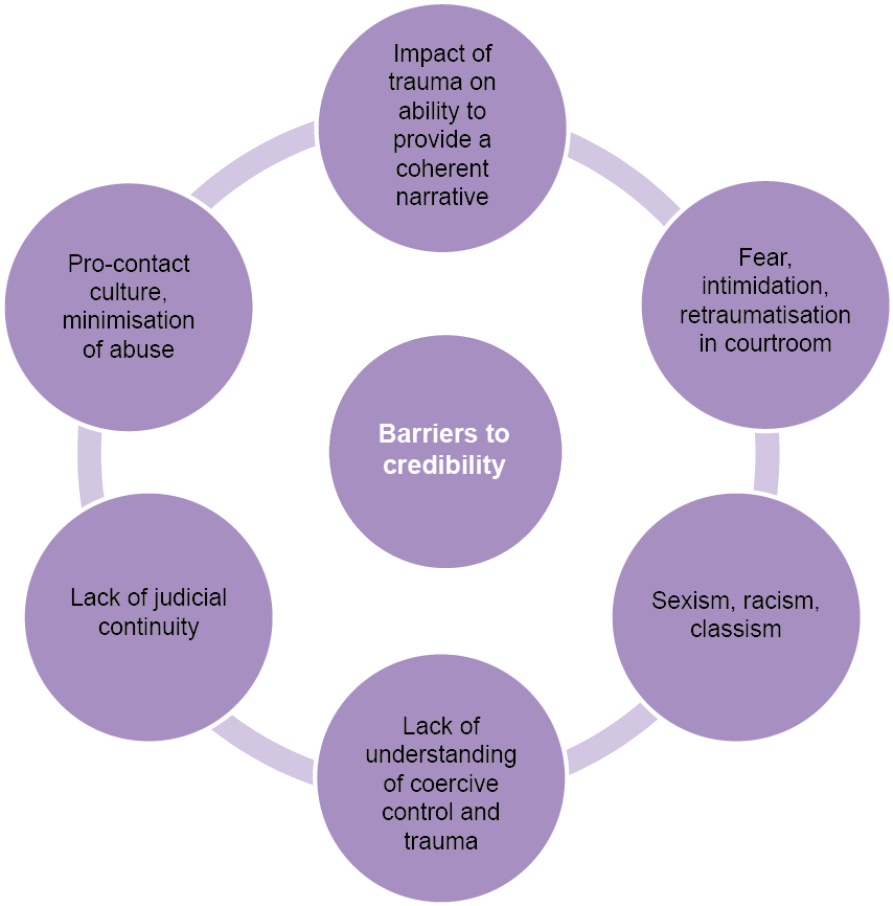
More generally, it is a well observed element of coercive control that the abuser often presents a charming and even admirable face to the outside world, so that any claims of abuse by the victim appear entirely unbelievable. Many of the mothers felt disadvantaged that their experiences of abuse had left them less credible in the eyes of the court because they were suffering the ongoing effects of abuse both in terms of trauma and diminished resources. As one mother observed: 'I had post-traumatic stress disorder' she felt that the judge was over emphasising her mental health in assessing the evidence 'without looking at the perpetrator who was the cause.'

In addition, the theme of intersecting structural disadvantage came through strongly in the submissions of BAME mothers and the submissions of professional groups supporting BAME mothers. Many of these submissions told of how BAME women felt their negative experiences of the court process were compounded by racism. One woman whose partner was a legal professional said that he not only used his professional status to his

[134] The term 'gaslighting' comes from the movie Gaslight (1944) in which a man manipulates his wife to the point where she thinks she is losing her mind.

advantage, but benefited from the fact that he was a white professional, whereas she was from a BAME background and due to his financial abuse of her was reliant on food banks. She described the racism and classism which she felt was implicit in the unsympathetic response of the court, believing the account of her abuser and treating her, she felt, as a 'nuisance'. The focus group held with women from BAME backgrounds replicated this type of account many times over. One woman told of how during cross examination she was asked, purely on the basis of her ethnic background, if she 'believed in voodoo', whether she was 'a witch' and whether she did 'blood sacrifice'. That these questions which had no relevance to the issues in the case could be asked without judicial intervention, would undoubtedly leave an impression, as it did in this instance, of racism.

The submissions therefore suggest a number of barriers to credibility as summarised below:



8.4.2 Special measures

> 'Victims who are not legally represented may not know to request 'special measures', but really, they should not have to. Systems should automatically be in place to protect these people. I have had cases where special measures are requested by the court but not actually put in place on arrival to court. For example no spare room and the court staff having forgotten to put a screen in place. In one court the screen was broken and so they had to put a desk/table in front of the witness block which acted as a 'makeshift' screen. It was embarrassing and fell well short. More needs to be done to protect vulnerable victims going through the court system on a practical level – there need to be more resources in place and automatic processes on to ensure the court experience is made less difficult for victims.' **Lawyer**

Face to face confrontation is the typical mode of adversarial legal proceedings but it has long been recognised that it is not necessarily the best way to establish truth. In the criminal justice system, provisions were introduced more than two decades ago by the Youth Justice and Criminal Evidence Act 1999 for special measures, such as screens and giving evidence via video link, to enable vulnerable witnesses to give their best evidence. The scope of these measures and their applicability to family proceedings is considered in the literature review.[135] The literature shows that although measures such as screening are technically available in the family courts, they are often not deployed. For example, a survey carried out by Women's Aid Federation of England found that more than half of women respondents who had been through the family courts had no access to special measures.[136]

As highlighted in chapter 3, The Family Procedure Rules 2010 were amended in 2017 to take into account research showing the potential benefits of screens and video links.[137] Whether these revisions to the procedural rules have had the desired effect was one of the specific matters that this call for evidence was designed to examine. Although the submissions we received from individuals related to cases which had occurred both before and after the changes to the Family Procedure Rules, as noted in chapter 2 there was a high degree of consistency of responses relating to different time periods. From this it appears that the problems with under-utilisation of special measures apply after the changes designed to encourage their use via 'participation directions' (see chapter 3). Participation directions cover not only screens and video links but also entering and exiting the building separately, separate waiting areas (discussed above) and directions on the conduct of cross-examination (discussed below).

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[135] Literature review section 8.2.

[136] Women's Aid Federation of England, *Nineteen Child Homicides* (2016).

[137] N Corbett and A Summerfield, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses* (2017).

Some of the professional submissions reported increased use of separate waiting rooms and screens for some victims of abuse and greater judicial intervention to prevent direct cross-examination since 2017. However, these submissions also emphasised lack of consistency, variations in local practices, resource limitations and the minimisation of domestic abuse affecting the availability and use of special measures such as screens and video links. Professionals said that most victims would find special measures such as screening helpful in reducing fear and intimidation in giving evidence in sight of the perpetrator, with consequent positive effects on the quality of evidence they can give. Some submissions suggested that certain measures were more effective than others. For example, Refuge felt that video link was more helpful than screening because the victim does not have to be in the same room as the abuser. Furthermore some professionals commented that screens can sometimes be makeshift and therefore not particularly effective.

However, it was evident from the submissions, that not all courts have the facilities available or readily deployable, even in the most basic form. One judge told the panel that if a request for screens were made he would have to seat the victim next to him on the bench in order to utilise the screen due to the layout of his courtroom and limited space. Many cases are heard in chambers in very small rooms where the parties have to sit in close proximity; even if a screen is used it may not be very effective in making the victim feel more secure in such circumstances. Professional submissions repeatedly noted that District Judges' chambers were too small to effectively deploy special measures. This is a resource issue and submissions to the call for evidence told of limited resources being rationed according to the perceived need for protection. For example, the submission from Rights of Women stated that the courts tend to prioritise the limited special measures available for fact finding hearings, however their submission pointed out that from the perspective of the victim, most hearings feel very similar and it is still extremely difficult for the victim to speak for themselves when the perpetrator is sitting an arm's length away.

It was also evident from the professional submissions that there continued to be some reluctance to grant special measures such as screens and video link even when the facilities were technically available. The submissions received seem to indicate that magistrates in particular might take this view. This reluctance was often linked to a perception that special measures were somehow 'preferential treatment' and might create a perception of bias or prejudgment against the alleged perpetrator of abuse. This is a theme which is evident in previous research,[138] and which was also echoed in a number of submissions from fathers who had been the subject of allegations of domestic abuse who stated that they felt that the use of special measures indicated bias against them. But while it is perhaps unsurprising that fathers might hold this perception, it is more surprising to hear from professional respondents that the courts often discourage the use of protective

[138] N Corbett and A Summerfield, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses* (2017).

measures because of ‘beliefs that this would unfairly bias the case’ (Women’s Aid Federation of England). Clearly the judge as a neutral decision-maker should not see screening or video link as prejudicial, and the judge has the ability to correct any misperception that special measures prejudge the issues.

At more than one of the practitioner roundtables it was noted that victims were made to feel like a ‘nuisance’ for requesting special measures, replicating the individual submissions received. Some professionals even expressed the view that victims could be ‘punished’ for requesting special measures because it was taken as a sign of their hostility to the other party and an unwillingness to co-parent cooperatively. It appears from the submissions that legal advice can compound negative stereotypes of special measures as being prejudicial towards abusers and indicative of mothers’ hostility. Echoing individual submissions, women in one of the focus groups said that they had been advised by their own lawyers not to request special measures as this would be seen as them being hostile to the abuser. Victims of domestic abuse should not be deterred from requesting special measures on the basis that this will be seen as evidence of hostility, parental alienation or an attempt to gain a tactical advantage in litigation.

Another concern that mothers expressed was that by asking for special measures they would be perceived as ‘weak’ or ‘vulnerable’, and thereby risked negative assumptions being made about their parenting capacity. The submission from Mosac, for example, stated that mothers alleging their children had been sexually abused had been put off requesting special measures as they did not want negative assumptions to be made about their mental health and parenting ability.

Submissions also mentioned a range of other reasons for the non-use of special measures. These included the fact that parties without legal representation were not aware of the availability of special measures and not in position to request them, while courts were not proactive in considering whether a litigant in person might be a vulnerable witness. More generally, professionals noted that courts tended only to recognise parties as vulnerable if they had learning difficulties or did not speak English, while neither victims alleging domestic abuse nor protective parents alleging child sexual abuse were accepted as vulnerable witnesses per se within the scope of the Family Procedure Rules. Further, some professionals observed that courts made inaccurate assessments of vulnerability based on stereotypical perceptions of how a victim should present. This was reinforced by submissions from a small number of fathers expressing concerns that the vulnerability of male victims of abuse is not recognised, that male victims were never offered safety measures at court and that requests for special measures by male victims were not actioned.

Overall then, it can be concluded that screening and video links are not being used as effectively as they could be and the changes to the Family Procedure Rules have not achieved the objective of offering better protection and affording victims the opportunity of

giving their ‘best evidence’. Professional submissions told the panel that special measures were still seen by many as desirable or aspirational, rather than mandatory or routine. The Magistrates Association pointed out in their submission that research carried out with 143 magistrates showed that while 68% said they felt very or quite confident in following FPR Part 3A and PD3AA, less than half (48%) said they followed them all the time or regularly. The weight of the evidence submitted therefore suggests that more could be done to ensure that special measures are available to victims in private law children proceedings. This will require resources and training to address some of the remaining attitudinal barriers.

8.4.3 Absence of appropriate supporter

Some of the submissions of both mothers and fathers recounted experiences of being refused requests to bring support workers into court as McKenzie Friends. From the literature review it is known that such McKenzie Friends can provide vital emotional and moral support for parties. But the panel was told of inconsistencies in practice as to whether or not domestic abuse advocates would be allowed into the courtroom to support survivors, and of occasions where abused mothers were denied the presence of a domestic abuse support worker because the judge was hostile or the father objected to their presence. Welsh Women’s Aid told the panel that support workers were often not allowed to accompany women into court because the judge felt that this would create a perception of bias. A practitioner roundtable also reported hostility from judges towards specialist domestic abuse supporters who were characterised disparagingly as ‘do gooders’. The submissions from some professionals supporting victims stated that their perception was that there was a belief, at least amongst some magistrates, that an alleged perpetrator has an absolute right to object to an alleged victim of abuse being accompanied by a supporter in court. In fact, this is a matter for the court to decide, and the court is also capable of dispelling any perception of bias. Instead of readily acceding to the objections to supporters, particularly IDVAs, the judge could explain what the function of the supporter is and that there is no prejudgment entailed in having a supporter present.

The reported objections to supporters in court appear to be in some ways very similar to the reported objections to special measures; they are based on flawed conceptions that the other side is being unfairly advantaged. However, the supporter is simply there to enable the victim to participate effectively in proceedings. Specialist support can be essential to victims of abuse who are planning their safety both in and outside the courtroom setting. The presence of someone who understands the experience of the victim and has the knowledge and experience to direct them to ask for the help that they need, for example special measures, can make a big difference to the ability to feel safe at court and give their best evidence. In the criminal justice context the availability of IDVAs has been one of the unequivocally successful elements of specialist domestic violence

courts. In this way the family courts can learn from the experiences of the criminal courts.[139]

As mentioned above, it was also apparent from the submissions received from fathers who had been victims of domestic abuse that they found appearing in court without an appropriate supporter difficult. In one of the focus groups held with male victims a father described how he experienced mental health issues but a mental health advocate who was willing to attend court with him was unwelcome in the courtroom. There are services specifically designed to meet the needs of male victims of domestic abuse. The panel was told that such services are under resourced. However, where they do exist, it is just as important that advisors and supporters from these services do not meet a hostile approach to their presence as supporters from Women's Aid Federation of England, Welsh Women's Aid and other organisations supporting female victims told the panel that they have received.

One theme that emerged strongly from the submissions of professionals supporting BAME women and these mothers themselves was the need for a supporter who was sensitive to their diverse needs. The specific difficulties of BAME women navigating the family justice process should not be overlooked. The literature review highlighted some of these problems.[140] Whilst not all of the difficulties experienced by BAME victims can be mitigated by the presence of an appropriate supporter, the input of groups supporting BAME women, such as Southall Black Sisters, suggest that appropriate support may be part of the jigsaw in finding ways to mitigate harm stemming from the process itself.

8.4.4 Cross examination

Cross examination is, as highlighted above, often a distressing, humiliating and re-traumatising experience for victims of domestic abuse. The difficulties are compounded in cases where the abuser is allowed to conduct the cross examination themselves. The problem of cross examination in person has been noted on many occasions prior to this call for evidence. The literature review refers to research which shows that victims of domestic abuse find it terrifying, traumatic and re-traumatising to be cross examined by their alleged perpetrator.[141] It has been noted by Coy et al (2012, 2015) for example that direct cross examination may allow the perpetrator of abuse to use court proceedings to continue abusing the victim and to ask inappropriate and intrusive questions about her lifestyle and activities.

In the individual submissions to the panel we heard from abused mothers who had been questioned in this way and found the whole process humiliating, degrading and frightening. The experience of being frightened and humiliated, and traumatic responses such as

[139] M Burton (2018) 'Specialist domestic violence courts in child arrangements proceedings: Safer courts and safer outcomes? *Journal of Social Welfare and Family Law* 40(4): 533–47.

[140] Literature review section 6.3.

[141] Literature review section 8.3.

freezing or being unable to think clearly or make sense in answering, undermined their ability to give coherent evidence and thus appear as a ‘good’ witness. The prospect of cross examination by their abuser was enough to put some mothers off trying to tell the courts at all about the abuse that they had suffered, and in other cases both mothers and professionals stated that the threat of direct cross examination at the final hearing had been used to bully the mother into agreeing to consent orders. Despite the reports from professionals of greater intervention by judges to prevent direct cross examination since 2017, many individual submissions gave more recent accounts of courts allowing direct cross examination by abusers, and of judges failing to prevent obviously abusive questioning.

Direct cross examination by the abuser has partly come about due to restrictions on legal aid for private family law proceedings. In their submissions, fathers told the panel that they could not always afford legal representation and felt compelled to conduct the case themselves. A number of mothers also highlighted that the restrictions on public funding brought about by LASPO resulted in them lacking the legal representation that could have protected them more effectively in cross examination. The adversarial system rests on an assumption of equality of arms. The reality in private law children proceedings’ is that many parties are either unequally armed (one party is legally represented and the other is not) or unequally unarmed (both lack legal representation so power, intimidation and control in the relationship is not mitigated). Both mothers and fathers told the panel that they found it unfair when they either had to conduct cross examination or be cross examined themselves without legal representation but the other side was legally represented. Submissions from both mothers and fathers highlighted that it is equally frightening and distressing for victims of abuse to have to question their abusers as it is being questioned by them, and the consequence may be that they do not feel able to advocate properly in order to protect their children from further abuse.

Recommendations to address the problem of direct cross-examination have been canvassed elsewhere, as the literature review highlights.[142] One of the suggestions previously made, and specifically included in PD12J, is for judges to take over questioning themselves. However, in research by Corbett and Summerfield (2017) it appeared that some judges are reluctant to do this, which in practice has come to mean judges are simply relaying questions from the LIP to the other party. Submissions to this call for evidence show that this approach does not necessarily protect victims of abuse from the harmful effects of cross examination. Mothers said that even when the judge read out the questions it was still the abuser’s words. In addition, when called on to provide written questions to the judge, some mothers said that they had difficulty in knowing what questions they should or could ask. In the absence of legal advice, formulating questions for cross examination is a daunting prospect. It is daunting for anyone without legal training but, as CLOCK noted in their submission, these problems can be compounded for

[142] Literature review section 8.3.

those with literacy problems. Some mothers' submissions stated that as a LIP they felt helpless and just did not think they could convince the court that the account being put forward by the abuser was untrue.

The professional submissions to the panel showed that many judges are uncomfortable with the responsibility that high numbers of LIPs place upon them in domestic abuse cases. In the adversarial approach, judges are used to the concept of burden of proof and committed to the idea of not descending into the arena of conflict. Judges who participated in the judicial roundtable pointed out the dilemmas they face. For example, when asked about cross examination and how they deal with LIPs in domestic abuse cases, one judge observed:

> "I keep thinking with a judicial hat on, it's absolutely right that we get the process of giving evidence right.....but there is a risk that if you don't have any questioning, or if you have too little questioning, the judges might not feel able to make a decision; we can't forget that we need to prove allegations....on the balance of probabilities....and it wouldn't be right to have a system whereby somebody makes an allegation and it is automatically believed... it needs to be a system of assessing it… if you don't ask any questions at all or the questions are so vanilla then you don't feel like you can get to the truth and judges are not able to make the findings we need them to make.....so this is just a warning to not forget the need to ascertain the facts....." **Judge**

It is obviously correct that accounts need to be tested, however, submissions to the call for evidence suggest that how that is done within the adversarial process currently in use in private law children proceedings remains problematic. Throughout the submissions there was a great deal of support from all quarters for a ban on cross examination in person. The professional submissions backed up the mothers' submissions that there are many instances of cross examination being used to bully victims of abuse and perpetuate coercive control, and of judges not intervening to protect victims effectively to prevent abusive questioning. On the other hand, some of the fathers' submissions were insistent that they should retain the 'right' to cross examine the mother directly. Those fathers who had experience of questions being put on their behalf by the judge were unhappy and some felt that they had been denied a fair hearing. Thus, for example, a father told the panel that he felt that the judge had asked the questions too politely and the meaning and context of the questions was lost through the judicial filter.

One of the possible solutions to the problem of bullying and coercion through direct cross examination is to ensure that both parties have legal representation. However, it should be noted that the mothers' submissions gave accounts of being bullied by the father's legal representatives. Being cross examined by a lawyer does not automatically mean the process is less traumatising. There were plenty of accounts in the mothers' submissions of being subjected to humiliating and insulting questions by the father's lawyer and being

compelled to look at the abuser during cross examination. Some fathers' submissions also said they had found cross-examination by the mother's barrister to be a horrible and abusive experience. As highlighted above, the restrictions on the types of questions that can be asked in criminal proceedings are not present in family law proceedings. Thus in criminal proceedings where the allegation is rape, there are evidential provisions which prevent or restrict the questions that can be asked about the victim's sexual history; no such restrictions exist in family courts. Both mothers and professionals told the panel of examples of being asked humiliating and irrelevant questions about their sexual history and other behaviour, as well as confidential information about counselling.[143]

The call for evidence generated a substantial body of submissions, from both individuals and varied professionals, that supports a conclusion that even in cases where both parties have representation, the adversarial approach can undermine the ability of both parties to present their case fairly and in a way that does not perpetuate further harm. Some of the submissions from professionals suggested that the solution to the problem may be to abandon the adversarial approach altogether and adopt a more investigative or inquisitorial approach. This is something that will be considered further in the recommendations made in chapter 11.

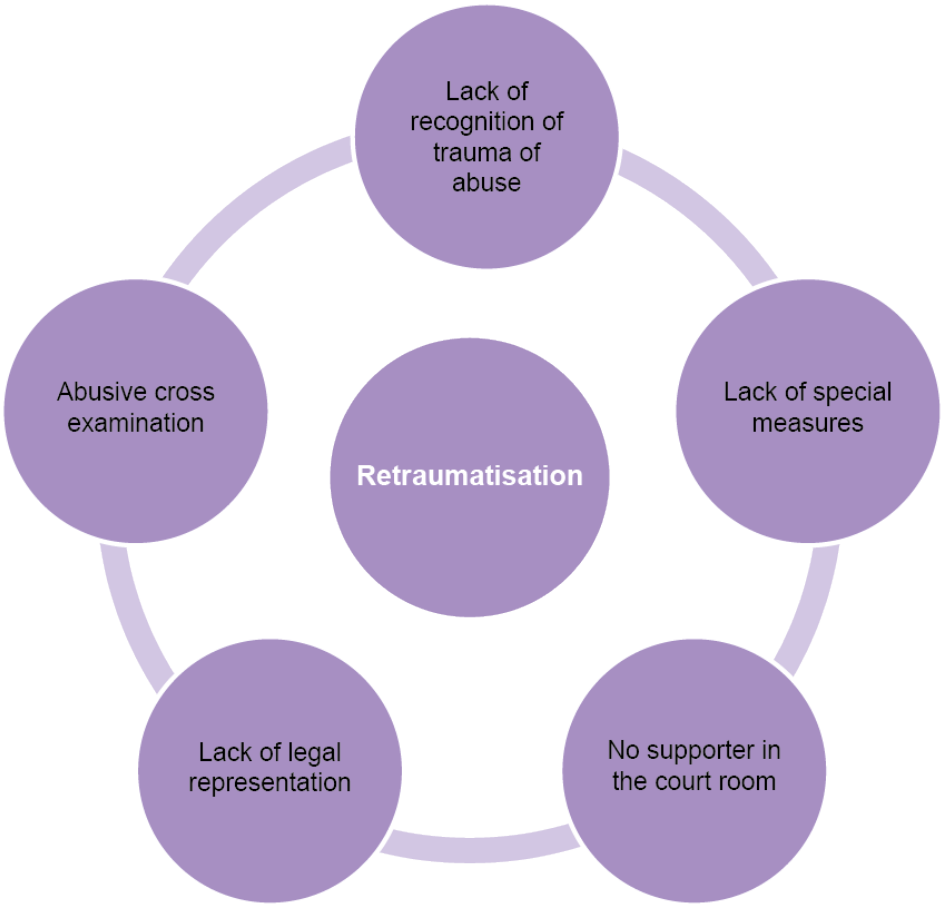
8.4.5 Absence of legal representation

In this chapter it can be seen how the lack of legal representation intersects with a number of different issues which affect the experiences of parties at court. For example, legal representatives can play an important role in ensuring special measures are applied for and used, and cross examination is also influenced by the issue of whether one or both parties are represented.

As some of the submissions cited in this chapter indicate, legal representatives are not always supportive or protective of their clients in the context of domestic abuse. Submissions from both mothers and fathers indicated dissatisfaction with individual lawyers. Participants in the Welsh practitioner and victim focus groups also highlighted the particular difficulties that can be experienced by victims of abuse living in small towns and rural areas, where all the lawyers know the abuser, in finding a legal representative who will provide good quality advice and act in their interests. This may also be an issue which affects victims of domestic abuse living in rural communities in England.

Overall, however, the extensive evidence we received about the compounding vulnerability of being a litigant in person means that the absence of legal representation can be seen as one of the orbiting influences, that make the experience of court proceedings for abused mothers re-traumatising, as shown in the following diagram.

[143] The panel notes the judgment of Russell J in *JH v MF* [2020] EWHC 86 (Fam) calling for family judges to receive dedicated training on sexual offences, and the fact that this training is now being implemented by the Judicial College.



8.5 Repeat applications and using the court process as abuse

> 'The family court has repeatedly accepted further requests for contact hearings from my ex-husband and ignored the history of abuse and the fact that he does not stick to any contact order he asks for. My Ex-Husband has continually taken me back to court applying to slight variations on the contact hours despite not sticking to the previous hours he requests.' **Mother**

The issue of repeat applications for child arrangements orders being used as a means of ongoing abuse has been raised as a concern by the judiciary in reported case law and in other contexts.[144] Chapter 3 described section 91(14) of the Children Act 1989, which allows the court to order that no further applications for child arrangements orders may be brought without leave of the court being obtained. If a party is 'barred' from making repeat applications without leave then this may provide some respite for victims of domestic

[144] B Hale (1999) 'The view from court 45', *Child and Family Law Quarterly* 11(4): 377–86.

abuse. There are other provisions which the court can use to prevent repeated unmeritorious applications but, as the literature review highlights, section 91(14) is the key provision for child arrangements cases. Case law shows, however, that even when perpetrators of abuse are 'barred' from making further applications, the process of applying for leave to apply can also be used as a tool of abuse. Thus, for example, in *Re P and N* (2019) Mr Justice Cobb, noted that an unmeritorious application for leave to apply may in itself put the resident parent under stress if she is made aware of it. It was observed that if all applications for leave to apply in cases where a section 91(14) order is in place required a response from the other party, then abusers would be provided with a legally sanctioned tool for continuing abuse, the very thing that section 91(14) is designed to prevent.

8.5.1 The non-use of section 91(14) orders to restrain abusive repeat applications

One of the matters that this call for evidence was set up to investigate was the use of section 91(14) and whether it is effective in preventing repeated applications from being used as a tool for continuing abuse to the detriment of the resources and parenting capacity of the non-abusive parent, and the welfare of the children who have experienced and continue to experience domestic abuse. Submissions were received from individuals and professionals on the issue of repeat applications. There were not many responses from mothers to the questions on section 91(14) specifically, as very few seemed to be aware that it was possible for the courts to prevent repeat applications being made. However, many of the mothers' submissions told of being brought back to court on numerous occasions, some documenting years of litigation at enormous emotional and financial cost. For example, one relative of a mother recounted how the family home had had to be re-mortgaged and debt levels rising to tens of thousands of pounds accrued in responding to repeated applications for contact.

The mothers told the call for evidence about court applications being used by abusers as a means to continue the abuse, control, stalk, harass and financially abuse them. Victims found being repeatedly brought back to court emotionally and financially exhausting and debilitating. One mother described how she felt like stalked prey, referring to her abuser as "predator in the jungle". She commented: "If you survive it's by luck, it has nothing to do with the system", revealing both the traumatic effects of being repeatedly brought back to court and the perception that family courts do nothing to prevent it. The courts may see the father as a 'good dad' trying to get more contact with his children, in line with the pro-contact culture. However, the mothers often found that the father had no real interest in the children, was using court proceedings to continue to abuse them and when awarded contact failed to exercise it. Mothers also told the panel that repeated applications under the Children Act 1989 were often combined with other forms of harassment via legal proceedings, such as prolonged financial proceedings and refusal to comply with financial orders. They also highlighted their experience being reported to social services with false allegations for children's social care neglect and abuse of their children. This bigger picture

of repeated actions and harassment in multiple systems shows how viewing child arrangements cases from a ‘silo’ perspective is misplaced. A more holistic picture would enable the courts to make a more informed and accurate judgement of ongoing harm and the need for a section 91(14) order.

There are circumstances in which victims of domestic abuse may make repeated applications for the making or variation of child arrangements orders, if they consider contact orders to be unsafe and resulting in continued harm to their children and themselves, or if they are the non-resident parent and the abusive resident parent is denying them contact. Indeed, some of the mothers who gave evidence to the panel had been subject to applications for section 91(14) orders against them. Their accounts suggested that the focus of section 91(14) has become the mere fact of repeated applications rather than the motivations or concerns underlying them.

In their submission's fathers said that they brought repeated applications to the court in response to repeated breaches of contact orders by mothers, or because they wanted to change contact arrangements which they believed were overly restrictive. In their view they had no choice but to bring repeat applications, at great expense, because mothers were not allowing contact which the court had previously ordered. They also told the panel that they had to make applications because the courts were not taking appropriate steps to enforce contact. In the view of some of the fathers, mothers were allowed to breach contact orders with impunity.

Unlike the mothers who made submissions, quite a few of the fathers who did so had experience of section 91(4) proceedings. Those who had had applications for ‘barring’ orders under section 91(14) made against them said that they found it quite easy to resist these applications which they regarded as a tactical game playing by the mother’s lawyer. Unsurprisingly, in instances where they had been barred from making further applications without the leave of the court, they felt that the court had reached the wrong decision and they should be allowed to make unrestricted repeated applications to obtain and enforce contact.

The comments of both mothers and fathers resonate strongly with the submissions received from professionals that applications and orders under section 91(14) are rare. In a survey of 143 magistrates by the Magistrates Association, over 90% said applications for such orders were rarely or never made. As highlighted above, this may be because mothers do not know about the possibility, perhaps because they lack legal advice, or because their lawyers are aware of the difficulty of obtaining an order. Nagalro submitted that repeat applications are a product of final orders being made without sufficient knowledge and understanding of the family’s needs and dynamics, so that the order is inadequate to address the needs of the parties or the fundamental issues (see also chapter 9). A number of other professionals considered that repeat applications may be avoided if the courts were able to hold onto cases for long enough to ensure that the

orders were working as they should (see also chapters 6 and 9). There was a view that there was pressure on courts to bring cases to a close as soon as possible rather than retaining control over matters until a tested and working solution is in place. However, some of the professionals felt that the motivations for repeat applications were not always child centred; abusers could pursue contact through lengthy and repeated proceedings when they had shown little or no interest in the children whilst living with the mother and had no real intention of building a genuine caring relationship with the child in the future.

8.5.2 The difficulty of obtaining a section 91(14) order

Many of the professional submissions noted the difficulties of bringing an application under section 91(14). It is unlikely that parties without legal representation would have the knowledge or capacity to make a successful application. Judges can make orders on their own motion, but no one giving evidence to the panel was aware of this happening. More typically, a formal application is required with statements and a long delay before the hearing, making the process lengthy, onerous and costly.

Whilst it was suggested in the judicial roundtable that orders might be made where there had been two or more applications in close proximity, the litigant was self-represented and nothing had changed, the reality appears to be that there is a high threshold before making a 'barring' order. Submissions from other professionals suggested that five or more applications would be needed before an order would be considered. Mosac submitted that they were not aware of any section 91(14) orders being made in child sexual abuse cases they had supported, even where there had been a conviction and the abusive parent had made multiple applications for child arrangements orders or variations. Similarly, Refuge said they were aware of only a handful of cases in which orders had been granted, all characterised by severe, prolonged physical and sexual abuse.

Professionals noted that courts were correctly following guidance from the Court of Appeal in being reluctant to make section 91(14) orders.[145] Because of concerns about infringement of the right to family life and the right to a fair trial, there should be a high hurdle to justify preventing a parent from having access to the courts, and orders should be supported by strong evidence and only be made in extreme circumstances. However some submissions considered that the degree of persuasion required depended on the tribunal, while others questioned why the threshold for making an order was so high due to the fact that it is not in reality a 'barring order' but simply an order that requires leave to be obtained. It was therefore suggested in some submissions that the culture should perhaps shift towards a greater willingness to make section 91(14) orders in order to prevent repeat applications being used as a form of abuse.

Furthermore, even when orders are made, they may be only for a limited duration. An order lasting 6 months is not long enough to give the non-abusive parent and children

[145] See the review of case law on section 91(14) 'barring orders'.

respite from proceedings being used as a form of abuse. Southall Black Sisters gave an example of a service user who faced 18 months of repeated contact applications. Her application for a section 91(14) order then took 6 months to decide, and was granted for only 12 months, after which she expected to be subject to further applications, and would then have to re-apply for another order.

8.5.3 The ease of obtaining leave to apply

By contrast with the high threshold for obtaining a section 91(14) order, it appears that the threshold for obtaining leave to apply once an order is in place is low. Applications for leave are generally granted where there are child welfare issues involved or a change of circumstances since the order was made, and professionals pointed out that some perpetrators were readily able to engineer small changes to justify applications for leave. A LIP support service also noted that leave to apply may be granted on the basis that the child's welfare has progressed, without recognising that that progression was due to the fact of the section 91(14) order and, as a result, relief from harassment from the abusive parent had been obtained. A solicitor submitted that it takes a robust judge to see past a leave to apply application.

Submissions also reported considerable variation in how leave to apply applications were handled, particularly with regard to whether the other party would be notified of the application. Responses ranged from saying that the other parent was always notified, that judges would screen applications and decide whether they wanted to hear argument from the other parent, or that the other parent was never notified. Clearly, as noted above, applications for leave to apply have the capacity to become yet another vehicle for abuse.

8.5.4 An ineffective remedy

At the moment it seems that section 91(14) orders are seen, in the words of one the professionals, as something of a 'lame remedy'; the threshold for granting the orders is in practice too high, the amount of evidence required and the approach of judges towards granting the remedy need some reconsideration.

One of the key issues identified by all groups in this respect was lack of judicial continuity, which resulted in courts' failure to identify abuse through repeated court applications; contributed to reluctance to grant section 91(14) orders and readiness to grant applications for leave to apply; and generally led to inconsistent decision-making within cases. A Legal Adviser noted that applications for leave to apply would be directed to the same level of judiciary as had made the original order but were rarely heard by the same judge or bench of magistrates. Southall Black Sisters further observed that while judicial continuity was good practice, it could potentially delay a hearing by several months. This further demonstrates the counter-productive effects of limited judicial resources for private law cases.

Whilst the way section 91(14) orders currently operate seems to be less than ideal, professionals saw great potential in them if they were put into practice differently. The symbolic aspect of signalling to the abusive parent that the court is aware of and disapproves of their attempts to use the proceedings as a tool to perpetuate abuse is significant. There is also the practical aspect of giving the abused parent and children much needed respite. Hence consideration ought to be given to a number of recommendations for improvement that were made in relation to section 91(14) and other aspects of the process discussed in this chapter.

8.6 Conclusion

The evidence reviewed in this chapter shows that victims of domestic abuse, both female and male, often find the process of appearing at court re-traumatising. Special measures to protect vulnerable witnesses, such as pre-court familiarisation visits, separate entrances/exits, screening and video links, are in theory available, but in practice often not successfully deployed. All victims find it difficult to face their abuser at court in the absence of adequate support and protection, however, this is particularly the case for litigants in person. Victims told the panel that they found cross-examination harrowing, especially where this was done directly by an unrepresented abuser. A number of victims had undergone this court process multiple times as they experienced repeat applications made by their abuser. Many had no knowledge that the court had powers to stop this through the use of ‘barring’ orders. The other evidence received by the panel suggested under-utilisation of section 91(14), with many professionals suggesting a fresh approach to preventing further abuse by repeat applications.

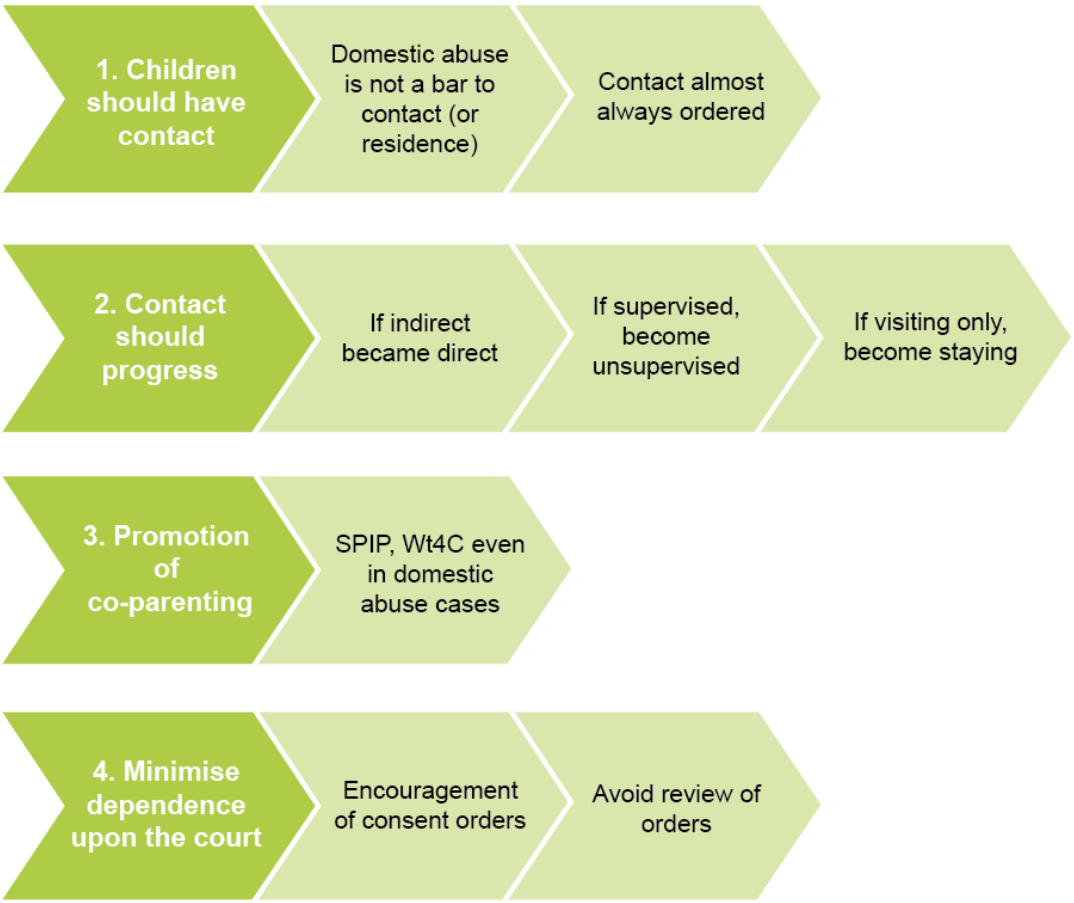
The overall weight of the evidence shows that the family courts need to become a place where a non-abusive parent feels safe, protected and heard. In order to achieve this the court buildings and all the court staff need to be trauma-aware. Victims of domestic abuse need support to deal with proceedings emotionally and avoid re-traumatisation. Victims should not have to face abusers in court and should have ready access to supporters and special measures. Judges can play a greater role in ensuring that proceedings are not used as a means of further abuse. In section 11.7 we make specific recommendations to enhance safety and security for victims of abuse at court, including recommendations with regard to special measures and participation directions, cross-examination, specialist support services, section 91(14) and the identification of abusive applications. The diagram in section 11.7 revises the one included at the outset of this chapter to show how the court journey for victims of domestic abuse could look post reform.

9. Orders made

9.1 The courts' approach

The evidence received by the panel, together with the literature review and review of case law highlighted four themes in the family courts' approach to making orders in private law children's cases. These are: that children should have contact with their non-resident parents, that restricted contact should progress to unrestricted contact, that co-parenting should be promoted and that parental dependence upon the court should be minimised. These themes are strongly influenced by the barriers identified in earlier chapters. In particular, the pro-contact culture assumes that children should have contact, ideally without any restrictions and that co-parenting is the ideal post-separation arrangement for children. Resource constraints limit the availability and use of interventions to monitor contact or to address abusive behaviour, as well as placing emphasis on the use of consent orders and the avoidance of review hearings.

Figure 9.1 The courts' approach: the four themes



9.2 Children should have contact

As noted in chapter 4, the Court of Appeal has directed family courts that they must make every effort to maintain contact between children and both of their parents:

> "There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt."[146]

In the context of domestic abuse, judges participating in the judicial roundtable correctly noted that, in accordance with the Court of Appeal's decision in *Re L* (2000), a finding of domestic abuse is not a bar to contact. PD12J specifies that when deciding on child arrangements where domestic abuse has been found, the court must ensure that any order for contact will not expose the child to an "unmanageable risk of harm" and will be in the best interests of the child.[147] The Practice Direction does not define what constitutes an "unmanageable risk of harm". Participants in the judicial roundtable described this as "the nub of the problem":

> "What is an acceptable level of risk at which you are allowing contact, what level do you say "no, that's it"? – that's where the difficulty is; there's the rather obvious harm as it were of domestic abuse as against the much more intangible harm of there being no or very little relationship." **Judicial Roundtable**

Individual submissions from parents who had alleged abuse or been the subject of allegations indicated that some form of direct contact, often unsupervised, was most likely to be ordered.[148] Nagalro observed that where findings have been made and the abusive parent has not acknowledged the harm caused or likely to be caused to the child and the non-abusive parent, the courts tend to make orders for indirect contact.[149] A number of other professional respondents, however, reported that overall, there is little difference between final orders made in cases where domestic abuse has been found and cases in

[146] *Re C (A Child)* [2011] EWCA Civ 521 per Munby P at [47]. The 'positive obligation on the State' referred to is the obligation under section 6 of the Human Rights Act 1998 for courts to act in a way which is compatible with rights under the European Convention on Human Rights, in this instance Article 8 of the Convention on the right to respect for private and family life.

[147] PD12J, para 35.

[148] Note that 'direct' contact includes face-to-face contact, and other forms of simultaneous contact such as phone calls and video calls. It may be supervised by a third person or unsupervised.

[149] 'Indirect' contact means non-simultaneous contact, such as the parent sending letters, cards and presents to the child, or to a third party to be passed on to the child.

which it has not been found or not raised. Professionals and mothers also expressed concern about courts sometimes ignoring assessments and recommendations made by Cafcass/Cymru or social workers in the interests of promoting contact.

> "I had a Cafcass safeguarding report and the court requested section 7 report and the father walked away with 50:50 share of the children despite Cafcass' strong recommendations of every other weekend and one or two visits in the week but no overnight. The judge that heard my case totally ignored the Cafcass safeguarding report and the Cafcass officer was in court to give evidence and stood by every word in her report regarding the risks of the father and background of him." **Mother, call for evidence**

> "My ex partner was finally arrested for domestic abuse after a four year reign of terror over our family. He was given a caution for 'previous good character'. Social services and CAFCASS both said he should have no unsupervised contact with the child. I successfully sought and was granted a non-molestation order. We then had to go to the family courts… The [District] Judge found my ex was violent, controlling and had definitely perpetrated domestic abuse. Shockingly the judge was only concerned with 'father's rights' and awarded unsupervised contact anyway." **Mother, call for evidence**

File-based research indicates that over the 10 years prior to 2017, indirect contact and no-contact orders were made in only around 10% of cases involving allegations of domestic abuse.[150] Harding and Newman also found that domestic abuse was generally considered "one factor out of many", with no contact and indirect contact orders usually made in response to a mix of domestic abuse, serious child welfare concerns (e.g. substance abuse, mental health), child objections, as well as problems with the non-resident parent's attitude and engagement.

As seen in the quotation above, submissions to the call for evidence also cited cases where shared care orders were made, or children were ordered to live with an alleged abuser. BAME women and women with disabilities who were victims of domestic abuse appeared more likely to experience their children being ordered to live with the abusive parent. SafeLives referred to a case example in which:

[150] J Hunt and A McLeod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (2008); M Harding and A Newnham, *How do County Courts Share the Care of Children Between Parents? Full Report* (2015) (86% of DA cases ended with orders for direct contact, 8% with orders for no or indirect contact); Cafcass & Women's Aid Federation of England, *Allegations of Domestic Abuse in Child Contact Cases* (2017) (57% of DA cases where the outcome was known ended with orders for unsupervised contact, 11% with orders for no or indirect contact); literature review section 9.12.

> "the perpetrator argued that because the victim was living in refuge she was homeless and couldn't offer a stable environment. The judge agreed and gave residency to the perpetrator as he was in work and had family to support him. The victim returned to him soon after stating she couldn't leave her children with him knowing what he was like."
> **SafeLives**

A number of mothers reported that when allegations of child sexual abuse were not found, the child was removed to live with the alleged abuser or placed in foster care. Mosac reported that its most recent annual advocacy statistics showed that 7% of its cases involving child sexual abuse allegations resulted in a 'live with' order in favour of the alleged abusive parent; 92% resulted in orders for unsupervised staying contact and fewer than 1% resulted in no contact.

When noting that domestic abuse is not a bar to contact, participants in the judicial roundtable observed that this appears to come as a surprise to some parties. Our submissions suggested that what parties experience on the ground is a disconcerting disparity between the findings of abuse and/or the established risk assessment and the orders made. It is difficult to understate the shock, dismay and anger reported by many mothers (and family members on their behalf) when describing how the court had ordered that unrestricted contact must occur despite what they perceived as serious and ongoing abuse putting themselves and their children at risk, one mother noted 'The sole objective is contact, no matter what harm has or may occur'. They had assumed that the court would focus on protection and many reported being bitterly disappointed that the court appeared to prioritise contact instead.

9.3 Contact should progress

Where the court considers that unrestricted contact is not safe, attention turns to how the risk of harm to the child (and/or the non-abusive parent) may be managed. This is well illustrated in a quotation from a District Judge interviewed as part of recent research by Harwood, who considered that "usually contact should still place" and that even children whose fathers had committed very serious offences may still have the right to know their father: "And I think that's the way the law is going. What it is about is managing the contact safely … so it's about making it safe but, generally, I'm not sure that even if there is some quite serious abuse, I am not sure that it prevents contact taking place".[151]

The main options available to courts for managing the risk of harm during contact are the suspension of direct contact on an interim basis pending the outcome of a fact-finding hearing, indirect contact, supervised or supported contact, and domestic abuse perpetrator

[151] J Harwood, *Child Arrangements Orders (Contact) and Domestic Abuse – an Exploration of the Law and Practice* (PhD thesis, Warwick University, 2019) p.162.

programmes (DAPPs). The following sections discuss the evidence received by the panel about these options in more detail. What most of them have in common, however, is that they tend to be considered as temporary restrictions, as stepping stones to the restoration of direct contact. In each case, the court's aim is likely to be to 'progress' to unrestricted, ideally staying contact as soon as possible. The one exception is indirect contact, which may be used as an interim measure, but is more likely to be ordered on a long-term basis. As discussed above, however, indirect contact orders have been made relatively rarely.

9.3.1 Interim orders

PD12J draws particular attention to the need to ensure that any interim child arrangements orders do not expose the child or the other parent to an unmanageable risk of harm, where disputed allegations of domestic abuse have yet to be determined.[152]

Submissions reported varying implementation of this provision. Participants in the English practitioner roundtable described many judges making interim contact orders in apparent disregard of PD12J, and in some cases making contact or even shared care orders before safeguarding checks had been completed, again contrary to PD12J.[153]

On the other hand, some respondents – particularly fathers and those supporting them – complained that courts (and especially magistrates) are overly cautious about contact prior to fact-finding. Fathers expressed concern that interim no-contact or restricted contact orders allowed alienation of the children by the mother to continue and become thoroughly entrenched, or interrupted a parent-child relationship which then took a lengthy period to restore. The National Association of Alienated Parents submitted that child-parent relationships are being severed by interim no-contact or indirect contact orders in private law children's cases without the rigour applied in public law cases. These concerns were usually associated with references to the slow pace of proceedings or the length of time taken to reach a fact-finding hearing. A social worker noted that the process for fact-finding is not in the child's timescales. More timely fact-finding hearings would be likely to alleviate many of the perceived problems in this regard.

In the Cafcass and Women's Aid Federation of England study of case files, no-contact and indirect contact orders when domestic abuse was alleged were not much more likely to be made at the first hearing (13%) than on a final basis (11%). The main difference between orders made at the first hearing and final orders in these cases was that in 42% of cases the court made no order about contact at the first hearing. While this would mean maintenance of the status quo, there is no information available as to how often the status quo meant existing contact or no contact.

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[152] PD12J, paras 25–27.

[153] PD12J para 12 states that the court should not generally make interim child arrangements orders or orders for contact in the absence of safeguarding information, unless it is to protect the safety of the child and/or to safeguard the child from harm.

9.3.2 Domestic abuse perpetrator programmes (DAPPs)

A DAPP may be ordered between findings of fact being made and the final welfare hearing. In England Cafcass funds places on accredited DAPPs which are commissioned by them. Although there are accredited DAPPs in Wales, Cafcass Cymru does not commission them to provide services or reports for the family courts. Respondents suggested to the panel that DAPPs were viewed as a mechanism that can eliminate the risk posed by an abusive parent and allow contact to happen[154] or, in the words of one mother's submission, "a meal ticket to contact". This is not how DAPPs are designed to function, but they may be seen this way within the courts' pro-contact culture. A number of submissions raised concerns about the availability, use and operation of DAPPs.

Several professional and organisational respondents commented on the shortage of DAPPs. In some geographical areas (particularly large rural areas in England) there was said to be very limited availability or a total lack of accredited behaviour change interventions. The complete absence of Cafcass Cymru-funded places on DAPPs in Wales was particularly noted by a number of respondents, together with Cafcass Cymru's refusal to accept reports from accredited programmes. Participants in the judicial roundtable pointed to a postcode lottery with regard to services – "It seems to be a bit of pot luck, which area you're in and whether services are available or not". They also expressed uncertainty about the status of non-Cafcass commissioned DAPPs where there were no Cafcass-commissioned DAPPs available in their area. While the lack of a Cafcass-commissioned DAPP significantly limits the options available to the court, it is equally unacceptable for courts to accept reports from DAPPs that are not commissioned by Cafcass, not accredited and/or not subject to the same standards.

Some fathers complained that Cafcass had not commissioned any DAPPs for women. It is not clear that the research base exists to support this kind of intervention for female perpetrators of domestic abuse, nor that it could be offered sufficiently widely in a cost-effective way given the much smaller numbers involved. However, the valid point remains that there is nothing available to enable mothers who have been found to have perpetrated domestic abuse to undertake work to address any ongoing risk they may pose to the child and their former partner.

Nagalro suggested that referrals are routinely made to DAPPs following findings of domestic abuse:

[154] See also literature review section 9.10.

> "In our members' experience, the child arrangement orders are usually not made where there has been domestic abuse unless and until the offending parent has gone through the remedial training [a DAPP] and is able to demonstrate to the court that contact can take place without risk to the child or the other parent." **Nagalro**

Other professionals reported variable willingness among courts to allow time for an abusive parent to undertake remedial work. Some were prepared to prolong proceedings to enable the parent to benefit from treatment, but others wanted to push forward to direct contact regardless. Some participants in the judicial roundtable expressed concerns that DAPPs are "too monolithic, it's a 26 week programme or nothing at all", suggesting that there is an inflexible, 'one size fits all' approach to behaviour change. Nevertheless, shifting the mind-set and entrenched behaviour patterns of an abusive parent can take a considerable time. Submissions expressed concern that the pro-contact culture may lead courts to minimise the seriousness of abuse and search for shortcuts to restoring contact which are not validated or effective in reducing risk.

Cafcass statistics show that the numbers of DAPP referrals are low:

Table 9.1 Cafcass referrals to DAPP and Safe Contact Programmes

Year	New private law cases	Referrals/families involved
2016/17	40,824	566 (1.4%)
2017/18	42,058	795 (1.9%)
2018/19	44,141	909 (2.1%)

Source: Cafcass Annual Reports

This suggests that in practice, substantial numbers of abusive parents obtain orders for contact without being asked to do anything to address their behaviour. Moreover, not all those referred to a DAPP will be accepted by the service provider (depending on the programme and their thresholds for eligibility) and some fathers fail to start the programme, although completion rates for DAPPs are relatively high since this is seen as the route to contact. Some submissions from mothers contrasted the obligations that the court expected them to carry in facilitating contact, often against their better judgement, with the very limited burden placed on perpetrators. One mother noted that a judge had asked the perpetrator to write a letter of apology to the children. He had not done so, but still continued to have unrestricted contact.

In the focus groups with men who had undertaken a DVIP course, all participants felt that it had been beneficial to go on the course and, where they had been ordered to attend, that the court had made the right decision for their child and ex-partner. Among other things they had learned about coercive control, gained insights into their behaviour and were no

longer denying their abuse. At the same time, they were clear that the course was a means to an end: to have contact with their children. One father described ongoing conflict with his ex-partner over contact, and said: “I tell her: it’s either I’m going to see them or I wait until I finish the course and start seeing them on the court’s terms” (Respect focus group).

Mothers whose ex-partners had undertaken DAPPs were less positive about them. In order to be accepted onto a DAPP, perpetrators are supposed to acknowledge their abuse and demonstrate the possibility for meaningful change; and following the programme that change should be evidenced. A number of mothers, however, reported failures to adhere to these standards, including:

- abusive fathers being accepted onto courses on the basis of minimal admissions or despite not meeting the eligibility requirements
- abusive fathers ‘ticking the boxes’, ‘passing’ the course and being considered rehabilitated despite no behaviour change, continued controlling behaviour and continued denial of their abuse, with no requirement to take responsibility for their actions
- post-DAPP risk assessments not taking into account the views of the adult victim or children.

SafeLives said that survivors had raised concerns with them about perpetrators being accepted onto programmes even if classified as high risk, post-programme reports being very short on detail and reporting only on participation rather than outcomes, and a lack of thorough risk assessment or judgement of whether the participant’s behaviour had changed. In these instances, it is questionable whether the DAPP was effective in reducing the risk posed by the abusive parent.

Finally, one lawyer observed a local practice of the court ordering a DAPP following fact-finding, but concluding the proceedings at that point and expecting the parents to agree contact once the DAPP was completed. This illustrates how DAPPs may come to be seen not as a requirement for accountability and the demonstration of meaningful change, but simply as a failsafe mechanism to progress contact. Similar reasoning seems to have been operating in the case of a mother whose ex-husband had attended a DAPP and had admitted intimidation and physical, emotional and financial abuse:

> “The Cafcass officer who did the section 7 told me that a line had been drawn under the Domestic abuse allegations because the magistrates had deemed it irrelevant to the future contact pattern. The section 7 did not even mention domestic abuse.” **Mother, call for evidence**

9.3.3 Supported and supervised contact

Previous research has suggested that the court may use supervised or supported contact at interim order stage as a short-term option to get contact restarted, but that it is seldom used as a long-term option as part of a final order. In the Cafcass and Women's Aid Federation of England study, supervised contact was ordered slightly more often at interim stage in domestic abuse cases (14% of orders at first hearing, 10% of final orders), although there was little difference in relation to orders for supported contact (7% of orders at first hearing, 5% of final orders).

Nagalro considered supervised contact to be valuable in both facilitating contact and protecting victims of abuse:

> "In cases where the other parent has addressed their behaviour but the victim is (quite understandably) distressed by having to face the other parent, the involvement of contact centres (where they can be afforded and are available) … have safely facilitated the relationship between the child and the parent" **Nagalro**

But they and many other respondents identified resource constraints as a key reason for the limited use of monitored contact. Multiple submissions referred to the shortage of contact services, particularly supervised contact. In some geographical areas (particularly large rural areas) there was said to be very limited availability or a total lack of supervised contact centres. A contributor to the judicial roundtable identified problems with availability and affordability:

> "We don't have enough child contact centres for people who can pay, they're expensive, they're inflexible, and you can suggest a contact centre and there's a 17/18 week wait, 70, 80 quid and they're too full to have handovers most of the time. There aren't any services." **Judicial roundtable**

Welsh Women's Aid noted that if funding is available through Cafcass Cymru, then it is for a limited number of sessions only, after which the parent has to continue to pay.

There are a number of consequences of the shortage of free or affordable services, particularly supervised services, in conjunction with the pro-contact culture. The ALC observed that "save for short periods where the supervision of contact can be categorised as an assessment…[t]he court can find itself unable to progress contact which it has decided is in the best interests of the child but needs to be supervised for safeguarding reasons". On the other hand, CLOCK and many mothers reported that in the absence of supervised contact services, courts will simply order unsupervised contact. The lack of supply means that victims and their representatives may give up on requesting

supervision. A participant in a survivors focus group in Wales, for example, reported being told that no supervised contact services were available and so there was no point asking for them.

Secondly, submissions suggested that in the absence of affordable or any supervised contact, courts are ordering contact at low-vigilance, volunteer-run supported contact centres or relying on the victim or a family member to supervise contact. The ALC also observed that closures of contact centres had meant that victims of domestic abuse were being asked more often to facilitate contact with an abusive parent. This is despite an amendment to PD12J in 2017[155] which was intended to end this practice where a risk assessment has concluded that a parent poses a risk to a child or the other parent. Rights of Women considered that the new provision is being overlooked by the courts and is only applied in cases where there is a risk of serious physical or sexual harm to a child. A mother whose experience in the family court was in 2018–19 explained: "I have to supervise contact between my abuser and our children. This has a detrimental effect on my mental health and causes me to continue to be traumatised by him but I have to do it in order to keep my children safe and happy".

Thirdly, the courts are unwilling to order supervised contact on a long-term basis. The Court of Appeal has emphasised that there is no general principle that direct contact should be ruled out if it would require long-term supervision in order to remain safe.[156] This does occur in public law cases. However, submissions from mothers noted that the court's expectations were always that contact would be 'progressing' from supervised to unsupervised, and as soon as possible.[157] One mother noted 'very rarely is there long-term orders for supervised contact'.

Yet, as many mothers pointed out, without change in the behaviour of the perpetrator, there was no reason to assume that the child or adult victim would be safe without supervision. A period of 'successful' supervised contact does not eliminate concerns or reduce the risk posed by an abuser, it merely puts their abusive behaviour on pause. Abusers who have been able to control their victims may be able to behave well while being watched, but upon 'progression' to unsupervised contact can resume the abuse unhindered.[158] Indeed, there were many submissions that identified the continued abuse of victims and children in unsupervised contact (see chapter 10).

[155] PD12J, para 38.

[156] *Re S (A Child) (Child Arrangements Order: Effect of Long-Term Supervised Contact on Welfare)*, [2015] EWCA Civ 689.

[157] See also literature review section 9.12.

[158] See also Perry and Rainey (2007) 'Supervised, supported and indirect contact orders: Research findings', *International Journal of Law, Policy and the Family* 21: 21–47, whose follow-up interviews with parents who had accessed some form of supervised contact found low levels of satisfaction and problems putting the post-supervision contact into practice.

There was also evidence that none of the forms of restricted contact was sufficiently robust to protect all children or adult victims. Multiple submissions raised concerns about the adequacy of supported contact and informal family supervision to protect children and adults from continuing abuse and coercive control.

> "He is allowed to contact them via phone and continues to use this as a mechanism to manipulate them, making them feel bad or sad for him as and when he wants. He will continue to abuse them for as long as he is given contact. I am able to stop the physical by always being there but this does not stop the impact of mental abuse and control. The court do not have an understanding or grip on coercive control at all." **Mother, call for evidence**

Similarly, Rights of Women noted that protection for the non-abusive parent in child arrangements orders tends to focus only on their physical safety, and does not extend to freedom from ongoing coercive control or harm to their emotional well-being, including the anxiety of having to hand over the child to a parent they know is abusive.

A number of submissions cautioned against assuming that indirect contact will necessarily protect children and the victim parent. The Suzy Lamplugh Trust commented that perpetrators can continue abuse through indirect contact by sending abusive letters which harass and stalk their ex-partner. A mother whose ex-husband had been convicted of rape and child abuse offences described how:

> "Initially, as an interim measure before the final hearing, the court allowed him to write to my children from jail once a month. These letters caused my children anxiety – they were very young but they knew enough to know that he was a paedophile and they felt physically sick at having to read his letters. My daughter self-harmed and ended up under CAMHS, my sons were deeply upset by the letters and had severe reactions every time the letters arrived – causing them emotional problems that led to them having to have counselling, as well can causing them to have problems at school and with friendships." **Mother, call for evidence**

Other mothers reported finding webcam, Facetime and Skype contact to be seriously intrusive, as it felt like it was allowing the abuser back into the home. It is mothers who are routinely left to manage the risks of this type of contact.

Multiple submissions referred to abusers still using supervised contact to perpetuate the abuse, including accounts of intimidation and threats outside contact centres which were not recorded or actioned by contact service staff; neglect of the child during supervised contact being overlooked by staff; and continued emotional abuse and grooming of children during supervised contact. Submissions also noted that even when incidents of

abuse were reported, children were ordered back to the contact centre. This respondent had been the subject of family court proceedings as a child:

> "I was entirely failed by the Family Court as contact was enforced at "supervised" centres where my father managed to be abusive even under "supervision". I do not wish to give precise details as this could identify me but he made threats quietly so supervising women could not hear, employed available toys to appear to be playing with me whilst using them to make up violent and macabre scenarios which he would relate to me as we apparently "played". I would like to be able to relate other incidents but again, these would make me too identifiable. When these things occurred I would always say to him that I was going to tell the adults and he would reply "No one will believe you". Unfortunately this was absolutely true as all this information was fed back into Family Court hearings where my mother was vilified as making them up. I must reiterate that I know this is true because I have read the case notes. … The effect upon me as a child was appalling as I absolutely did not want to go to these contact centres and I certainly did not want to see my biological father as his behaviour at these centres was so intimidating. I recall becoming very distressed when told I had to go there and my mother explaining to me that if I did not go, she would be sent to jail. This I also know to be true as I have seen in the case notes a copy of a letter from his solicitor to her solicitor stating their intention to commence committal proceedings if she refused to comply with the order for me to attend supervised contact. I also very clearly recall standing in the doorway of the centre screaming and refusing to go in. The case notes also show that this behaviour was attributed to my mother's "coaching", i.e. she was teaching me to do this. She was not." **Childhood victim of domestic abuse, call for evidence**

A mother gave evidence of her and her child's experience of long-term contact at a contact centre following a psychologist's report stating that "contact should remain supervised for a considerable time":

> "We did that for 7 years. Son repeatedly disclosed to teachers at school he didn't feel safe. Regularly given confectionary with nuts in [by father] despite knowing that child had severe nut allergy. Regularly taken into the toilet where threatened again. Spoke with contact centre staff. All volunteers in a church setting. No action or safeguarding taken. Disclosed to a counsellor. No action taken. I rang social care, told to call the police. I rang police, told it was a social care matter. Due to child not being physically assaulted couldn't get legal aid to get matter returned to court so stuck. Stuck for 7 years. 7 years of repeated actions by dad that worsened [child's] PTSD. Final straw, son aged 13 sexually assaulted by dad at contact centre. Permanently damaged. Please tell me how that is child centred." **Mother, call for evidence**

Thus, the evidence received by the panel suggests that not only may 'progressing' contact from supervised to unsupervised expose children and the other parent to an ongoing risk of harm, but supervised contact in itself may not protect children from a determined abuser.

9.4 The promotion of co-parenting

The third theme in the family courts' approach is the expectation that parents will work together as co-parents. This appears to hold even where there is a background of domestic abuse and coercive control. Multiple respondents, including Sheffield City Council, noted victims of domestic abuse and their former partners being ordered to attend Separated Parents Information Programme (SPIP, in England) or Working Together for Children (WT4C, in Wales) courses which focus on co-parenting and are not appropriate for domestic abuse cases.

> "I had recommendations by the court that I had to go onto a "working together for the child" course and I was ordered to go onto that. It was the worst 4 hours. I found it really distressing, insensitive and the lady who delivered it and when I was talking to her she said to me, "this isn't a counselling session, if you're in the court system it's a lose-lose situation and the best thing you can do is sort it out outside of the court"…My ex the perpetrator is a psychopath, he's a narcissist, and I've got a restraining order out on him, you can't work together or co-parent with someone like that." **survivor focus group participant**

The expectations of co-parenting are reflected in the limited protection for non-abusive parents in contact orders and orders that mothers supervise contact, discussed in the previous section. British Autism Advocate provided further examples of supervised contact being ordered at the resident parent's home, to enable an autistic child who cannot cope without their resident parent to have contact with the other parent, regardless of the safety and mental and emotional health risks to the resident parent. Southall Black Sisters also raised concerns about courts often making orders for fairly loose contact arrangements to be decided between the parties, leaving victims of abuse alone to negotiate arrangements with their abusers. A domestic abuse support worker argued that Cafcass's expectations about parents working together to sort out contact arrangements were completely inappropriate for domestic abuse cases and could provide further avenues for abuse, such as the parents' 'communication book' being used by the abuser to make allegations and send abusive messages – sometimes hidden references that only the victim would recognise.

The willingness of the courts to direct that parents attend activities to support contact and co-parenting contrasts with the limited use of interventions to address abusive behaviour. Many submissions noted this contrast in the court's expectations that protective parents

comply with contact orders and the co-parenting ideal, despite any ongoing concerns they might have about domestic abuse or other harm to their children, while the requirements placed on perpetrators of abuse were minimal.

9.5 Reducing dependence on the court

The fourth theme in the courts' approach is the longstanding emphasis on encouraging parents to make their own decisions about parenting post-separation. This has encompassed attempting to divert cases from court through the encouragement of alternative dispute resolution and encouraging settlement for those cases that do reach court, rather than the imposition of a decision by the court. Whilst promoting private agreement and supporting parental responsibility may be entirely appropriate in some cases, many submissions raised concerns that it could be entirely inappropriate in domestic abuse cases where victims and children need the protection of the court to counteract the abuser's power and control.

Two main issues arose in submissions in relation to this theme: reliance on consent orders and the limitation on review hearings.

9.5.1 Reliance on consent orders

Consent orders in private law children's cases are considered both desirable as a reflection of constructive co-parenting and necessary to enable courts to manage their caseloads within their limited resources. A consistent finding of previous research is that more than three-quarters of final orders in child arrangements cases are made by consent, with cases involving domestic abuse appearing just as likely to be resolved by consent as cases without domestic abuse allegations.[159] In practice, therefore, many of the contact orders made by family courts in domestic abuse cases will be made by consent.

PD12J requires courts to exercise the same caution in making consent orders in child arrangements cases as they must in making contested orders. In considering whether there is any risk of harm to the child, the court must consider all the information and evidence available to it.[160] There is also provision for the court to direct an oral or written section 7 report before approving consent orders,[161] although the evidence to the panel did not suggest that this option is often taken up.

Many responses to the call for evidence raised serious concerns about the courts' heavy reliance on consent orders. Mothers reported numerous instances of feeling coerced into

[159] See literature review section 9.6. The Cafcass and Women's Aid Federation of England study, *Allegations of Domestic Abuse in Child Contact Cases* (2017) found that in cases raising allegations of domestic abuse, 89% of orders made at the first hearing (where known) were made by consent. 86% of final orders were also made by consent but this not broken down in the report by DA/non-DA.

[160] PD12J, para 8.

[161] PD12J, para 8

agreeing to consent orders by the abuser, their lawyer and/or the court despite raising concerns that the order did not reflect established risks.

> "It causes huge amounts of stress, pressure and fear not just of what the abuser may do but the risk of the victim losing custody of their child if they do not comply with the order even though they know doing so could ultimately lead to more harm." **Mother, call for evidence**

Southall Black Sisters noted, in particular, that BAME women are often under tremendous social and cultural pressure to reconcile and agree contact, and recommended that greater effort is needed to safeguard victims and children prior to granting consent orders.

Professional respondents likewise reported that victims are frequently pressured by both judges and opposing lawyers into consent orders that do not address their concerns about domestic abuse. They noted that victims often do not have the money or emotional energy to resist this pressure. Alternatively, if they do wish to pursue litigation, it is made clear to them by their own or the opposing lawyer or the court that if they do not agree to contact the court will order it anyway, possibly with fewer safeguards. Some respondents observed that the victim's agreement to a consent order could then be taken to indicate either a failure to protect their children or a tacit admission that their allegations had been exaggerated or an attempt at 'alienation', and that contact is in fact safe.[162]

9.5.2 The discouragement of review hearings

Since the introduction of the Child Arrangements Programme in 2014, courts have been discouraged from holding review hearings. Previously, courts regularly operated a step-by-step approach whereby some form of contact would be ordered and then reviewed by the court. With the reduction in review hearings, the court has moved towards staggered or stepped orders for contact, with a pre-determined timetable for contact to 'progress'. This approach may increase the pace at which contact will 'progress' to the least regulated form.

> "Cafcass said a prolonged period of therapy for my son before any supervised contact even allowed, judge ordered contact within 2 weeks, my son became suicidal at this point and was referred to CAMHS." **Mother, call for evidence**

The discouragement of review hearings also places responsibility on the parents to bring the case back if there are problems, rather than the court taking responsibility for ensuring that its orders are indeed workable and safe. The following submission summary illustrates

[162] For an example of such reasoning, see also *Re LG (Re-opening of Fact-finding)* [2017] EWHC 2626 (Fam).

some of the disadvantages of this approach. A number of submissions from mothers, fathers and professionals called for orders to be automatically reviewed after a set period rather than leaving parents either to try to manage unsuitable and unsafe arrangements or to commence new proceedings.

Submission Summary

A mother left her husband following a history of coercive control, including physical abuse and rape. She reported feeling guilty about removing the child from their nuclear family, but said that she had left on professional advice. A fact-finding hearing was scheduled, but the most serious allegations were omitted on the basis that they were being investigated by the police. The judge wished to avoid the hearing and persuaded the ex-husband to make admissions. The mother reported that these were "so artfully created [by the lawyers] through use of specific language and wording, that any allegations I had made seemed insignificant". Cafcass encouraged her to co-parent. The judge made an order for direct contact and "refused for there to be a [review] hearing to check on how things were going for my [child] or I". The mother reported that the child was hyperventilating before contact and not wanting to go, following the father's explosive outbursts of temper. The mother reported feeling helpless as Children's Services would not intervene and only advised her to return to court which she could not afford. Meanwhile, the father regularly threatened her with court proceedings if she disagreed with him. She ended with the irony of professionals telling mothers to leave but being left "in a worse situation as the court makes such poorly informed decisions without any regard for the child's individual needs or the victim's well-being".

9.6 Conclusion

Many respondents argued that in ordering direct contact in the majority of cases, the court ignores, dismisses and systematically minimises allegations of domestic abuse and simply treats the case as if domestic abuse was of no continuing relevance. Too often, even where findings of domestic abuse are made, the submissions suggest that victims are told to 'move on' and to progress contact, even though the perpetrator has shown no or minimal effort to accept or engage with the findings made against them. Thus, the victim is left with the responsibility of ensuring that contact takes place, including liaison with the abuser, and sometimes against the expressed wishes of the child. In contrast, the evidence indicated that abusers are able to exercise their right to contact without being expected to take full responsibility to address their abusive behaviour. A number of submissions identified this consequence of the pro-contact culture as a form of entrenched sexism in the family courts.

Despite the intentions of PD12J, the dominant message arising from submissions, together with previous research and official statistics, is that domestic abuse cases are

often not treated much differently from non-abuse cases. The strength of the pro-contact culture, combined with resource constraints, mean that the same approach to contact appears to be applied to private law children's cases, regardless of whether there is a history of domestic abuse. As a result, the orders that the court makes in the majority of domestic abuse cases look very similar to those made in non-domestic abuse cases, with the expectation that restricted contact will progress to less restricted and unrestricted contact as soon as possible, if it is not ordered immediately. In only a small proportion of cases will the court impose protective measures, and these have been criticised as insufficiently protective against determined abusers and frequently of limited duration.

The pursuit of contact and limited efforts to address the behaviour of perpetrators appears to reflect a hope that somehow abusers will stop abusing without further intervention. As chapter 10 shows, however, this hope does not accord with the reality of the outcomes of court orders for child and adult victims of domestic abuse. Allowing perpetrators to have unrestricted contact without addressing their behaviour can and does compromise the safety of children and protective parents. In chapter 11 the panel recommends, among other things, that a reformed procedure should include automatic reviews of orders to check whether they are working safely, and that there should be a review of DAPPs. More generally, the panel's recommendations are designed to facilitate a change of culture to support more effective protection for children and adult victims of domestic abuse through court orders.

10. Harm arising from family court orders

10.1 Introduction

In response to the call for evidence, respondents provided significant new evidence to the panel about experiences of court-ordered contact in the context of domestic abuse. While there has been considerable research on the ongoing impacts of abusive parents on their children and ex-partners after separation,[163] most previous research on experiences of court-ordered contact has been in the form of small-scale studies,[164] including case studies of children who have been killed by abusive fathers following court proceedings and contact orders.[165] The evidence received by the panel adds substantially to this literature and for that reason, this chapter quotes more extensively from the submissions and focus group evidence than has been the case in previous chapters. Respondents reported that Family Court orders had enabled the continued abuse and control of children and adult victims of domestic abuse. They also reported that as a result of court orders and continuing abuse, children and adult victims have suffered long-term physical, psychological, emotional and financial harm, harm to their education, and harm to their parent-child relationships, sibling relationships, wider family relationships and children's future relationships.

There were general differences between the submissions made by mothers and fathers about the outcomes of court orders. Mothers expressed very high levels of concern for the safety of their children. Many felt that they and their children were worse off as a result of going to the family court, and many expressed feelings of despair, anger, anguish, desperation and hopelessness at the situation they found themselves in after court proceedings. Submissions from fathers were less detailed and more focused on the outcomes of court orders for themselves. They generally expressed less concern about abuse to children resulting from court orders, their children's safety, or being trapped in

[163] See literature review section 4.2.2.

[164] E.g. Callaghan et al. (2018) 'Beyond "witnessing": Children's experiences of coercive control in domestic violence and abuse', *Journal of Interpersonal Violence* 33(10): 1551–81; J Fortin, J Hunt and L Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experience Parental Separation in their Youth* (2012); S Holt (2015) 'Post-separation fathering and domestic abuse: Challenges and contradictions', *Child Abuse Review* 24: 210–22; F Morrison, *After Domestic Abuse: Children's Perspectives on Contact with Fathers* (2009), F Morrison, *Children's Views on Contact with Non-Resident Fathers in the Context of Domestic Abuse* (2016); R Thiara and A Gill, *Domestic Violence, Child Contact, Post-Separation Violence: Experiences of South Asian and African-Caribbean Women and Children* (2012). The evidence received by the panel echoes the findings of this earlier research.

[165] H Saunders, *Twenty-Nine Child Homicides* (2004); Women's Aid Federation for England, *Nineteen Child Homicides* (2016).

abusive relationships, and provided less evidence of harm to children as a result of living with or having contact with their mothers.[166]

10.2 The continuation of abuse through contact orders

Mothers overwhelmingly described continued abuse, control and suffering in connection with contact orders. Some reported that the abuse had worsened and they considered their children to be in greater danger after family court proceedings. A consistent refrain was that they and their children were now subject to what they perceived as court-ordered abuse:

> "The courts have not only allowed our abuser to continue to abuse us, they have actively participated in our abuse for the past three years." **Mother, call for evidence**

> "I was a child who was put in harm's way during contact. The final time I had contact was when my father threw a punch at me, he is a violent man and this was know right from the start yet he was given contact to me for 7 years and my brother longer. During the 7 years I saw a girlfriend of his beaten and various marks over his now wife on visits, the threats about wanting to kill my mum or how he'd take every penny from her. This is all abuse. I was a very scared child having to see him every other weekend and during school holidays." **Childhood victim of abuse, call for evidence**

Many mothers explained that they had fled the relationship with the father in order to protect their children and themselves from abuse, only to find that protection undermined or destroyed by the family court. As a result of the court's orders, they frequently found that they had no way of keeping themselves or their children safe, no means of escape, and they lived in fear for their children's and their own lives.

> "Now the abuse (emotional, physical and financial) is happening to my two youngest as family court wishes for this contact to not be supervised and being overnight. Meanwhile my ex uses the system to control me. Three years since we left our family home and we still live in fear and waiting for his next step." **Mother, call for evidence**

[166] Several fathers described harm to their children resulting from contact with mothers who were mentally unwell or who misused alcohol or drugs. While these are undoubtedly serious safeguarding issues, and may co-exist with domestic abuse, they are not directly within the remit of this report.

These submissions were affirmed by practitioners who observed that survivors' expectations that things would get better once the abuse was reported were contradicted by the reality that things often got worse.

Many of the mothers responding to the call for evidence described direct abuse of their children during contact or while living with the abuser. They and professionals working with them also reported that the courts, Cafcass/Cymru, police and children's social care refused to act on concerns raised by mothers or by children themselves about abuse during contact, including accounts of serious physical, sexual and emotional abuse, and continued to insist that contact must occur and blamed the victim if it did not.

> "I found out my ex had abused my son as well which I didn't know. He left after the abuse against me. While he was on a visit with their dad he abused him. I reported that and told the police. My son cannot to this day talk about what went on. He was interviewed in school, nothing got done. My ex is intimidating me, he turns up at school clubs, at my work, at my house. I've asked for a non molestation. The police say their hands are tied because of the family court order." **Survivor focus group participant**

> "My daughter told Cafcass recently how her father had been abusing her and she told her advocate too – and social services won't investigate because they say it's a family court matter. By the way – she told them and the following week they tried to force her into a room with him. She was screaming, crying in the car park, she saw his car and that was it, she was crying and shaking and didn't want to go in there. … Cafcass are still going down the parental alienation route, that I'm somehow doing this, despite clear evidence and a disclosure from a child." **Survivor focus group participant**

Mothers said they were accused of lying and alienating their children when they raised concerns about abusive contact, and that children were told it didn't happen and were sent back to the abuser. Mothers gave numerous accounts of feeling fearful all the time their children were with the abusive parent.

> "Our child now is court ordered to spend unsupervised contact with our abuser 6 hours a fortnight. 6 hours can cause a lot of damage. My child was 2 when we fled our abuser and family court have now let him start his abuse again. … Those 6 hours are hell wondering if my child is ok and that our perpetrator is not heading for the nearest airport. You see our child is his ticket to stay in the UK." **Mother, call for evidence**

As well as direct abuse of children, mothers described continued experiences of abuse themselves in connection with contact orders. We received many accounts of abusers continuing to use children as pawns in the exercise of coercive control over their mothers.

> "[T]he abusive parent continually questions the child for information to use against the abused parent, so that they can control the situation to take back to court. Children are used as pawns by the abusive parents to get at the abused parent, to control them more and more even though they are not with the abuser anymore. The abused finds it difficult to find new relationships because of the abuser, but when they do, they have support, but the abuser uses this against the child and tries to find information by asking more and more questions. The child is not in a good situation. … This is one of the reasons I gave up my daughter, along with my health, I had to think about what the abuser was doing to her to try to get to me." **Mother, call for evidence**

Refuge provided an example of an abuser giving new phones and tablets to their children which turned out to have multiple tracking apps installed on them to track the children's and their mother's movements. Resident parents are also left to cope with their children's reactions to contact.

> "Children are neglected, teeth not brushed, not bathed, not fed or improperly fed, have their sleep routines disrupted (during contact with an abusive parent) and then come home, tired, upset, manipulated, abused (including physically), frustrated and lash out at mother. Father blames mother for being inadequate, though he is the hidden cause." **Domestic abuse worker, call for evidence**

Children may be affected by domestic abuse both directly, and indirectly when abuse of the child's primary carer impacts on that parent's mental state and their ability to focus on and respond to the child's needs.[167] Many submissions described abusers' behaviour having serious and deliberate impacts on mothers' parenting capacity, with consequent detrimental impacts on their children.

[167] See PD12J, para 4; literature review section 5.2; and in particular C Sturge and D Glaser (2000) 'Contact and domestic violence – The experts court report', *Family Law* 30: 615–29.

"I suffered severe emotional distress due to lies being told within my community…and have had severe PTSD due to the consequences of the lies about me. The court were not interested in alienation. Alienating behaviours were not identified by CAFCASS in 2011, nor by CAFCASS in 2017. … The children suffered at school and life has been extremely challenging… Now 18 year old son and I became estranged from age 10 and he was exposed to abusive rhetoric and hate speech from an early age, the impact to our relationship has been catastrophic. The court failed to recognise the impact to our youngest child who ended up in foster care due to my having a severe breakdown due to the unrelenting distress being caused by an alienating and mentally/emotionally abusive parent… I am deemed as an over-protective parent, I am not an over-protective parent, I am a caring parent who struggled to protect her two sons from a parent that was determined to ensure that I was erased from their lives." **Mother, call for evidence**

A number of submissions described how orders that the children live with the father or for shared residence had the effect of perpetuating the economic abuse the mother had suffered. In accordance with the rules on benefits and child maintenance, these orders resulted in the mother's income being cut, or her being required to pay child maintenance to the father. Professional respondents observed that orders transferring residence to the alleged perpetrator of abuse can result in the non-abusive former resident parent losing child-related benefits and in some cases becoming homeless.

"In 2016 I asked for an adequate amount of maintenance money to be paid as I was still struggling as a working single mother and he was affording lavish holidays and expensive items when I couldn't afford the girls' extra curricular activities. In retaliation to my request for maintenance money their father initiated court proceedings for him to have the girls live with him half the time. I raised the domestic abuse as a major cause for concern. Cafcass…recommended that the 50/50 care take place… So, reluctantly and with no other choice I had to sign an order by consent for 50/50 shared care. The same day that was signed the girls' father contacted HMRC to say that he should now receive child benefit and tax credits instead of me as he was now caring for the girls more. … The child benefit and tax credits situation did not get sorted for 12 weeks. During that time those payments were stopped altogether while it was ascertained who had the legal right to claim those payments. During that time I was no longer able to meet my financial commitments and I was unable to pay my credit card bill so I had to get a debt relief order." **Mother, call for evidence**

Several submissions from both mothers and professionals referred to prohibited steps orders which prevented victims of abuse from moving away from their abuser to a safer place. Conversely, there were also reports of abusers moving many miles away and compelling their victims to drive long distances to deliver the children for contact.

> "Dad wanted handover half way as mum and dad live 90 miles apart. We have always fought this as dad moved away when they separated. Mum has ME and it is widely known that ME suffers draining and it is not always possible or safe for themselves or other road users never mind the child on board. But dad got his way." **Sister of abuse victim, call for evidence**

A major theme of the submissions was that the effect of court-ordered contact was to trap victims of domestic abuse in a relationship with their abuser until their children are old enough to be able to make their own decisions. Victims felt that the family court proceedings had further empowered and strengthened the perpetrators of abuse and increased their dominance. In their view, perpetrators had found that they could use the court process to inflict further harm on their victims.

> "All the court did was empower my husband, he's so powerful now after the family court process. He was already a seriously violent perpetrator and now he's a much stronger one. Since the final hearing in May I've had no end of messages: look at all I've taken from you, look at how I've destroyed you, you've got nothing left." **Survivor focus group participant**

A mother in the BAME women's focus group reported that she never felt confident when going to court that the judge would listen to her and she was afraid of the judge's power. She thought it was not right that she should be scared of the person she was asking for help from even though she was the victim. She was already living in fear of her husband, and was now living in fear of the law as well.

A few mothers concluded in their submissions that it would have been safer to stay with their abuser, because they would have had a better chance of protecting their children and could have ensured the children would not be left alone with him.

Similarly, Mosac recounted that many of the parents they supported said they would not report child sexual abuse to authorities again as a result of their experience in the family court. Southall Black Sisters told us that survivors relay "a sense of profound mistrust in the family court system and its ability to protect them and their children from harm". Other professionals gave examples of mothers agreeing contact arrangements or returning to live with high risk domestic abuse because they felt better able to protect their children that way rather than risking court proceedings and court-imposed orders.

10.3 Resistance to contact and the harm of forced contact

The panel received many reports of children being extremely distressed at the prospect of contact and of trying everything to avoid it.

> "I have examples of children so desperate not to go to contact they for example hide under beds, lock themselves away in rooms, run into roads whilst under supervision of an expert, hurt themselves so they don't have to go to contact, refuse to go to school, suffer severe tummy pains to the extent they have been rushed to hospital with suspected appendicitis which was proved to be emotional pains only, cry, withdraw, become more clingy to their 'safe' parent, regress to a much younger age in behaviour, display mute catatonic behaviour when asked about the parent they are scared of, stop socialising with other children and have regular nightmares." **Divorce and domestic abuse professional, call for evidence**

Yet our respondents also noted that very often, despite their reports of harm during contact and fear at the prospect of contact, children are ordered to have contact against their wishes and mothers are required to force them to go. Mothers said they were threatened with imprisonment for contempt of court or removal of the children from their care if they failed to comply. These mothers described being placed in an impossible position: if they tried to protect their children from abusive contact and to support their wishes not to have contact, they could be subject to enforcement proceedings, accusations of obstruction and punitive responses. But if they tried to force their children into contact, the children were placed in danger and lost trust in their mother's ability and willingness to protect them.

10.3.1 Children's experiences of forced contact

Many mothers expressed concern about their children being forced to have contact with an abusive parent:

> "My son when he was 12 wasn't allowed a say, I had to make him go to his dad and he hated me for it. His schooling went downhill, he was kicking off at school. He was being hurt by his dad and I had to keep making him go. Til one day he got naked in bed and said I had to try and dress him for him to go." **Mother, call for evidence**

Evidence from childhood victims of domestic abuse recounted similar experiences of forced contact:

> "I very luckily came under CAMHs for my PTSD, this is what saved me from further unwanted contact which had been going on since I was around 7 years old, my brother was not so lucky at 3 years younger than me, he had to go on day contact with our father – he would break down in tears and scream after going as the woman from Cafcass would show up on the visits and make him feel trapped. My brother was then made to carry on fortnightly weekend visits, even though he had said he insisted he didn't want to see his father." **Childhood victim of domestic abuse, call for evidence**

Submissions made clear that forced contact has several highly damaging consequences for children. Firstly, it is harmful for children to be forced into a situation where they do not feel safe.

> "Children's emotional health suffers greatly when being forced to see someone who has hurt them physically and emotionally and they don't want to go. My child became scared of the contact area as she related it to having to see her dad." **SafeLives survey respondent**

A legal representative at one of the practitioner roundtables described a current case in which the judge had persuaded the Cafcass officer to change her recommendation from indirect contact in the Section 7 report to supervised contact at a contact centre:

> "[The mother] started taking the children; on the first day, the elder child just simply cannot get out of the car, they're kicking and screaming because they don't want to go in. Finally, she gets them to go in. For the next visit, mum calls them up beforehand and says, she doesn't think she can do this, to which the Cafcass lady says "just trick the child into thinking she's going somewhere else, then bring her to the centre". So mum arrives with children who are absolutely heaving and screaming so she takes them home again – the older child is absolutely traumatised by the whole thing and now blames mother for all the things that have gone wrong. … I've now got to reapply to the court to try and unravel the whole thing, but it's almost a situation that the children are that traumatised that now social services may need to come in, all because of what the courts and Cafcass have done to them, and that is a complete and utter disaster." **Lawyer, practitioner roundtable**

Secondly, as earlier quotations suggest, it is harmful and disempowering for children not to feel heard and for their strongly expressed views to be disregarded.

> "My child was told by Children's Services that she would be put in foster care, moved to live with her father and never see her mother again unless she stopped refusing to go to unsupervised contact and overnight stays. She was a bright 10 year old at the time. We both suffer mentally from the trauma and my child has sleeping problems. My child continues to be emotionally abused." **Mother, call for evidence**

Thirdly, CLOCK submitted that children receive confusing messages: on the one hand they are taught about the importance of recognising and reporting abusive behaviour, but on the other hand, they are told by someone in authority that they must put up with abusive behaviour from one of their parents. Just as damagingly, children are encouraged to disregard their own fear and distress or told they will get used to it. This mother noted that it was her children rather than the father who were asked to change to enable contact:

> "Surely it can't be healthy to be forced against your will for 6 years to go to someone that you don't trust, that says and does things to you that hurt you, make you feel small, insignificant, anxious, not listened to, excluded, neglected, ignored, not fed, scared, isolated and depressed, even if that is your parent. With no real support where someone works with your father to change these behaviours, just with you the child year after year which certainly won't change his behaviours. I believe the court and Cafcass have damaged my children for life due to their continued beliefs that children's wishes and feelings are less important than parental involvement and they therefore ordered forced contact without any support to change father's behaviours and improving the relationship." **Mother, call for evidence**

Finally, and of particular concern, children are deprived of their key source of resilience against the effects of abuse – the support of their protective parent. Threats to their mothers for failing to promote contact result, as a number of submissions observed, in children having no-one to talk to if they are frightened or suffer abuse during contact. Children may not dare to speak to their mother about what has happened during contact because it could be used against her in court to demonstrate 'implacable hostility' or 'alienation'. Consequently, children suffering ongoing abuse through contact are left isolated.

> "Yeah she [mum] was very supportive of me but in that circumstance it's very hard to be supportive of your child because you get accused of manipulating, and that's what happened for five years. So in those five years I didn't actually have anyone to turn to. Because I couldn't turn to my family because… it would look bad on them and it would not be in my best interests in court. So for five years I was very much on my own." **Family Justice Young People's Board focus group participant**

> "Also it's also hard that your most trusted person might be your mum or your dad and then you can't talk to them because that then voids the whole thing, so that's very difficult. Couldn't speak to mum because she got in trouble once because she said "what do you want?" once, but she was meaning just genuinely "what do you want?" which then got written up." **Family Justice Young People's Board focus group participant**

Submissions further noted that children's isolation and deprivation of support is exacerbated by the lack of mental health and counselling support available for children going through distressing and traumatic contact. This may be due to resource limitations and a shortage of services, but it may also be a result of court intervention.

> "My child was going through a children's group programme at a local Women's Aid, for children specifically and for mothers to help them recover from the abuse. My judge in my case stopped it because they said these groups would teach children that they'd been abused, they said these groups cause the children's bad behaviour and said that they wouldn't even know they were victims if they hadn't been to these groups." **Survivor focus group participant**

Conversely, Mosac described: "In two cases recently reported to Mosac, the family court ordered that the children should undergo therapy to help them understand that they weren't abused, despite the fact that the children continued to report abuse." As seen above, children seem to be expected to change to overcome their objections to contact, while children's recovery from abuse is not supported to the same extent.

A few examples of more supportive practice were provided to the panel.

> "I received an amazing line in my court order by a judge who understood (eventually) my ex's control over us. The line was put in to protect the children when they didn't want to go (felt unsafe after an abusive episode) so that the law didn't say they HAD to go to him because it was his contact time. The line was along the lines of 'whilst the mother is to support contact, the children's wishes and feelings must be considered'. Several policemen have told me what a great line this is in our court order and how they wish more court orders had this line. The judge told me to tell the boys about this line in the court order – he knew he was empowering 2 children with this. And he was. It has proved absolutely invaluable to us and enabled my children to create for themselves some stability over the longer term." **Mother, call for evidence**

10.3.2 Mothers' resistance to contact

Many submissions from fathers complained that resident mothers exerted complete control over contact and breached contact orders with impunity, and that family courts were not sufficiently robust in enforcing contact orders.

> "Child arrangements orders aren't worth the paper they're written on anyway as the courts don't enforce against mothers. Only 0.8% of the time when suitable are orders enforced. … Mums should promote contact…rather than ignore orders and alienate." **Father, call for evidence**

The only study to date of contact enforcement cases,[168] however, found that 'implacably hostile mothers' appeared in only a very small minority of such cases (4%), while around one third of cases involved current risk or safety issues relating to domestic abuse and/or child abuse. In these cases, contact had broken down because orders were unsafe. The study also found that courts 'misread' almost half of the risk cases as involving mutual conflict or implacable hostility, and consequently managed the safeguarding issues inadequately, resulting in inappropriate interventions and further unsafe contact orders. The study attributed these results to the courts' pro-contact culture.

Counter-allegations of 'parental alienation' were discussed in chapter 5 as one of the factors that might inhibit victims from raising or pursuing allegations of domestic abuse in the family court, and in chapter 6 as a means by which children's voices may be disqualified. As seen in several of the quotations above, accusations of 'implacable hostility' or 'parental alienation' may also be made in situations where mothers fail to promote or stop contact due to safety concerns, or where children refuse contact and the

[168] L Trinder et al, *Enforcing Contact Orders: Problem-Solving or Punishment?* (2013). See also literature review section 10.

mother is blamed for this refusal. This was reflected in a wide range of submissions and in several of the focus groups.

While the panel accepts that some resident parents may be opposed to their children's contact with the non-resident parent, the strong association between claims of alienation and domestic abuse allegations,[169] and the weight of the research evidence[170] and submissions suggest that accusations of parental alienation are often used to threaten and blame victims of domestic abuse who are attempting to protect their children and achieve safer contact arrangements.

A substantial number of mothers referred to the threat of children being transferred to live with the father if they did not promote contact, which they experienced as a further form of abuse:

> "It causes huge amounts of stress, pressure and fear not just of what the abuser may do but the risk of the victim losing custody of their child if they do not comply with the order even though they know doing so could ultimately lead to more harm." **Mother, call for evidence**

In some cases, mothers said that residence had been transferred to the abusive father due to their perceived alienation of the children, leaving them unable to offer either protection or support:

> "When I last saw my 8 year old he said to me, "mummy I'm getting very angry because I miss you all so much". The social worker said that's not recorded. The contact before that, my son who's 6 said to me, "mummy when are we going to be a family again?". He had a meltdown, the contact workers were witness to him saying "mummy I want to come home with you" and all I could say… in my agreement … I'm not allowed to talk to him about what happened, about court. I'm not allowed to tell them I want them to come home …So I can't reassure them, I can't say I'm fighting for you to come home all the time … Why aren't they promoting contact, the relationship between mother and child? I still have parental responsibility, but it means nothing." **Survivor focus group participant**

The evidence received by the panel suggests that where mothers are perceived to be at fault, they are regarded more negatively and are more likely to be expected to change their

[169] See A Barnett (2020) 'A genealogy of hostility: Parental alienation in England and Wales', *Journal of Social Welfare and Family Law* 42(1): 18–29.

[170] See L Trinder et al, *Enforcing Contact Orders: Problem-Solving or Punishment?* (2013); articles and references in the special issue of the *Journal of Social Welfare and Family Law* 42(1) (2020); articles in the special issue of the *Journal of Child Custody* 16(1)–(2) (2019).

behaviour than are fathers who have perpetrated domestic abuse. The evidence also suggests that within the pro-contact culture, courts are too ready to minimise or disregard domestic abuse and accept the stereotype of the 'implacably hostile' or 'alienating' mother. The apparent double standards applied to mothers and fathers were described forcibly by a childhood victim of domestic abuse:

> "As the child of proceedings, speaking from both memory and from full access to case notes as an adult, I remain stunned by the profound misogyny enacted within family courts which denigrates and threatens mothers who seek to protect children and valorizes the rights and supposed roles of fathers to the exclusion of everything and everyone else no matter how provably abusive and harmful they are. Until this stops, harms to both women and children will remain dangerous and profound." **Childhood victim of domestic abuse, call for evidence**

10.3.3 Long-term consequences of abusive contact

Respondents' reports of the long-term consequences for children of court-ordered contact were consistent with the literature on the longer-term outcomes for children generally of post-separation contact with an abusive parent.[171] They were also consistent with the wider literature on the long-term impact of adverse childhood experiences (ACEs).[172] In addition, the submissions offered insights into the lasting consequences of court-ordered contact for adult victims of abuse, and the way in which the family court process and orders may actively impede the ability of child and adult victims from beginning the process of healing from trauma.

10.3.4 Hindering recovery

Submissions reported various ways in which child and adult victims of abuse were blocked from accessing support or therapeutic services during the course of family court proceedings. In some cases, abusers obtained prohibited steps orders to prevent this. In other cases, the court itself barred recourse to support. CARA, for example, reported orders that children who had disclosed sexual abuse should not receive specialist support or therapy while family court proceedings were under way. When they had raised this issue with the relevant DFJ, they had been informed that such orders were made in accordance with good practice guidance,[173] which states that "The issue whether or not a child has been sexually abused is for the decision by the court and it is essential that other

[171] See literature review section 5.3.

[172] For a useful discussion of the research evidence on ACEs, see House of Commons Science and Technology Committee, *Evidence-Based Early Years Intervention* HC 506 (2018).

[173] The guidance referred to in the submission as having been cited by the DFJ is the Annex on Flawed Sexual Abuse Investigation taken from the Handbook of Best Practice in Children Act Cases. The Handbook of Best Practice was originally published by the Children Act Advisory Committee in 1997. The panel has been unable to independently locate the cited Annex.

agencies await that decision before introducing management, counselling or therapy that pre-judges the issue" (CARA submission). However, CARA noted that this guidance is significantly out of kilter with current thinking in the criminal justice system and with CPS guidance on the provision of therapy for alleged child victims.[174]

> "Provision to ensure that children can access specialist support is embedded in criminal justice proceedings around sexual abuse and is not seen as being in conflict with the sexual abuse not having been proved. The denial of this support by the family court may prevent children from moving forwards from a traumatic experience. Denying play therapy (which is gentle and child led, often involving no direct reference to sexual abuse), also represents a significant misunderstanding of the way specialist sexual abuse services for children under 12 operate." **CARA**

Parent victims told us about their inability to access support services and counselling while the family court process was ongoing as they were still effectively (re)living the abuse:

> "SARC [Sexual Assault Referral Centre] now say you have to be out of the other side of family court before they'll engage you in counselling. This is great for the court but delayed my access to support. When are you ever out of the family court process?" **Survivor focus group participant**

> "I have now been diagnosed with PTSD and a dissociative disorder, I've also had a mental breakdown, all this has happened since him starting the family court process and I am under the mental health team who will not start my therapy for recovery until the court process is over as he is still being allowed to abuse me. I'm one of the lucky ones that my boy is too young for the process to be affecting him, but indirectly whilst I cannot work on my mental health, he is being affected." **Mother, call for evidence**

Once final orders have been made, submissions explained how ongoing contact with the abusive parent further prevents children and adult victims from beginning the recovery process. Instead, they are forced to remain in survival mode in order to manage the ongoing risk of abuse.

[174] Provision of Therapy for Child Witnesses Prior to a Criminal Trial: https://www.cps.gov.uk/legal-guidance/therapy-provision-therapy-child-witnesses-prior-criminal-trial

"One of the most common aspects of our advocacy and support work is that more often than not, we have to address the emotional fall out following private law children proceedings in which residence/contact has been ordered in favour of abusers. Rather than help women with their recovery process and to rebuild their lives, we find ourselves having to continue to support women and children who have suffered harm as a result of child arrangement orders. We find ourselves having to provide intensive support and counselling, as well as helping women to manage the increased risks that arise due to such orders having been made." **Southall Black Sisters**

10.3.5 Long-term harm to children

The submissions provided many detailed and disturbing accounts of harm suffered by children which respondents attributed to their court-ordered contact with abusive parents. The panel acknowledges that it is difficult to do justice to the scale and severity of damage described by respondents. We were told of children experiencing multiple physical injuries, being sexually abused and emotionally devastated; of children developing eating disorders, sleeping problems, night terrors, bedwetting, stomach pains, anxiety, insecurity, hypervigilance, anger, behavioural issues, low self-esteem, ADHD, OCD, PTSD, complex PTSD and depression. In addition, submissions described children's schooling being affected, children experiencing learning difficulties and being excluded from school. There were many accounts of children self-harming, some of children attempting suicide and, in a few awful cases, of children committing suicide.

"[After the order for unsupervised contact was made] The child quickly became violent and started bedwetting, refusing food and developed night terrors. … My child is seriously damaged because the family Court refused to follow 12J and refused to protect the child." **Mother, call for evidence**

"My eldest child developed chronic stomach aches and would vomit during the week leading to contact she was so afraid. My youngest child gave up completely and wouldn't ever complain when she was abused as both children told me over and over again, that it didn't matter, nobody cared and nobody listens…. My eldest child was terrified of being in the same room as grown men for a long time. Her school was very worried at the reaction she had when she had to have a lesson in class with a male teacher. As she would become hysterical." **Mother, call for evidence**

> "I developed PTSD, it was so stressful.... My sister's anxiety became so bad she left school." **Childhood victim of domestic abuse, call for evidence**

Many submissions spoke of children being referred to or needing to access Child and Adolescent Mental Health Services (CAMHS).[175] While these submissions were often concerned about the lack of resources available and the difficulty of securing appropriate treatment for traumatised children, the submissions suggest that the perpetuation of harm resulting from family court orders has created a significant cost to CAMHS.

In addition to the impacts on children's physical and mental health, submissions observed that children's relationships were also distorted by the ongoing abuse they experienced through contact – for example, they were alienated from their mothers by abusive fathers, exposed to an inappropriate role model and grew up not understanding the difference between healthy and unhealthy relationships. Some children were described as mirroring their father's behaviour, becoming controlling, abusive and continuing the cycle of violence, or they formed relationships as adults with abusive men.

> "My son is grown up and through court ordered contact has learnt to be like his father. He started to be abusive (physically and verbally) to myself and younger siblings and could no longer live at home. The court let him live with his father!!! I had asked for foster care to be considered until he got help. Anyway I now expect he will engage in DV against future partners and children. He is manipulative, exploitative and abusive. Court ordered contact with DV offender father destroyed my child." **Mother, call for evidence**

> "I think certainly growing up in an environment which was abusive, when I then got in a relationship that was abusive I didn't notice it as early as someone else maybe would do because it was kind of normal… so it was kind of that's alright. And then when I eventually broke up I was like oh my God, I can't believe I let that happen to me again." **Family Justice Young People's Board focus group participant**

Children exploited by their fathers to perpetuate the abuse of their mothers said they felt unloved, used and lonely. Children compelled by the family court to have contact with an abusive parent described the lifelong consequences of that disempowerment.

[175] The NHS website explains: "CAMHS is used as a term for all services that work with children and young people who have difficulties with their emotional or behavioural wellbeing. Local areas have a number of different support services available": https://www.nhs.uk/using-the-nhs/nhs-services/mental-health-services/child-and-adolescent-mental-health-services-camhs/.

> "As a child I suffered acute problems with eating, sleeping, toileting and anxiety. As a teenager and adult I had a profound fear of authority figures because I saw them as people who could force me, against my will, to do things I absolutely did not want to do. Secondly, I saw them as people who had the power to punish me. I also had ongoing adrenal and anxiety problems. I have absolutely no faith in social systems or the legal system." **Childhood victim of domestic abuse, call for evidence**

10.3.6 Long-term harm to adult victims

Adult victims of abuse provided equally harrowing accounts of living with the long-term impacts of domestic abuse and trauma, which have been intensified and perpetuated by the court proceedings and continuing abuse enabled by court orders. These effects included long-term chronic health conditions and disabilities, PTSD and nervous breakdowns.

> "The judge found my ex guilty of DV but said I was party to my own abuse. Every organisation knows we are the victims, I felt like I was been abused all over again, I now suffer anxiety and PTSD, I do not trust anyone anymore." **Mother, call for evidence**

> "[The court] took too long to protect the children, didn't listen and we were subjected to barbaric, humiliating and sometimes inhumane acts, with the court failing to follow its own procedure and guidelines, resulting in years of trauma that led to 1 adult and 2 children having long psychological treatment for PTSD, anxiety and abuse. … The children and I have been subjected to years of direct abuse, with indirect abuse through the court system also being used as a weapon of intimidation and fear. The result after years of this, was long and intensive therapy to overcome the trauma caused to the children and myself. The financial harm has also been devastating and almost the age of 50, I feel my life is ruined and has been ruined by an unjust system." **Father, call for evidence**

A number of mothers described how they had lost their jobs, lost their homes, run up huge debts due to legal costs, been trapped in poverty, become homeless and destitute. A number had also suffered the pain of their children being ordered to live with the abuser; while some were subject to subsequent public law proceedings.

> "They did not stop him from continually taking me to court, because he would not negotiate, and I ended up having a nervous breakdown, which then ended up with me having to leave work. I was diagnosed with 'Reactionary Depression' and I eventually had to give up my youngest daughter, even though I know about his abuse, because I could not prove it... I was left with massive debts, and ended up having to pay most of the debts off with the sale of the house we had, and I still had approx £5,000 of debts. I am still paying off those debts with a debt management agency." **Mother, call for evidence**

Some fathers also described the pain of being prevented from seeing their children, which had resulted in depression, anxiety and suicidal feelings.

> "Unnecessary / poor contact arrangements do massive psychological harm to the distant parent ... My son spent time in care of others instead of with his loving parents." **Father, call for evidence**

After describing a father's attempts to maintain a relationship with his children in the face of the mother's obstruction, one respondent observed:

> "The effects of this on the father have been traumatic. He appears depressed, has expressed suicidal thoughts and is angry about the injustice and impact on his children's wellbeing. This anger manifests itself in shouting. There are days when I'm sure he could walk away because he feels helpless, is frightened about losing his children, the impact it has had on them and what their futures will be." **Father's family member, call for evidence**

Responses from parents appear to reflect substantial failures by the family courts either to support protective parents or to encourage and support abusive parents to change entrenched patterns of behaviour.

Some mothers finally noted that in the absence of consequences in the family court, fathers who had perpetrated domestic abuse were now abusing their new partners and children in the same way. These submissions raised concerns for the safety of children and adult victims who were not currently the subject of court proceedings, as well as for the children who are visiting them for contact and having their experiences of domestic abuse compounded by witnessing it again.

10.4 Long-term consequences of no contact

In addition to asking for evidence of harm resulting from orders made in private law children proceedings, the call for evidence asked about the risk of harm to children in not having a relationship with a domestically abusive parent or a parent who has committed other serious offences against the other parent or a child.[176]

We received evidence from fathers about the harm to children of not seeing their fathers and the father's wider family, and sometimes also being cut off from siblings. These harms were described in terms of loss of established relationships, family connections and part of the child's identity.

> "[My daughter] had cut off contact to all my side of the family of which she had very strong relations before. This has been a terrible time for her and the full extent of what has happened is not yet known. Although she was showered with [material things] she lost the real things that count through what she believed where her own decisions. … My daughter lost her own identity. Everything she says and does when speaking to me has to go through her mum." **Father, call for evidence**

The Association of Lawyers for Children submitted that while the evidence concerning the risk of harm to children from a relationship with an abusive parent is well known, "The evidence of the risk of harm to children not having a relationship with a domestically abusive parent is less clear", although they considered that "there are risks to the lack of identity from not seeing a parent when the alleged victim parent may well find it difficult to provide life story work about the abusive parent". In the view of Nagalro:

> "the answer depends upon how well the abusive parent has acknowledged, accepted and reformed the abusive behaviour that was likely to cause harm to their child. This requires time and resources but it often leads to a safe relationship between the child and the parent. Where this can be achieved, this is the best and least damaging outcome for the child. … In cases, where there is no acknowledgement of the harm caused or likely to be caused to the child and the non-abusive parent, then orders for indirect contact only have reflected the need for the welfare of the child to be the paramount consideration." **Nagalro**

As discussed in chapter 9, indirect contact, life story work (where the child is provided with information about their father and paternal family) and identity contact are all mechanisms

[176] Call for evidence questions 22 and 23.

used to try to maintain some relationship between the child and their abusive parent while minimising the potential harm to the child.

> "We needed another full trial which resulted in contact becoming supervised by an independent social worker and identity contact being kept at 4 times a year. We were also given a section 91.14 order to last until my daughter reaches 16. ... He was told to find 3 social workers that he had to pay for but I could select the final person to look after my daughter when she was with him. We did this and she has now had 4 contact sessions over the past year. It is far from perfect but my daughter has settled into them. **Mother, call for evidence**

As also discussed in chapter 9, however, these forms of contact are infrequently ordered in private law children's cases and may not prevent perpetrators from continuing their abuse.

On the other hand, many responses expressed incredulity that we were asking these questions.

> "We do not expose children to adults who are abusive and coercive in any other social context other than family law. If a child is deliberately and repeatedly exposed to the abusive and coercive behaviour of an adult in any social context other than family law, it becomes a matter for social services. The harm of exposing a child to the behaviour of an abusive and coercive adult is so obvious that this question should not even need asking. Abuse and coercion are not okay just because a man is biologically related to the child." **Childhood victim of domestic abuse, call for evidence**

These respondents considered that the possible pain and distress of not having a relationship with the abusive parent is heavily outweighed by the serious harms and trauma, as detailed earlier in this chapter, of continuing to experience and live with abuse.

> "Children who have experienced domestic abuse end up as adult clients of ours accessing our trauma therapy, which is pretty conclusive evidence that witnessing abuse can be as harmful as enduring it. To force children into a relationship with an abuser is wholly wrong – yet it is common practice in Family court. … I do not think there is harm in not having a relationship… [Where one parent has died, for example] it is perfectly fine for a child to be raised healthily and happily by one parent, what is not fine is children being forced into contact with an abusive parent." **Domestic abuse professional, call for evidence**

> "The fact is that an abuser cannot be a good parent. The courts need to recognise this. The belief that is held in the courts is that the trauma experienced by a child in later life from not having a relationship with their parent is more than any trauma caused by forcing contact. This is simply not true and is extremely barbaric and damaging for a child." **Divorce and domestic abuse practitioner, call for evidence**

Responses from domestic abuse and family support workers considered that children develop better in a calm, loving and abuse-free environment.

> "It is better for a child to have one consistent, non-abusive parent who provides routine and boundaries with positive parenting (including support workers and her community to do so – school too) than to have the ongoing chaos that abusive and manipulative parents always bring into any relationship with anyone, including their own children." **Domestic abuse worker, call for evidence**

The mothers who had managed to escape from their abusive relationships provided evidence of the great relief that came once contact with the abusive father ceased. They described how their children were gradually able to recover, to achieve a sense of safety and security, and to begin to flourish.

> "Daughter is now blossoming without him which says everything." **Mother, call for evidence**

Even where contact was suspended for a period of time, mothers noted that their children were remarkably better off – they were better behaved, calmer, and their traumatic symptoms ceased:

> "She didn't see her dad for 3 months because I stopped contact because it was harming her. And within that 3 months she was a totally different child. There was no fighting with her sisters, she was kinder to me and much calmer, and as soon as she's just gone back to see her dad, on the Sunday, she went to counselling on the Monday and they said straight away there's a difference in her behaviour after seeing her dad, she's much more angry and aggressive." **Mother, call for evidence**

The respondents who had been the subject of family court proceedings as children said the same – their recovery had started when contact stopped – even though in some cases they were still being stalked and harassed by their abusive fathers.

"When I cut off my relationship, I started to get better and three years later (despite repeated harassment) I am much healthier and happier with my non abusive parent." **Childhood victim of domestic abuse, call for evidence**

"In primary school I was such a horrible child… when I became good [it] was because of the fact that I wasn't living with my dad any more. I moved away from that environment and within 8 months to a year I was a different child… I was feral like a cat and then I was nice." **Family Justice Young People's Board focus group participant**

"I've not had any contact with my dad since I was 9 and I don't feel any worse off for it. I feel if anything a lot better off. I'm free from something that was quite horrible and I don't think that it's necessarily fair to assume that to take a child away from one of the parents or to not promote a relationship is necessarily emotionally and mentally harmful for the child. In my case it saved me from something quite horrible." **Family Justice Young People's Board focus group participant**

10.5 Conclusion

The evidence reviewed in this chapter indicates that family courts do not effectively protect many child and adult victims of domestic abuse from further harm. On the contrary, the courts' pro-contact culture results in orders in many private law children's cases which put children and their protective parents at risk of often severe harm. Experiences of unsafe, abusive and traumatic contact in turn are seen to give rise to a wide range of longer-term impacts on victims' wellbeing. Many respondents felt that such harms vastly outweighed the value of an ongoing relationship with the abusive parent.

Nagalro made the important point that the safety and benefit to the child of an ongoing relationship "depends upon how well the abusive parent has acknowledged, accepted and reformed the abusive behaviour that was likely to cause harm to their child". The evidence to the panel discussed in chapter 9 and this chapter suggests that in a large number of cases abusive parents are given contact without being asked to acknowledge, accept or reform their abusive behaviour, and instead it is children and non-abusive parents who are expected to accommodate themselves to contact and to bear the costs, regardless of the harm this may cause. These findings echo those of Ofsted's joint targeted area inspection reports of children's social care responses to domestic abuse: that the cumulative effects on children of experiencing domestic abuse are not sufficiently recognised; that there is too much reliance on vulnerable adult victims to keep children safe; and that there is insufficient focus on the perpetrator and the need to change their behaviour.[177]

[177] Y Stanley (2020) 'Domestic abuse: Keeping the conversation going' at https://socialcareinspection.blog.gov.uk/2020/01/07/domestic-abuse-keeping-the-conversation-going/

The panel believes that family courts can best promote children's welfare by protecting them from continuing exposure to abuse, acknowledging and supporting the role of protective parents, enabling children and protective parents to recover from trauma, challenging abusive parents and encouraging and assisting them to undertake the hard work of behaviour change. This is likely to require enhanced resources to enable courts to thoroughly investigate and understand allegations of domestic abuse, to require and be satisfied of behaviour change on the part of abusive parents, and to make orders which assist victims' recovery.

The panel also considers that children and resident parents should not be compelled to live with unsafe contact orders and resident parents should not be threatened, blamed or punished for not forcing children to have contact in these circumstances. If a child does not feel safe having court-ordered contact, then the order should be reviewed and the child's concerns should be addressed. Further, the panel considers there is a case for greater investment in therapeutic support for children and adult victims of abuse during family court proceedings, as well as in accredited behaviour change programmes for perpetrators of abuse.

These conclusions are incorporated into the panel's recommendations in chapter 11, for a new set of principles and procedures in child arrangements cases, a review of DAPPs, and additional resourcing for support services for child and adult victims of domestic abuse.

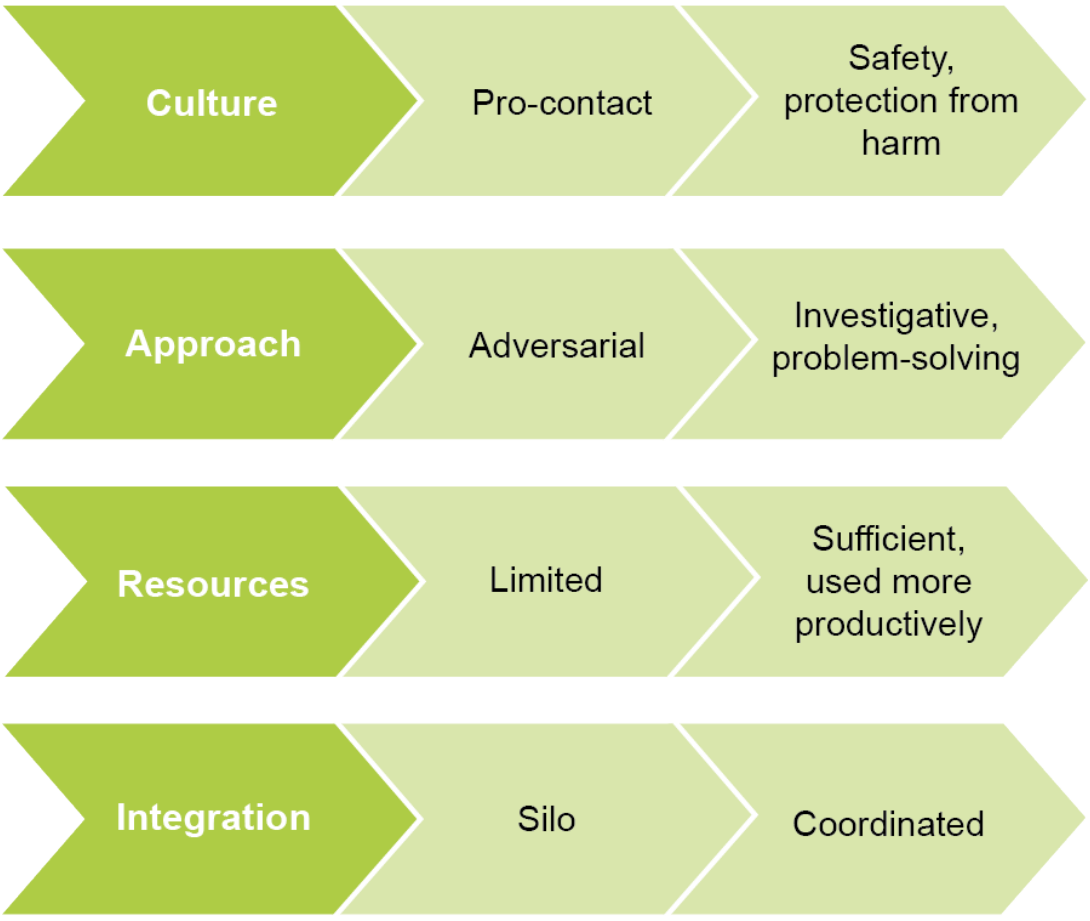
11. Recommendations

11.1 Overview

The evidence received by the panel, together with the literature review, show that there are four overarching barriers to the family court's ability to respond consistently and effectively to domestic abuse and other serious offences:

- The court's pro-contact culture
- The adversarial system
- Resource limitations affecting all aspects of private law proceedings
- The way the court works in a silo, lacking coordination with other courts and organisations dealing with domestic abuse.

To enable family courts to protect children and adult victims consistently and effectively from further harm, comprehensive changes are needed to address these barriers, as set out in Figure 1:



The panel concludes that in order to achieve these changes it is necessary to reform private law children's proceedings in a fundamental way, as advocated by a number of submissions and focus group participants. The panel hopes that its recommendations will empower judges, lawyers, Cafcass, Cafcass Cymru and other family justice professionals to work to their best potential in private law children's proceedings, and above all, that its recommendations will benefit children experiencing domestic abuse and their parents.

11.2 Design principles for private law children's proceedings

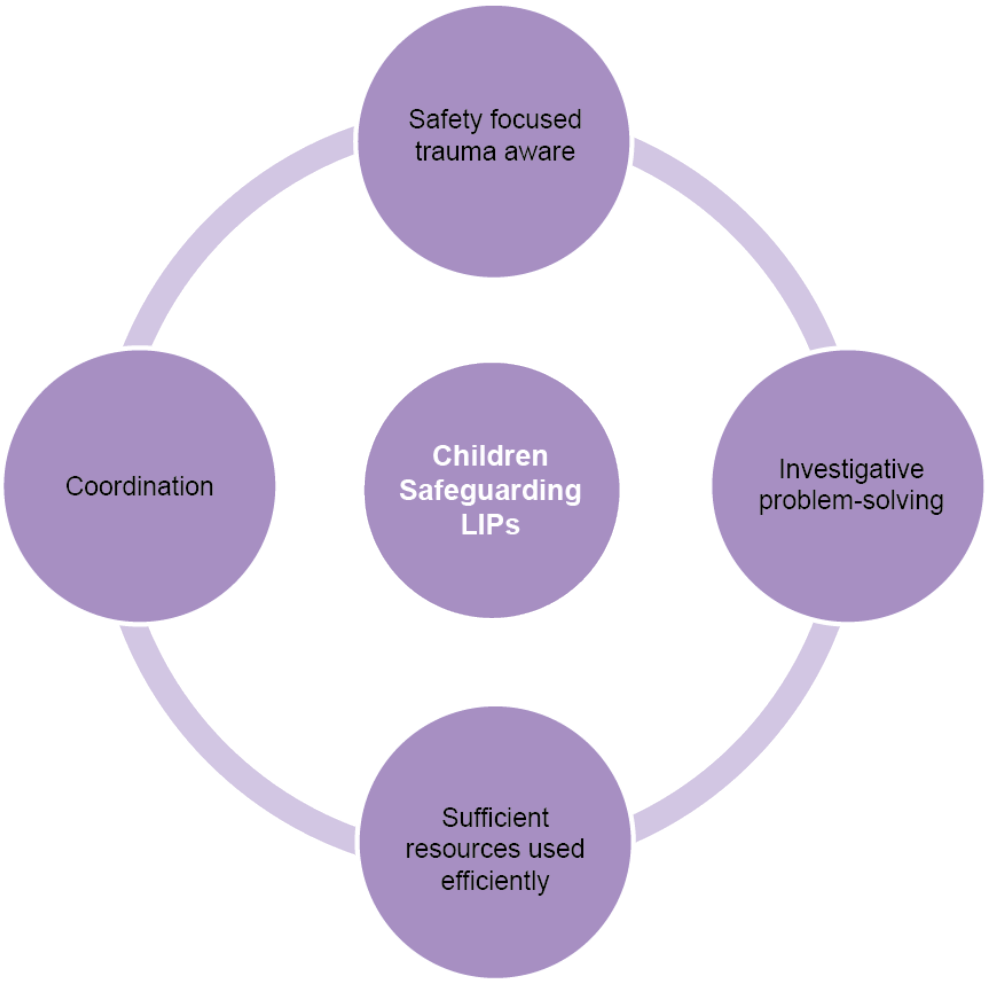
The panel recommends that the basic design principles for private law children's proceedings should be those set out in Figure 1 above. The court's paramount consideration is the welfare of the child. The procedure for determining and promoting children's welfare should:

- be safety-focused and trauma aware[178]
- take an investigative, problem-solving approach based on open enquiry into what is happening for the child and their family
- have the resources needed to operate effectively and use resources efficiently in accordance with these fundamental principles
- work in coordination with connected systems, procedures and services

Court procedures in private law children cases must cater for the full range of issues brought before the family courts. However, the current procedures evolved at a time when parents coming to court were more typically represented by lawyers. Recent research has also reinforced the high levels of safeguarding concerns raised in private law children cases.[179] **As well as ensuring that children's needs and wishes are at the centre of private law children proceedings, the panel recommends that procedures be designed with the needs of litigants in person, and domestic abuse and other safeguarding concerns, as central considerations** (Figure 2). Procedures designed for the most challenging cases and the most vulnerable participants are typically capable of addressing the needs of children in the more straightforward cases. Indeed, the panel considers that its proposed reforms would be beneficial for all private law children's cases, even those without safeguarding concerns.

[178] By 'trauma-aware' we mean aware that domestic abuse and other serious offences cause trauma to children and adult victims, aware of the effects of trauma when a victim is attending and giving evidence in court, aware of the need to avoid and prevent re-traumatisation in the court process as far as possible, and aware that those who have suffered trauma need support and the opportunity to heal.

[179] Cafcass/Women's Aid Federation of England, *Allegations of Domestic Abuse in Child Contact Cases* (2017) – 62% of contact applications raising allegations of domestic abuse; Cafcass Support with Making Child Arrangements (Manchester) Pilot (2019) – 80–86% of applications raising serious safeguarding issues and unsuitable for diversion from court.



11.3 A consistent and ethical approach to cases raising issues of domestic abuse and other risks of harm

The evidence raised repeated concerns about the treatment of children and adult victims of domestic abuse in a considerable number of cases. Although we do not know how representative these concerns are, on the evidence available the panel concludes that family courts approach domestic abuse cases inconsistently, and in some cases with harmful effects. In order to build on the instances of good practice identified and to embed them consistently, **the panel recommends that a statement of practice be adopted for cases raising issues of domestic abuse or other risks of harm. This statement should include the following points:**

- Allegations of domestic abuse and other safeguarding concerns raised by parents or children will be dealt with respectfully and explored fully.
- Processes and decision-making will be free of any form of bias including gender bias, racism, stereotyping and prejudicial assumptions.

- Court processes and facilities aim to provide safety and security for all participants, to avoid re-traumatisation and to allow participants to be emotionally supported.
- Processes will be as speedy as possible and delay will be kept to a minimum, but safety is the priority.
- The court and those working within the system will be alert to those seeking to use court processes in an abusive or controlling way. Such behaviour will be actively identified and stopped.
- The court aims to ensure a coordinated response across agencies to issues of harm and risk to children.
- Children's views on matters affecting them will be heard in accordance with their rights under the UNCRC. Where a Cafcass, Cafcass Cymru, social work or expert report makes a recommendation or the court makes a decision which is contrary to the child's wishes, the reasoning for this should be explained to the child.
- If allegations of domestic abuse or other serious offences are not found as facts, the underlying reasons why the allegations have been made will be sensitively assessed and addressed as far as possible.
- The ongoing safety of child arrangements orders will be kept under review. If a child feels unsafe having court-ordered contact, then the reasons for this will be assessed in a child focused way, the child's voice will be heard, and their concerns will be appropriately acknowledged and addressed.

The panel invites the President of the Family Division to promote this statement of practice. The panel also recommends that it be incorporated into the Child Arrangements Programme.

The panel hopes that the messages of its recommendations will also be confirmed and highlighted by the Senior Courts, through their appellate, and other significant, judgments. The panel envisages that some existing binding or persuasive authorities (which address procedural and substantive law relevant to domestic abuse and harm) may need to be re-visited if its proposals are implemented.

11.4 The presumption of parental involvement

Although some professionals supported the presumption of parental involvement in section 1(2A) of the Children Act 1989, the panel received sufficient evidence to conclude that in the cohort of cases described in submissions the presumption further reinforces the pro-contact culture and detracts from the court's focus on the child's individual welfare and safety.

The panel debated various suggestions made in submissions and models available internationally as to how best to avoid these unintended consequences of the presumption, but were not sufficiently persuaded by any particular options for amendment. The panel is clear, however, that the presumption should not remain in its present form.

We recommend that the presumption of parental involvement be reviewed urgently in order to address its detrimental effects.

11.5 The Child Arrangements Programme

In accordance with the need to address the overarching problems identified from the evidence, **the panel recommends that the family courts should pilot and deliver a reformed Child Arrangements Programme in private law children's cases**. The reformed programme would implement the design principles of being safety-focused and trauma-aware; taking an investigative, problem-solving approach based on open enquiry; having sufficient resources and using them efficiently; and coordinating with connected systems, procedures and services. It would also implement the statement of practice recommended at 11.3 above. The panel notes the Westminster Government's manifesto commitment to pilot Integrated Domestic Abuse Courts, and recommends these two strands of work are brought together and coordinated. The panel also recommends that the future work of the President of the Family Division's Private Law Working Group be coordinated with this proposal.

The panel believes that the revised Child Arrangements Programme should take a non-adversarial, problem-solving approach in which judicial continuity is a key feature.[180] It suggests that the programme be comprised of three stages:

(i) an initial **investigation and information exchange phase** – The focus would be on understanding what has been happening for the child, including the direct and indirect impact of any abuse within their family and the child's and adult victim's needs to be protected from future harm. Information would be gathered proactively, drawing on all relevant sources, including specialists already working with the family. Parents and children would be consulted, and parents would also be provided with information relevant to the issues raised in the case (including psycho-educational work on domestic abuse in all its forms). If no agreement is reached the case would be proactively prepared for adjudication.

(ii) an **adjudication phase** – This would be a judge-led process focused on accurately identifying any harm and risk, problem-solving and securing future welfare. Special measures would be proactively provided where required. Coordination with other justice processes would be maintained and other agencies who have worked with family members would be drawn on for evidence and support. If facts need to be determined to assess the risks to a child or a parent this would take place at this stage.

[180] The panel notes that Family Drug and Alcohol Courts (FDAC) are one model with which family justice practitioners will be familiar, which embodies such an approach, albeit operating in a different context within child protection proceedings. The panel expects that the FDAC model, along with international models of specialist domestic abuse courts and other problem-solving courts, will be drawn upon in the process of developing these proposals into a working system. The panel also notes that how judicial continuity may be achieved at Tier 1 will require particular attention.

(iii) a **follow up phase** – A proactive follow up three to six months after orders are made to see how they are working. This would again be non-adversarial and if there is a need for further adjudication or variation of orders, the investigation and adjudication process would again be followed.

Returns to court initiated by a party would be referred to the assigned judge and dealt with in accordance with the same principles and process. The assigned judge would be in a position to identify and should be alert to any issues of systems abuse through repeated applications, and should initiate preventive action.

11.6 Enhancing the voice of the child

Many submissions argued that the voices of children who are victims of domestic and sexual abuse need to be amplified in private law children's proceedings. The barriers to hearing children were the same four already identified:

- the courts' pro-contact culture means that children who do not wish to have contact with an abusive parent, do not feel safe having contact or are abused during contact may not have their voices heard;
- lack of resources mean that insufficient resources are available for consulting, representing and supporting children in private law children's proceedings;
- the adversarial procedure means that the focus on children's needs, wishes and safety can be replaced by an excessive focus on adult allegations and counter-allegations, the burden of proof, technical procedural requirements, and suspicions of parental self-interest;
- silo working can result in important evidence about what is happening for the child being overlooked and support for the child to recover from trauma being withheld or undermined.

The panel takes the view that more should be done to accord children the opportunity to be heard in these proceedings, in accordance with Article 12 of the UNCRC. We received a wide range of suggestions for improvements in the way children's voices are heard, represented and responded to, including Cafcass/Cymru FCAs having time to build a relationship with children, greater separate representation of children, the availability of independent therapeutic support for children during proceedings, and family courts working more closely with services and organisations which have supported children outside the court. Submissions were almost unanimous in advocating improved resourcing of this area, including resources both for Cafcass/Cymru and for community services supporting children.

The panel believes that its recommended reforms to the Child Arrangements Programme, which seek to overcome the identified barriers, will provide an important framework for enhancing children's voices in private law children's proceedings. **The panel recommends that the range of options for hearing from and advocacy,**

representation and support for children be explored more fully as part of the work of elaborating and piloting the reformed Child Arrangements Programme.

In addition, the panel endorses the work done by the Vulnerable Witnesses and Children Working Group with regard to the evidence of children and young people, and encourages the MoJ to implement its recommendations as quickly as possible. The panel recommends that the work of elaborating and piloting the reformed Child Arrangements Programme take full account of the Working Group's report.

11.7 Safety and security at court

Submissions overwhelmingly called for improved provision of special measures for victims of domestic abuse in family courts, a statutory ban on direct cross-examination by either perpetrators or victims of domestic abuse, and a consistent and inclusive approach to victim support services. There was also considerable support for a reformed approach to section 91(14) orders to strengthen their potential to prevent abusive applications. The design principles recommended above of family courts being safety-focused and trauma-aware, having the resources needed to operate effectively and working in coordination with connected services are particularly relevant in this context.

The panel's proposed reforms to the Child Arrangements Programme would include the proactive provision of special measures and participation directions. **The panel makes the following recommendations in relation to special measures and participation directions:**

- The provisions in the Domestic Abuse Bill concerning special measures in criminal courts for victims of domestic abuse should be extended to family courts. The provisions should apply to all cases in which domestic abuse is alleged.
- The provisions in the Domestic Abuse Bill should be amended to bar direct cross-examination in any family proceedings in which there is evidence of domestic abuse (including abuse being admitted or established), or in which domestic abuse is the subject of proceedings.
- Where there are allegations of domestic abuse, use of special measures should be the norm at any point when the parties are in court together.
- Where there are allegations of domestic abuse, the vulnerability of alleged victims should be assessed in a trauma-aware manner, and the provisions of Part 3A and PD3AA should be applied proactively, including those concerning how the parties are to be questioned and the holding of ground rules hearings. Consideration should be given to participation directions for the alleged perpetrator to give their evidence remotely.
- Initial safeguarding enquires (by Cafcass/Cymru) or investigations (under the investigative phase of the reformed process) should include discussions with the parties as to the need for and the type of safety measures parties might require at court.

- A framework of key entitlements to protect adults and children involved in Family Court proceedings should be developed, based on the MoJ Code of Practice for Victims of Crime, to include familiarisation visits and a robust response to breaches of safety and security.

In relation to specialist domestic abuse advocacy and support services, the panel recommends that:

- As a matter of course, IDVAs, domestic abuse advocates and mental health support workers be allowed to accompany the party they are supporting into court.
- Relevant practice directions and guidance be amended to incorporate this provision.
- IDVAs, domestic abuse advocates and mental health support workers be consulted in assessing a party's vulnerability for the purpose of Practice Direction 3AA.
- An appropriate model and its cost-effectiveness be explored for the provision of specialist support services for both alleged victims and alleged perpetrators of domestic abuse in all family courts.

In relation to section 91(14), the panel notes that the provisions of the Children Act 1989 are non-prescriptive, but the sub-section has been interpreted in case law from *Re P* [1999] to apply only in exceptional circumstances. **In order to enable section 91(14) to protect children and adult victims more effectively from harm, the panel recommends that measures be included in the Domestic Abuse Bill to reverse the 'exceptionality' requirement for a section 91(14) order** laid down most clearly in *Re P (Section 91(14) Guidelines)* [1999]. These measures should amend, replace or supplement section 91(14) in an Article 6 compliant way to ensure that the following policy objectives are clearly and explicitly provided for in statute:

- that section 91(14) orders may be made where it is in the best interests of the child to make such an order;
- that section 91(14) orders may be made where the court concludes that the bringing or prolonging of proceedings constitutes domestic abuse against the other parent;
- that it is not necessary to demonstrate repeated applications before the court could properly make such an order;
- that the court may make such an order of its own motion;
- that leave to apply for a child arrangements order following the imposition of a section 91(14) order should only be granted where the applicant provides evidence to show that circumstances since the imposition of the order have materially changed, and where the grant of leave would not create a risk of harm to the child or the other parent.

The panel further recommends that the Child Arrangements Programme should incorporate a procedure for identifying abusive applications and managing them swiftly to a summary conclusion. This procedure should include:

- judicial continuity between prior and subsequent applications, and between section 91(14) orders and leave to apply applications;

- the court treating further applications cautiously where there have previously been findings of domestic abuse;
- the court actively considering whether to make a section 91(14) order of its own motion in such cases;
- the court considering of its own motion the making of additional orders granting protection from continuing harassment or abuse (e.g. non-molestation and prohibited steps orders); and
- management of leave to apply applications in order to minimise their effect on the other parent and children.

Through the adoption of these recommendations, the panel envisages a reformed court journey for victims of domestic abuse as set out in Figure 3:

Getting to court	• Victims informed about special measures and encouraged to use them • Offered pre-adjudication familiarisation visits • Access to pre-adjudication counselling and support
Court building	• Separate entrances and safe waiting areas • Court staff well trained and effective arrangements in place to ensure they are aware of the needs of parties • Robust response to breaches of safety and security
In the courtroom	• Move to a more investigative, problem-solving approach • Proactive and trauma-aware identification of vulnerability • Special measures such as screens and video link readily available • Effective limitations on abusive cross examination • Understanding of effects of trauma on how victims present and give evidence • Support workers permitted in courtroom • Inequality of arms addressed
Repeat applications	• Judicial continuity, consistent approach • Proactive identification of abuse via court proceedings • More effective use of section 91(14) orders to prevent further abuse

11.8 Mechanisms for communication, coordination, continuity and consistency

The evidence regarding the adverse consequences of silo working in family courts is clear. The panel notes that the President of the Family Division's Private Law Working Group has made a number of recommendations on improving coordination between court and support services. In addition, **the panel recommends that functioning mechanisms for communication, coordination, continuity and consistency be put in place at national and local levels in relation to the areas listed below.**

The panel considers that national level mechanisms should be established under the auspices of the President of the Family Division. Local level arrangements to implement national mechanisms and processes should be overseen by Designated Family Judges. The aim of these mechanisms should be to ensure that the experience and protection from harm of children and adult parties is consistent between proceedings; that family courts in private law children cases are aware and take account of other proceedings concerning the same family, and vice versa; and that relevant information is shared between processes. The areas for coordination are:

- between private law children's cases and other family court proceedings (injunctions, financial proceedings, public law);
- between family courts and criminal courts (with particular reference to criminal procedures to support and protect victims, and criminal convictions);
- between family courts and the police (with particular reference to police disclosure into private law children's proceedings) and the Crown Prosecution Service (with particular reference to concurrent criminal and family proceedings);
- between family courts and MARACs and other perpetrator management panels (with particular reference to decisions and action plans made in those forums concerning high risk victims and perpetrators of domestic abuse);
- between family courts and children's statutory and third sector agencies and services (with particular reference to information sharing and consistency of approach);
- between family courts and specialist domestic abuse and child abuse agencies and services (with particular reference to valuing the expertise and information these services can provide, and facilitating access to support during family court proceedings);
- between family courts and family support and therapeutic services (with particular reference to valuing the expertise and information these services can provide, and facilitating access to support during family court proceedings).

In addition to the need for improved coordination between family courts and the police in relation to police disclosure, there is also a need for arrangements to cover the costs of police disclosure where the parties are unable to pay for it. The panel therefore also recommends that **urgent consideration is given by police forces, together with the**

Family Court and policy representatives, as to how police disclosure may be funded where parties are not legally aided and are not otherwise able to fund it themselves.

11.9 Resource issues

The panel accepts the concerns raised in many submissions that lack of resources has severely impacted the ability of family courts to protect children and victims of domestic abuse and other risks of harm from exposure to further harm. The evidence received concerning the costs of continuing domestic abuse to children, individual parties, statutory and community services, both now and in the future, is discussed in chapter 10. These include direct costs to the family justice system in returns to court when unsafe orders break down. The panel believes there is a strong argument for additional investment in the family justice system to enable family courts to protect children and victims of domestic abuse more effectively. This would manifest the Westminster and Welsh government commitments to addressing domestic abuse, create savings in the costs of domestic abuse to the family justice system and to other services and the economy more generally,[181] and represent a more productive use of resources. **We recommend additional investment in the following areas, in conjunction with our proposed revisions to the Child Arrangements Programme:**

- The court and judicial resources available for private law children's cases – to minimise delays in listing hearings, enable cases to be dealt with in a timely manner, avoid long periods of disruption of a child's relationship with their parent before a decision is made, ensure sufficient court time is available to hold fact-finding hearings in private law children's cases, and ensure that those hearing such cases have the administrative and welfare support they need to do their job effectively.
- Cafcass and Cafcass Cymru – better resourcing for all of their functions in private law, including safeguarding enquiries; risk assessment (both upskilling to undertake assessments, and providing assessors with the time needed to understand the family dynamics and obtain feedback from other services involved with the family); consulting with children (including providing section 7 reporters with the time needed to build a relationship with children, and the flexibility needed to elicit wishes and feelings in accordance with children's preferences); enabling the involvement of specialist FCAs in private law children proceedings; and enabling the more frequent appointment of children's guardians to assist children's voices to be heard.

[181] See Rhys Oliver et al., *The Economic and Social Costs of Domestic Abuse* (2019). This Home Office research report estimates the cost of domestic abuse in the 12 months to 31 March 2017 to be £66bn, comprising £47bn in physical and emotional costs to victims, £14bn in costs to the economy and £5bn in costs to statutory and victim services and the legal system. These figures did not include the cost of harms to children or the costs of financial abuse or coercive and controlling behaviour. Although only a proportion of these costs may be attributable to ongoing domestic abuse facilitated by family court orders and returns to court where orders have broken down, there is evident potential for savings following targeted investment.

- The family court estate – to ensure security particularly in District Judges' chambers; and to make the provision of separate waiting rooms, separate entrances, screens and video links standard in all courts.
- Legal aid – to make legal aid available to alleged perpetrators as well as alleged victims of domestic abuse in the interests of the child; to ensure evidential requirements do not place barriers in the way of victims of abuse and parents seeking to protect a child from sexual abuse where the nature of the abuse is such that third party evidence may not be available; to ensure that parties are not faced with administrative barriers to accessing legal aid and that Legal Aid Agency decision-making is better coordinated with court timetables.
- Funding for specialist assessments – through legal aid or otherwise – so that in complex cases where domestic abuse or child sexual abuse are established, a suitably qualified expert can be instructed to undertake a risk and/or psychological assessment to assist the court. Such experts should be specialist practitioners in the relevant form of abuse, working for an accredited agency or appointed from a court panel of experts.
- Domestic Abuse Perpetrator Programmes in both England and Wales (further recommendations in relation to DAPPs are made at 11.10 below).
- Supervised contact centres – to ensure wider availability of services, affordable on a means-tested basis, and with stronger requirements to monitor and protect children's safety and to record and respond to safeguarding incidents.
- Educational and therapeutic provision relating to domestic abuse for parents in private law children's proceedings – both at the early/investigation stage of proceedings (aimed at identifying abusive behaviours and understanding available behaviour change interventions), as well as for victim-survivors post-court to assist in recovery. Like DAPPs and supervised contact services it would be appropriate for these services to be commissioned by Cafcass and Cafcass Cymru.
- Specialist domestic abuse and child abuse support services – these require sustainable funding and investment in additional provision to meet the needs of child and adult survivors of domestic abuse in the family courts, including extended provision of specialist advocacy support workers in courts, support for children whose parents are involved in contested private law children's proceedings, and independent post-court therapeutic provision for children where necessary.

In addition, it is essential that proper resourcing be provided for Local Authority social workers undertaking work in private law children proceedings, to ensure that Section 7 and Section 37 reports are completed by experienced social workers who are well trained in domestic abuse.

11.10 Review of domestic abuse perpetrator programmes

The panel endorses recommendations by several respondents that DAPPs should be more widely available in England and Wales and should allow for self-referral for

parents in private law children's proceedings. While there was also evidence of the effectiveness of DAPPs in some cases, the panel concludes that their overall performance could be improved.

The panel therefore recommends a review of the current provision of DAPPs to ensure that they are effectively focused on reducing harm for children and families affected by domestic abuse, and are anchored in the design principles underpinning all of our recommendations. The review should be overseen by and report to a steering group including representatives from key stakeholders in both England and Wales, including the Ministry of Justice, Welsh government, judiciary, Respect, Welsh Women's Aid, Women's Aid Federation for England and the Domestic Abuse and Victims' Commissioners. The panel proposes that outcomes of the review should form the basis for a new commissioning specification for DAPPs.

The review should address the range of concerns about the availability and operation of DAPPs identified in submissions and discussed in chapter 9, including:

- whether DAPP provision responds to the range of risk and need present in private law children cases;
- how timely access to DAPPs may be improved;
- when DAPP attendance is and should be ordered by family courts;
- the content of DAPP courses, in particular ensuring that post-separation controlling and coercive behaviour, financial abuse, and post-domestic abuse parenting are addressed;
- how behaviour change is assessed, including the need to incorporate the experience of parents and children who have been victims of abuse, and evidence of positive steps taken to reduce harm;
- what interventions would be most effective where mothers are identified as perpetrating abuse and for parents in same sex relationships;
- the need for accreditation, consistency in quality assurance and a single service standard framework for all perpetrator interventions used in family courts.

11.11 Training

Many of the submissions suggested a need for further training for all participants in the family justice system. The availability and extent of training for magistrates was noted as an area of particular concern. On the other hand, evidence from judges observed that they had already received a significant amount of training on domestic abuse through the Judicial College, which enhanced its programme in this respect following the last revision to PD12J in 2017.

The panel considers that existing training has been undermined or neutralised by the four barriers to the effective working of the current system: the pro-contact culture, adversarial approach, silo working, and limited resources. The panel concludes that without

fundamental reform as recommended above, more training alone would be likely to have a limited effect. Following fundamental reforms to private law children's proceedings in accordance with the panel's recommendations, priority for training should be given to embedding those changes. Training would need to be aligned with key aspects of the system outlined above.

The panel recommends that training in the family justice system should cover the following areas.

1. Overarching reform:
   - A cultural change programme to introduce and embed reforms to private law children's proceedings and help to ensure their consistent implementation. The College of Policing's 'Domestic Abuse Matters' training package may be a suitable model for such a cultural change programme.
2. Key areas of knowledge required for the effective and consistent implementation of the reformed Child Arrangements Programme:
   - An in-depth understanding of domestic abuse, its gendered nature and its effects, with particular focus on coercive control, sexual abuse, emotional abuse and economic abuse;
   - Recognising domestic abuse;
   - Intersections of domestic abuse with race, religion, culture, disability and immigration matters;
   - Accurate understanding of data on the incidence of false allegations of domestic abuse;
   - The impacts of domestic abuse on children, and how children experience domestic abuse in comparison to adults;
   - Early child development and attachment theory;
   - An in-depth understanding of child sexual abuse, including accurate understanding of prevalence rates;
   - Trauma and its effects;
   - Risk assessment;
   - Interactions and distinctions between risks in complex cases: domestic abuse, child sexual abuse, parental alienation, drug and alcohol abuse, mental health, high parental conflict;
   - The law relating to sexual offences and consent to sexual acts;[182]
   - Identifying and responding to vulnerable victims (training provided to criminal practitioners was identified in submissions as a model in this regard), and the application of Part 3A and PD3AA to victims of domestic abuse;

[182] The panel understands that for the judiciary, the Judicial College will be providing training modelled on the sexual offences training made available to judges who sit in the Crown Court and are ticketed to conduct trials of offences of a serious sexual nature.

- Unconscious and confirmation bias arising from assumptions about gender roles, and how these intersect with race, disability, age, sexuality and class;
- Diversity of court users, including male victims of domestic abuse, and the particular experiences of, and institutional barriers faced by, BAME women, disabled women and LGBT communities;
- How perpetrators of domestic abuse may use child contact, the courts and other agencies to continue abuse alerts indicating potential abusive use of proceedings;
- What constitutes behaviour change in perpetrators of domestic abuse.

Some submissions made helpful suggestions as to how and by whom training should be delivered. Consideration should be given to:

- Multi-professional, multi-agency training to promote a consistent approach.
- The provision of training facilitated by specialist providers such as
  - the Violence Against Women and Girls sector, including BAME service providers in this sector;
  - Children's charities concerned with domestic abuse and child sexual abuse;
  - the Domestic Abuse Commissioner.

11.12 Social worker accreditation

The evidence set out in this report suggests that there is a significant weakness in the knowledge and skills of social workers who are undertaking risk assessments and other related direct work with children and their families where domestic abuse is alleged, suspected or known. In England the Children and Social Work Act 2017 sets out national post-qualification standards for child and family social work. A national post-qualification accreditation has been developed to ensure social workers have the knowledge and skills necessary to meet these standards. In Wales, social workers, once qualified, have a duty to adhere to the Welsh Government statutory guidance and National Training Framework when responding to domestic abuse, as well as to adhere to training requirements associated with the Social Services and Well-being (Wales) Act 2014. **The panel recommends that:**

- social workers undertaking assessments for private law children's proceedings in Wales are trained in domestic abuse to Group 3 Violence Against Women, Domestic Abuse and Sexual Violence National Training Framework standard;
- social workers undertaking assessments for private law children's proceedings in England are nationally accredited child and family practitioners; and
- the content for the accredited training in Wales and the accreditation assessments in England is reviewed by domestic abuse specialists to help ensure the requisite knowledge and skills are sufficiently assessed.

11.13 Monitoring and oversight

A significant number of submissions suggested a need for ongoing monitoring and oversight of private law children's proceedings to ensure they are operating effectively to protect all children and victims of domestic abuse and other serious offences from harm. The panel agrees that such monitoring and oversight is necessary to direct continuing attention to this area of concern. **The panel makes three recommendations in this regard**:

- That the Ministry of Justice work with HMCTS, Cafcass and Cafcass Cymru to develop and implement a consistent and comprehensive method of gathering administrative data on cases raising issues of domestic abuse, child sexual abuse, and other safeguarding concerns.
- That a national monitoring team be established within the office of the Domestic Abuse Commissioner to maintain oversight of and report regularly on the family courts' performance in protecting children and victims from domestic abuse and other risks of harm in private law children's proceedings.
- That Local Authorities and Welsh Regional Safeguarding Boards include family courts in local learning reviews (in England), child practice reviews (in Wales) and domestic homicide reviews, where the family concerned have been involved in private law children's proceedings. This should include seeking contributions to the review from the Ministry of Justice and Cafcass or Cafcass Cymru, and a review of the family court case file.

11.14 Further research

Professional and organisational respondents made several suggestions for additional research. These centred on the need for further systematic, quantitative data on the process and outcomes of family courts' responses to cases raising allegations of domestic abuse, including:

- the process and outcomes of safeguarding
- how children's voices are being heard and taken into account in family court proceedings
- the coincidence of domestic abuse allegations with allegations of parental alienation, and the outcomes in such cases
- the implementation of PD12J (by variables such as court, region and judicial tier)
- orders made (before and after the enactment of the presumption of parental involvement)
- returns to court and the implementation of section 91(14) of the Children Act 1989.

There were also calls for further research concerning the impact of court proceedings on children:

- developing the evidence base on children's experience of family court proceedings and the impact of proceedings on children
- the effects of interrupting contact vs not doing so pending determination of facts and risk assessment
- the long-term impact, safety and effectiveness of court orders.

The panel recommends that:

- The Ministry of Justice commission an independent, systematic, retrospective research study on the implementation of the current CAP, PD12J and section 91(14) in cases in which allegations of domestic abuse, child sexual abuse or other serious offences are raised, to provide a pre-reform baseline prior to the implementation of the reforms recommended by the panel.
- The Child Safeguarding Practice Review Panel conduct a statutory national practice-based review of domestic abuse cases in private law children proceedings during the next 12 months to provide a baseline, and with a 2–3 year post-reform follow-up to look at practice changes; and that the National Independent Safeguarding Board Wales commission a similar review in Wales.
- Any pilots established to test the panel's recommendations for a reformed Child Arrangements Programme be robustly evaluated using both quantitative and qualitative research methods, including the review of court files, orders and judgments.
- The remit of the national oversight team recommended to be established in 11.13 include the commissioning and/or conduct of prospective and on-going research on the implementation of the reformed system for private law children's matters, and that its funding is sufficient to permit the effective discharge of this function.

Annex A: List of Acronyms

ADHD – Attention deficit hyperactivity disorder

ALC – Association of Lawyers for Children

BAME – Black, Asian and minority ethnic

BBR – Building Better Relationships

C100 – Child arrangements order application form

C1A – Allegations of harm and domestic violence form

CAMHS – Child and adolescent mental health services

CAP – Child Arrangements Programme

CARA – Centre for Action on Rape and Abuse

CLOCK – Community Legal Outreach Collaboration Keele

CPS – Crown Prosecution Service

DAPP – Domestic abuse perpetrator programme

DDJ – Deputy District Judge

DRA – Dispute Resolution Appointment

DVIP – Domestic violence intervention project

ECHR – European Court of Human Rights

FCA – Family Court Adviser

FHDRA – First Hearing Dispute Resolution Appointment

FJYPB – Family Justice Young People's Board

FPR – Family Procedure Rules

HMCTS – HM Courts and Tribunals Service

IC – Istanbul Convention

IDVA – Independent Domestic Violence Adviser

LASPO – Legal Aid, Sentencing and Punishment of Offenders Act 2012

LIP – Litigant in Person

MARAC – Multi agency risk assessment conference

MIAM – Mediation Information and Assessment Meeting

MoJ – Ministry of Justice

Mosac – Mothers of sexually abused children

NAGALRO – National Association of Guardians ad Litem and Reviewing Officers – the professional association for children's guardians, Family Court Advisers and Independent Social Workers

NSPCC – National Society for the Prevention of Cruelty to Children

OCD – Obsessive compulsive disorder

PAI – Partner Abuse Interventions

PD – Practice Direction

PSU – Personal Services Unit – now known as Support Through Court

PTSD – Post traumatic stress disorder

SARC – Sexual Assault Referral Centre

SPIP – Separated parents information programme

UNCRC – United Nations Convention on the Rights of the Child

WT4C – Working together for children

Annex B: Review of Case Law

This Annex reviews the case law associated with Practice Direction 12J (PD12J) of the Family Procedure Rules 2010 and section 91(14) of the Children Act 1989, to inform the panel's deliberations. While section 91(14) orders are the most common judicial tool to prevent repeated and unreasonable applications in private law children proceedings, this Annex also considers civil restraint orders (CROs), which are another type of order available to courts to prevent vexatious applications.

1. Practice Direction 12J: Child Arrangements and Contact Orders: Domestic Abuse and Harm

The approach to be taken in child arrangements cases in which there are contested allegations of domestic abuse was originally established by the Court of Appeal in *Re L (A Child) (Contact: Domestic Violence)* [2001] Fam 260. In that case, Butler-Sloss P set out the steps to be taken by a court where a party alleges that a history of domestic abuse should be taken into account in determining arrangements for contact and/or residence. The Court endorsed a two-stage process whereby:

1. A fact-finding hearing is held to determine the truth of the allegations; and
2. The court then makes a welfare-based decision about child arrangements incorporating and weighing up
   (a) the proven facts concerning domestic abuse;
   (b) the expert evidence concerning the effects of domestic abuse on children; and
   (c) the other factors in the welfare checklist.

PD12J substantially elaborates on this framework and now provides a detailed code for courts to follow in child arrangements cases where there are allegations of domestic abuse. The case law on PD12J not only provides authoritative interpretations of its provisions and guidance on its implementation, but also illustrates the areas in which persistent difficulties have been experienced and problems arisen.

1.1 The definition of domestic abuse

Para 4 of PD12J sets of the definition of domestic abuse (including transnational marriage abandonment, coercive behaviour and controlling behaviour) for the purposes of the Practice Direction. This has not generally been a subject of contention or judicial commentary.

In *Re A (Children)* [2019] EWCA Civ 74 the trial judge found the mother had not suffered transnational marriage abandonment because she did not conform to the stereotype of the 'classic' abandoned wife, who would be virtually imprisoned by the husband's family overseas. However the Court of Appeal noted that within the definition of transnational marriage abandonment in PD12J, 'abandonment' and 'stranding' were not terms of art and were not intended to be applied in a formulaic manner. There were a number of ways in which a spouse might be abandoned or stranded.[183] The core feature of this form of abuse is (attempted) exploitation by one spouse of the other's vulnerability, to seek to ensure that they are unable to enter or return to the UK.[184] Even if the attempt to strand a spouse is unsuccessful, it could still support a finding of controlling or coercive behaviour.[185] On re-hearing, the court found that the husband had indeed stranded the mother overseas, and this had been part of a sustained campaign to alienate the children from their mother.[186]

In *JH v MF* [2020] EWHC 86 (Fam), Russell J found that the trial judge had failed to apply the definition of domestic abuse in PD12J. Among other things, the judge had focused only on one alleged incident of physical violence, wrongly dismissed abusive texts sent by the father as merely 'sexting', minimised other allegations of abuse, and failed to consider whether they amounted to a pattern of coercive and controlling behaviour.[187]

1.2 Consent orders

Para 7 of PD12J specifies that the court shall not make a child arrangements order by consent unless the parties are present in court, all initial safeguarding checks have been obtained by the court, and a Cafcass officer has spoken to the parties separately, except where the court is satisfied that there is no risk of harm to the child in making the order.

In *Re H* [2016] EWCA Civ 988, Black LJ noted that, although not directly applicable in that case, the provisions of paras 7–8 of PD12J "underline… the caution that needs to be exercised in approving parental agreements in the context of allegations of domestic

[183] *Re A (Children)* [2019] EWCA Civ 74 [70] per Moylan LJ.
[184] Ibid [71].
[185] Ibid [78].
[186] *Re A (Children) (Rev 2)* [2019] EWHC 2334 (Fam) per McFarlane P.
[187] *JH v MF* [2020] EWHC 86 (Fam) per Russell J at [18], [28], [31].

violence".[188] In *Re LG (Re-opening of Fact-finding)* [2017] EWHC 2626 (Fam), Baker J stressed that the duty to ensure that orders do not expose children to a risk of harm is an ongoing one. Thus, if evidence of domestic abuse subsequently comes to light, the fact that previous orders were made by consent does not immunise them from further scrutiny. Rather, the court should re-examine the orders to ensure they are safe and do not expose the child or the victim of abuse to any further risk of harm.

1.3 Deciding whether findings of fact need to be made and if so, whether to hold a separate fact-finding hearing

Paras 16 to 20 of PD12J set out what the court should do in determining whether it is necessary to hold a fact finding hearing in relation to disputed allegation of domestic abuse and if so, giving directions as to how it should proceed.

In *L v F* [2017] EWCA Civ 2121 Peter Jackson LJ noted that:

> Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is 'used to harm, punish, or frighten the victim...' and 'controlling behaviour' as behaviour 'designed to make a person subordinate...' In cases where the alleged behaviour does not have this character, it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict.[189]

He also observed that "The task of identifying cases where allegations of domestic abuse require findings of fact to be made…is the stock-in-trade of judges in the Family Court".[190] The case law indicates, however, that this is an area in which judges are most subject to appeal in relation to the application of PD12J, with appeals most often allowed in these cases due to a failure to engage in fact-finding.

There are two questions involved here: first, whether fact-finding is necessary, and second, whether that should be done at a separate fact-finding hearing. As noted by Black LJ in *Re H* [2013] EWCA Civ 72, PD12J does not *require* a separate fact-finding hearing.

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[188] *Re H* [2016] EWCA Civ 988 [50].

[189] *L v F* [2017] EWCA Civ 2121 [61]. In this case the judge's decision not to hold a fact-finding hearing was upheld.

[190] *L v F* [2017] EWCA Civ 2121 [62].

Rather, if the court decides that findings of fact are needed, it should also decide whether that should be at a separate hearing or at a composite fact-finding and welfare hearing.[191]

1.3.1 Issues of delay, especially in the context of 'historic' allegations

The Court of Appeal considered both questions in *Re T* [2016] EWCA Civ 1210. The case concerned a judge's decision to discharge orders for a fact-finding hearing after lengthy delays and instead to proceed directly to a welfare hearing. It provided the opportunity to consider the relationship between PD12J and the overriding objective in FPR rule 1.1, as well as the court's duty actively to manage cases in rule 1.4. The judge's case management decision that it was no longer either necessary or proportionate to hold a fact-finding hearing was held to be wrong in principle.[192]

On the issue of necessity, Ryder LJ noted that the mother had made serious allegations that the father had sexually groomed and abused her as a child, which impacted on her position regarding contact and raised issues of potential direct and indirect risk to the child. "The underlying welfare analysis accordingly necessitated determination of the truth of the allegations in order to draw appropriate inferences from the same".[193] In particular, the judge had ignored the fact that:

> the passage of time had not dimmed the mother's perception of the importance of the allegations (i.e. their effect upon her) and the lack of recent complaint is an element but not necessarily a decisive element in the assessment of the mother's position for the future and the risk, if any, that contact might entail.[194]

In relation to proportionality, the judge had failed to consider the available options, including that of hearing the finding of fact in conjunction with the welfare issues or with only a short interval between fact-finding and the welfare determination. Thus, a more proportionate and fair way of dealing with the case management issues would have been to adjourn the fact-finding hearing to a new date when the welfare disposal could also have been undertaken. The experienced guardian would not have needed an extended period of time to advise on the child's welfare after the judge's findings of fact. This was not a case in which time was needed between the fact-finding and final hearings to allow the father to consider his position or to undertake a therapeutic programme.[195] Ryder LJ further observed that proportionality must be considered individually as well as collectively, with a concern for the achievement of justice in the individual case.[196]

In *Re T*, therefore, the nature of the allegations was such that they seriously impacted on the mother and potentially both directly and indirectly on the child. Despite their age, they

[191] *Re H* [2013] EWCA Civ 72 [54].
[192] *Re T* [2016] EWCA Civ 1210 [21].
[193] Ibid [13].
[194] Ibid [14].
[195] Ibid [17]–[18].
[196] Ibid [19].

remained highly relevant to the decision as to whether and if so in what terms a child arrangements order should be made. This came into sharp focus when the allegations were viewed not as 'historic' incidents but in terms of the ongoing relationship dynamics and risk posed by the father.[197] In this context the most appropriate way to deal with delays in the proceedings was not to dismiss the need for fact-finding, but to bring together the fact-finding and final welfare hearings as far as possible.

Similarly, *Re G (A Child: Fact-Finding Hearing)* [2017] EWHC 2591 (Fam) was a mixed public and private law case involving a 10-year dispute between the parents, during which the mother had abducted the child overseas for a period, and on their return the child had been placed in foster care. At the heart of the case were contested allegations against the father of abuse of the mother during the relationship and after separation. In Baker J's view, the court needed to establish the truth once and for all as a basis for any decisions about the child's future.

In *Re David (A Child, appeal)* [2018] EWFC B76, HHJ Atkinson upheld a DJ's decision that a fact-finding hearing was necessary, since the allegations made were such as to make them relevant to any order for contact the court might ultimately make. The fact that there would unfortunately be a lengthy delay before the fact-finding hearing could be held did not render it disproportionate or contrary to the child's welfare:

> The impact on the child of delay in making decisions as to his welfare is one factor which must be borne in mind. It is not the only factor. There is an issue as to domestic abuse here that needs to be tried. To suggest that the unfortunate delay in being able to list that hearing means that a more proportionate approach is to abandon the need for that issue to be determined at all is simply not right.[198]

1.3.2 Complex cases with major issues apart from domestic abuse

In *Re J (Children)* [2018] EWCA Civ 115, the mother had made allegations of abuse against the father, which he denied and in turn made allegations of abusive and controlling behaviour by the mother. A fact-finding hearing was scheduled, but in the interim, a NYAS report indicated that the children (then aged 15 and 10) were strongly opposed to contact and it was decided not to continue with fact-finding as no further purpose would be served. On the father's appeal, McFarlane LJ held that the judge had been wrong not to proceed with the fact-finding hearing, given the parties' polarised positions and the fact that they had both alleged that the other presented a risk to the children. The factual situation needed to be considered alongside the children's negative views of the father rather than being put to one side.

In *Re CB (International Relocation: Domestic Abuse: Child Arrangements)* [2017] EWFC 39, there was an application by the mother to relocate overseas with a 16-month-old child,

[197] On the issue of relevance, see also *Re V* [2015] EWCA Civ 274 [37] per McFarlane LJ.
[198] *Re David (A Child, appeal)* [2018] EWFC B76 [27].

against a background of domestic abuse. The father had been convicted of harassment of the mother, the mother had been found by a MARAC to be a high-risk victim of domestic abuse, and she had made further allegations of abuse which were denied by the father. However it appears that initial hearings had focused solely on the relocation issue. Cobb J commented:

> It is of concern that at no point in the earlier case management stages of this case was the need to consider PD12J identified either by the judiciary or by the lawyers for the mother (the father has, until this hearing, been representing himself); I raised it for the first time at the final hearing myself, the first occasion on which I had seen the case.[199]

He determined that it was necessary to make findings of fact on the disputed issues concerning the father's conduct towards the mother, and of necessity this had to occur at the final hearing. But as explained below, the findings ultimately required postponement of the welfare determination because this was a case where therapeutic intervention was required.

1.3.3 Fact-finding not necessary where abuse already established

Re P [2015] EWCA Civ 466, by contrast, illustrates the kind of situation in which fact-finding is *not* necessary. Here, the father had been convicted of assault and his violence had also prompted social services involvement with the family. There were no new allegations which would significantly bear on the court's decision in relation to contact. The Court of Appeal held that the Recorder's decision not to order a fact-finding hearing was justified, since there was already ample evidence of an established and substantial history of domestic abuse on which the court could proceed in making its welfare determination.[200]

1.3.4 Judicial continuity

Para 20 of PD12J emphasises the importance of judicial continuity between fact-finding and welfare hearings. However it doesn't address the issue of judicial continuity at other stages of the process, particularly between the FHDRA, the issuing of directions for fact-finding, and the actual fact-finding hearing itself. The cases frequently demonstrate a lack of judicial continuity at these stages. This was highlighted as a problem by Baker J in *Re A and R* [2018] EWHC 2771 (Fam).[201]

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[199] *Re CB (International Relocation: Domestic Abuse: Child Arrangements)* [2017] EWFC 39 [38].

[200] *Re P* [2015] EWCA Civ 466 [19] per King LJ.

[201] *Re A and R* [2018] EWHC 2771 (Fam) [59].

1.4 The conduct of a fact-finding hearing

Paras 19, 20, 28 and 29 of PD12J provide detailed guidance regarding the conduct of a fact-finding hearing.

1.4.1 Limiting the number of allegations

Pressures on court time and the need to deal with fact-finding proportionately often result in courts imposing limits on the number of allegations to be decided. The risk, however, is that those allegations become decontextualized and treated as isolated incidents rather than as part of a pattern of controlling and coercive behaviour. As stated by Baker J in *Re LG (Re-opening of Fact-finding)* [2017] EWHC 2626 (Fam):

> It is … entirely appropriate for a court in the exercise of its case management powers to confine a fact-finding hearing to the issues that it considers necessary and relevant. Not infrequently, a party alleging domestic violence is directed to identify and rely on a few allegations as "specimen" allegations on which to seek findings. In taking this course, however, parties and the court must be careful to ensure that significant issues are not overlooked. Sometimes a pattern of harassment and other forms of domestic abuse is only discernible by conducting a broader examination of the allegations.[202]

Baker J reiterated this point in *Re G (A Child: Fact-Finding Hearing)* [2017] EWHC 2591 (Fam), noting that as PD12J makes clear, courts must be alert to patterns of behaviour, and to the fact that, as a pattern, such behaviour has a tendency to be repeated and hence to impinge on the child's welfare in the future.

He returned to the issue again in *Re A and R* [2018] EWHC 2771 (Fam). In that case, the mother had been restricted to five allegations and the father to four. The allegations they put forward to comply with these limits were very disparate. Baker J observed that each seemed to be trying to demonstrate a pattern of coercive, controlling and manipulative behaviour, but the way the fact-finding hearing was set up was not designed to enable them to demonstrate such a pattern. In this context, the Recorder had conducted a careful analysis of the evidence and their conclusions on the separate allegations were unassailable but it was clear the findings gave a very incomplete picture of the abuse that may have occurred in the relationship.

1.4.2 Special measures

Para 10 of PD12J deals with special arrangements to protect a party or child attending any hearing. This must now be read alongside FPR Part 3A and Practice Direction 3AA which specifically address the issue of vulnerable witnesses and the making of 'participation directions' to enable vulnerable witnesses to participate effectively in proceedings.

In *JH v MF* [2020] EWHC 86 (Fam), among the many reasons for the mother's appeal against a fact-finding decision being upheld, were serious procedural irregularities in the

[202] *Re LG (Re-opening of Fact-finding)* [2017] EWHC 2626 (Fam) [27].

way the trial judge required the parties to give their evidence, failing to apply PD3AA to enable the mother to give her best evidence and, having done so, drawing adverse inferences about her credibility based on her unsurprisingly 'anxious' demeanour in court.[203]

1.4.3 Litigants in person and the issue of direct cross-examination

Paras 19 and 28 of PD12J recognise that a fact-finding hearing may involve litigants in person, and that the procedure must be adapted to enable them to participate as effectively as possible. Para 28 specifies that the hearing may be an inquisitorial or investigative process, and that the judge or lay justices should be prepared, where necessary and appropriate, to conduct the questioning of the witnesses on behalf of the parties, focussing on the key issues in the case. Para 28 is designed to assist in particular with the issue of direct cross-examination of victims of abuse by their alleged abusers. Concerns about this practice and the serious impact on the victim of abuse and their capacity to participate fairly and equally in the proceedings have been expressed, for example, by Hayden J in *Re A (a minor) (fact-finding: unrepresented party)* [2017] EWHC 1195 (Fam) and by DJ Read in *JY v RY* [2018] EWFC B16.

In *PS v BP* [2018] EWHC 1987 (Fam), Hayden J offered some 'observations' (which he was careful not to characterise as 'guidance') for the deciding how to conduct a fact-finding hearing in these circumstances, taking into account the provisions of both PD12J and PD3AA (vulnerable witnesses):

(i) Once it becomes clear to the court that it is required to hear a case "put" to a key factual witness where the allegations are serious and intimate and where the witnesses are themselves the accused and accuser, a "Ground Rules Hearing" (GRH) will **always** be necessary;

(ii) The GRH should, in most cases, be conducted prior to the hearing of the factual dispute;

(iii) Judicial continuity between the GRH and the substantive hearing is to be regarded as essential;

(iv) It must be borne in mind throughout that the accuser bears the burden of establishing the truth of the allegations. The investigative process in the court room, however painful, must ensure fairness to both sides. The Judge must remind himself, at all stages, that this obligation may not be compromised in response to a witnesses' distress;

(v) There is no presumption that the individual facing the accusations will automatically be barred from cross examining the accuser in every case. The Judge must consider

[203] *JH v MF* [2020] EWHC 86 (Fam) per Russell J at [15]–[16], [26].

> whether the evidence would be likely to be diminished if conducted by the accused and would likely to be improved if a prohibition on direct cross-examination was directed. In the context of a fact-finding hearing in the Family Court, where the ethos of the court is investigative, I consider these two factors may be divisible;
>
> *(vi)* When the court forms the view, from the available evidence, that cross-examination of the alleged victim itself runs the real risk of being abusive, (if the allegations are established) it should bear in mind that the impact of the court process is likely to resonate adversely on the welfare of the subject children. It is axiomatic that acute distress to a carer will have an impact on the children's general well-being. This is an additional factor to those generally in contemplation during a criminal trial.[204]

In the continuing absence of a legislative basis for directing that an advocate be appointed to conduct cross-examination,[205] the options available to the judge in this situation are limited. They include the questioning being conducted instead by the judge, a McKenzie Friend, or the children's guardian.

Judicial questioning

In *Re D (Appeal – Failure of Case Management)* [2017] EWHC 1907 (Fam), Peter Jackson J allowed a mother's appeal against case management decisions made by the trial judge, who had wrongly assumed that the father had a right directly to cross-examine the mother and failed to appreciate her powers to take over questioning under PD12J.[206] In *Re J* [2018] EWCA Civ 115, McFarlane LJ expressed the view that:

> where an alleged perpetrator is unrepresented, the court has a very limited range of options available in order to meet the twin, but often conflicting, needs of supporting the witness to enable her evidence to be heard and, at the same time, affording the alleged perpetrator a sufficient opportunity to have his case fairly put to her. Of the options currently available, the least worst is likely to be that of the judge assuming the role of questioner.[207]

Guidance on conducting questioning on behalf of the parties was provided by the Court of Appeal in *Re K and H* [2015] EWCA Civ 543. Etherton LJ stressed that the conduct of questioning on key issues by the judge in an inquisitorial/investigative process is not the same as engaging in cross-examination of a witness.[208] The aim is not forensically to dissect the witness's evidence, but to enable the judge to determine the factual issues that need to be resolved.

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[204] *PS v BP* [2018] EWHC 1987 (Fam) [34].

[205] This is intended to be addressed to some extent by the Domestic Abuse Bill 2019–21.

[206] *Re D (Appeal – Failure of Case Management)* [2017] EWHC 1907 (Fam) [21].

[207] *Re J* [2018] EWCA Civ 115 [74].

[208] *Re K and H* [2015] EWCA Civ 543 [58].

In *PS v BP* [2018] EWHC 1987 (Fam), however, the father's appeal was upheld because the way the judge took over questioning was considered to have been overly-protective of the mother and did not allow her allegations to be sufficiently tested. Further, the judge had not given the father the opportunity to make representations about the conduct of cross-examination, or to reduce his questions to writing to be put by the judge. Hayden J's 'observations' on this aspect continued:

(viii) If the court has decided that cross-examination will not be permitted by the accused and there is no other available advocate to undertake it, it should require questions to be reduced to writing. It will assist the process, in most cases, if **'Grounds of Cross-Examination'** are identified under specific headings;

(*ix)* A Judge should never feel constrained to put every question the lay party seeks to ask. In this exercise the Judge will simply have to evaluate relevance and proportionality;

(*x*) Cross-examination is inherently dynamic. For it to have forensic rigour the Judge will inevitably have to craft and hone questions that respond to the answers given. The process can never become formulaic;

(*xi*) It must always be borne in mind that in the overarching framework of Children Act proceedings, the central philosophy is investigative. Even though fact finding hearings, of the nature contemplated here, have a highly adversarial complexion to them the same principle applies. Thus, it may be perfectly possible, without compromising fairness to either side, for the Judge to conduct the questioning in an open and less adversarial style than that deployed in a conventional cross-examination undertaken by a party's advocate.

McKenzie Friends

In *Re J*, McFarlane LJ considered that it would only be appropriate in extremely rare cases for the court to grant limited rights of audience to a McKenzie Friend for the purposes of conducting cross-examination.[209] Likewise, in *PS v BP*, Hayden thought this option would be inconsistent with the general role of a McKenzie Friend as set out in the Litigants in Person Guidance.[210]

The Children's Guardian

There is a split in the case law with regard to the appropriateness of requiring the children's guardian (if there is one, or of appointing one if there is not) to conduct the questioning of both parties. As noted above, McFarlane LJ in *Re J* [2018] EWCA Civ 115 considered that the judge assuming the role of questioner was probably the least worst of the options available. And in *Re D (Appeal – Failure of Case Management)* [2017] EWHC

[209] *Re J* [2018] EWCA Civ 115 [73].
[210] *PS v BP* [2018] EWHC 1987 (Fam) [9].

1907 (Fam), one of grounds on which the mother's appeal was allowed by Peter Jackson J was that the judge had inappropriately attempted to delegate questioning of the mother to the child's solicitor, while failing to appreciate her own powers to take over questioning.[211]

By contrast, in *PS v BP*, Hayden J's 'observations' included:

(vii) Where the factual conclusions are likely to have an impact on the arrangements for and welfare of a child or children, the court should consider joining the child as a party and securing representation. Where that is achieved, the child's advocate may be best placed to undertake the cross-examination. (see **M and F & Ors. [2018] EWHC 1720 Fam; Re: S (wardship**) **(Guidance in cases of stranded spouses) [2011] 1 FLR 319)**.[212]

In *M v F* [2018] EWHC 1720 (Fam) the children had already been made parties to the proceedings and a guardian appointed who had obtained information from the children which led to the view that they could properly test the evidence of the parties. Williams J therefore instructed counsel for the guardian to cross-examine both parties, considering this the most appropriate course in this case, although it would not necessarily be so in all cases.[213]

Dispensing with questioning

In *RJ v CM* [2018] EWHC 2509 (Fam) the mother did not attend the first day of the fact-finding hearing because the child was unwell and she was unable to find appropriate child care. Her request for adjournment was turned down, and counsel for both parties agreed that the judge should decide on the basis of written submissions only. The judge rejected all of the mother's allegations other than those admitted by the father. On appeal, Baker J held that the mother could not now argue that she should have been given the opportunity to give evidence because she had not asked for that at the time. However he also considered that in the vast majority of cases it will be essential for the court to hear oral evidence before making contested findings of fact.[214]

1.5 Making findings

There have been several appeals against the findings made by judges at fact-finding hearings, however these are rarely upheld due to the general principles relating to the role of the appeal court and its deference to the judge who has heard all the evidence and seen the parties giving it. *Re A (Children)* [2019] EWCA Civ 74 was one of the rare instances in which the mother's appeal against the judge's findings at a fact-finding

[211] *Re D (Appeal – Failure of Case Management)* [2017] EWHC 1907 (Fam) [21].
[212] *PS v BP* [2018] EWHC 1987 (Fam) [34].
[213] *M v F* [2018] EWHC 1720 (Fam) [11].
[214] *RJ v CM* [2018] EWHC 2509 (Fam) [29].

hearing was allowed, on the basis that the findings were contradictory, the judge's conclusions were not supported by his analysis of the evidence, and he had failed to make any findings on some issues. *JH v MF* [2020] EWHC 86 (Fam) was another such case, in which the trial judge's finding were overturned on the basis that he had ignored part of the evidence, failed to make findings on some of the allegations, made findings on other matters in the absence of evidence, applied the wrong standard of proof, and applied the wrong test for consent in determining the mother's allegations of rape.[215]

1.6 Risk assessment and interventions after fact-finding

Paras 32 to 39 of PD12J set out how the court should proceed in all cases where domestic abuse has occurred.

What happens after fact-finding or domestic abuse is otherwise established is the other significant area for appeals in relation to the application of PD12J. Here, the major problem appears to be where judges make findings of fact but then effectively ignore them in the welfare determination, and/or attempt to save time by dispensing with risk assessment or otherwise cut corners and fail to follow the Practice Direction.

1.6.1 Risk assessment

In all but the most obvious cases, risk assessment is likely to be essential in order to understand the implications of the abuse that has occurred in terms of ongoing risk to the child, even if a fact-finding hearing has not been considered necessary.[216] In *Re W* [2012] EWCA Civ 528, the judge made significant findings of sustained domestic violence by the father at a fact-finding hearing but then refused an application for a section 7 report and a psychological assessment of the father, stating that he was satisfied that the father had been ill but was now much better and that further assessment was therefore unnecessary. His decision that contact should proceed was overturned on appeal, with Black LJ making clear that the assessment of the father's mental state and the risk of further violence was a matter on which the judge required further professional assistance.[217]

In *MS v MN* [2017] EWHC 324 (Fam), the father was found at a fact-finding hearing to have seriously assaulted the mother twice, once in the presence of the child, to have threatened to kill the mother on numerous occasions, and to be generally aggressive and to have a short fuse. The court then allowed immediate contact, contrary to Cafcass recommendations. In allowing the appeal, Moor J noted that the judge had failed to follow PD12J. In order to move forward, Cafcass considered there was a need for a specialist

[215] *JH v MF* [2020] EWHC 86 (Fam) per Russell J at [21], [23]–[25], [27], [30], [32]–[57].

[216] See *Re P* [2015] EWCA Civ 466 [30] per King LJ.

[217] *Re W* [2012] EWCA Civ 528 [19]. This was decided under the 2009 version of PD12J in which the wording of the relevant paragraph was slightly different from the current paragraph 30, but Black LJ's observation as to the need for further professional opinion remains relevant.

risk assessment of the father before commencing any intervention, but the father would not pay for the risk assessment, and his denial of his violence meant that Cafcass would not pay either. In the circumstances, which included previous local authority involvement, Moor J directed the local authority under section 7 to provide a further report on the risk posed by the father and the safety of any proposed contact.

1.6.2 Interventions to reduce risk

The potential interventions contemplated by paras 33(b) and 34 of PD12J provide the court with the opportunity to make efforts to enable safe and beneficial contact ultimately to be re-established. In *MS v MN* for example, Moor J stated:

> I make it clear that I do believe that every reasonable avenue should be investigated to see whether contact can be established in this case, but it has to be safe and secure. I cannot see that, given the findings of fact, a judge can say it is safe and secure, at this point in time. I hope that a judge will be able to say it in due course…[218]

In *Re K* [2016] EWCA Civ 99, the Court of Appeal found that the Recorder had failed to follow the guidance in PD12J, and in particular paragraphs 33–34, in considering the various alternatives available to enable direct contact to occur between the children and the father,[219] who had been found at a fact-finding hearing to have perpetrated domestic abuse. The father was a litigant in person, and the Recorder had relied on the guardian's view that the father's failure to accept responsibility for his abuse meant that only indirect contact should be ordered. But the Court made it clear that the Recorder should have made an independent effort to grapple with the alternatives before abandoning the possibility of direct contact.[220] For example, the guardian had not recommended or arranged a risk assessment, and no attempt had been made to assist the father to make the changes considered necessary.[221] Paras 33–34 of PD12J directed the Recorder to a range of alternative resources which ought to have been considered.[222]

In *Re CB*, the findings of fact indicated that the child was at risk of exposure to future violence/abuse and consequent harm and Cobb J observed that "contact must be safe for the child, and currently, and while the father is unable to demonstrate a reliable ability to contain his strong emotions, I have considerable doubts that it can be confidently and safely managed". There were no viable options for supervised contact as the contact service was unwilling to continue working with the father and the paternal grandmother did not accept there was any problem with the father. And while it was clear the father needed professional help to address his behaviour, Cobb J had no information about local services. He decided, however, that it was in the child's interests for the father to be given

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[218] *MS v MN* [2017] EWHC 324 (Fam) [12].

[219] *Re K* [2016] EWCA Civ 99 [41]–[43] per King LJ.

[220] Ibid [44], citing *Q v Q* [2015] EWCA Civ 991.

[221] Ibid [23].

[222] See also *Re M (a child)*, Court of Appeal, 25 November 2015, per Macur LJ to the same effect, cited in *Re K* ibid [35]–[36].

one final, time-limited opportunity to demonstrate he could be a good parent to the child. He therefore placed the onus on the father to self-refer to a specialist domestic abuse intervention as a precondition to any substantive child arrangements order. He set a timetable for agreement on the intervention and the making of an appropriate contact activity direction, and adjourned the final hearing for at least five months to enable the father to commence and hopefully largely complete the programme of work and demonstrate the ability to parent his child safely. While Cobb J was conscious of the issue of delay, he was satisfied in the circumstances that it was purposeful and proportionate.

In *Re S*, there was a disagreement between two Cafcass officers as to whether therapeutic intervention for the father was required before direct contact could appropriately be ordered. The judge simply opted for the view of the officer who advocated immediate supervised contact. The Court of Appeal, while expressing sympathy for the judge's desire to avoid delay in resuming contact, overturned the decision, ruling that it was necessary to hear from the two officers and fully consider the reasons for their respective recommendations.[223] The overriding consideration was not the avoidance of delay but the avoidance of harm to the child.

1.7 The welfare determination and orders

In all cases where domestic abuse has occurred, paras 35–37 (which are based on the Sturge and Glaser report provided in *Re L*) set out the factors which must be taken into account when determining whether to make a child arrangements order.

1.7.1 Factoring the effects of established abuse into the welfare determination

The Court of Appeal has repeatedly stressed that the discipline in these and the preceding paragraphs offers the surest guide to both correct and appeal-proof decision-making. For example in *Re P* [2015] EWCA Civ 466, while the Court of Appeal upheld the Recorder's decision not to hold a fact-finding hearing, it overturned the orders made because the Recorder had then failed to obtain a risk assessment and failed to apply para 36 of PD12J. He had wrongly disregarded the established history of domestic violence, or considered it relevant only to the quantum rather than the mode of contact.[224]

In *Re W*, the case in which the judge had held a fact-finding hearing and then moved straight to determining how contact should move forward, Black LJ held that the parents should have been given the opportunity to give further evidence about how the violence found to have occurred had affected the mother and the children, and how the father

[223] *Re S* [2012] EWCA Civ 617 [32]–[34] per Black LJ.
[224] *Re P* [2015] EWCA Civ 466 [22]–[23] per King LJ.

responded to the findings made against him, before any decisions were made about contact.[225]

In *Re F* [2015] EWCA Civ 1315 the mother's appeal was allowed partly on the ground that while the trial judge had made findings that the father had harassed the mother, and had continued a non-molestation order against the father, he then ignored those findings when considering the question of the mother's contact with the child who was living with the father.

In *Re A and R* [2018] EWHC 2771 (Fam), one of the appellant's criticisms of the Recorder's fact-finding judgment was that they had not considered the impact of the domestic abuse found to have occurred on the children, as required by para 29 of PD12J. Baker J did not consider this to be an error, but suggested that such findings should be considered at the forthcoming welfare hearing, when the Recorder would also have the benefit of a report from an independent social worker.[226]

In both *Re K* and *Re A* the Court of Appeal reiterated the advice that trial judges should take care to refer in their judgments to the relevant paragraphs of PD12J and make clear how they have followed the Practice Direction and considered the matters required to be considered.[227] In *Re A*, McFarlane LJ said it would be 'wise' for some express reference to be made to PD12J so as to dispel any doubts that the correct approach has been taken, and in some cases it may be necessary to detail how paras 35–37 have been complied with.[228]

1.7.2 Contact orders and conditions

Paras 38–39 apply where the court, having taken all of the factors and any expert risk assessment into account, nonetheless considers that contact is safe and beneficial for the child. In *Re P* the Recorder had been concerned about delays in the case and decided not to order supervised contact because it would be too difficult to arrange. This was disapproved by the Court of Appeal as it failed properly to take into account the established history of domestic violence, the risk posed by the father to the children, and fact that contact would need to be reintroduced after being suspended for some time.

By contrast, an order for long-term supervised contact survived appeal in *Re D* [2016] EWCA Civ 89, as the trial judge had followed all the required steps and clearly shown in her reasons how the identified risk factors attendant on unsupervised contact had not diminished.[229]

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[225] *Re W* [2012] EWCA Civ 528 [18].

[226] *Re A and R* [2018] EWHC 2771 (Fam) [67].

[227] *Re K* [2016] EWCA Civ 99 [42], [45] per King LJ; *Re A* [2015] EWCA Civ 486 [35], [49] per McFarlane LJ.

[228] *Re A* ibid [49].

[229] *Re D (Children)* [2016] EWCA Civ 89 [37]–[39] per Baker J. For another case involving long-term supervised contact, see *ND v KD* [2019] EWFC B17.

In *Re M* [2013] EWCA Civ 1147, the Court of Appeal stressed that judges must carefully consider and give reasons for their rejection of supervised contact options, including an explanation of why the risks found to exist will not be sufficiently guarded against by supervised contact, before deciding to order indirect or no contact.[230]

This decision points to the importance of the Court of Appeal's general case law on contact and its influence in domestic abuse cases. In other words, it is not just the case law on PD12J which is relevant. The key case here is *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521, in which Munby P said:

- Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
- Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
- There is a positive obligation on the State…to take measures …to maintain or restore contact. … The recorder must grapple with all the available alternatives before abandoning hope of achieving some contact. …
- The court should take both a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems. …
- All that said, at the end of the day the welfare of the child is paramount; 'the child's interest must have precedence over any other consideration.[231]

Numerous previous and subsequent cases reiterate and reinforce the default position that contact is to be encouraged and pursued.

[230] *Re M (Children)* [2013] EWCA Civ 1147 [19], [24], per Macur LJ and [27] per Underhill LJ.
[231] *Re C (Direct contact: suspension)* [2011] EWCA Civ 521 [47].

2. Section 91(14) of the Children Act 1989

Section 91(14) of the Children Act provides that: “On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court”.

2.1 Guidelines for making section 91(14) orders

Guidelines for the making of section 91(14) orders were laid down by Butler-Sloss LJ in the case of *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573 and are still applicable. The guidelines, set out in para 41 of the judgment, are as follows:

1) the welfare of the child is the court’s paramount consideration
2) the court’s power is discretionary; in the exercise of its discretion the court must weigh all the relevant circumstances in the balance
3) imposing such a restriction is a statutory intrusion into the right of a party to bring proceedings before the court and to be heard in matters affecting their child
4) such an order is the exception and not the rule, and the court’s power should be used with great care and sparingly
5) it is a weapon of last resort in cases of repeated and unreasonable applications
6) in suitable circumstances and on clear evidence, a court may impose the restriction where the welfare of the child requires it, even if there is no past history of making unreasonable applications
7) in cases where there is no history of unreasonable applications but the welfare of the child requires a restriction on applications, the court must be satisfied, firstly, that the facts go beyond the commonly encountered need for time to settle and/or situation where there is animosity between the parties, and secondly, that there is a serious risk that the child or the primary carer(s) will be subject to unacceptable strain without the imposition of the restriction
8) a court may impose the restriction on making applications even if a party has not applied for it, subject to the rules of natural justice such as an opportunity for the parties to be heard on the point
9) a restriction may be imposed with or without a time limit
10) the degree of restriction should be proportionate to the harm it is intended to avoid, so the court should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of the order
11) it would be undesirable, other than in the most exceptional cases, to make the order without notice.

A case that illustrates the balancing exercise required by these guidelines is *Re M (a Child)* [2012] EWCA Civ 446, which concerned the father's application for contact with and parental responsibility for a nine-year-old child. On the second day of the final hearing the father "lost his self-control", "ranted at the injustice of the system", unsuccessfully applied to withdraw his applications, and left court. In his absence the judge dismissed his applications and made a section 91(14) order for a period of two years. The judge acknowledged that the order was "draconian" but considered that the mother had suffered from the proceedings and that the order was a justified and proportionate response. The Court of Appeal held that the child's welfare remained the judge's "paramount signpost" so the father should have been given time to "come to his senses" before his application was dismissed, effectively abandoning any prospect of contact. The court must be "cautious in making these prohibitions. They should properly be advanced by application supported by evidence, and the person who is sought to be prohibited must be given every opportunity to respond to the application" (para 10). Additionally, the trial judge had made a blanket order instead of specifying the type of future applications to be barred.

In *Re G (Children) (Intractable Dispute)* [2019] EWCA Civ 548 the Court of Appeal upheld a no direct contact order to a child and a section 91(14) order for a period of three years made against the father who was assessed as displaying intimidating behaviour and open hostility towards the children's mother which was harmful to her welfare and that of the child. The Court of Appeal concluded that although "the presumption of parental involvement is very strong … it is not absolute. As in all matters relating to the upbringing of a child, welfare prevails."[232] The Article 8 rights of the father were not breached by the absence of contact since "the children would suffer emotional harm if they were placed with the father or required to have direct contact with him against their wishes" and he had "completely lost sight of their welfare". No party sought permanent cessation of contact rather, a therapeutic approach where the father's behaviours changed. This was "an obvious case for a s.91(14) order in the light of the Judge's findings and the terrible litigation history. The mother and children are entitled to some protection from incessant litigation and the length of the order is not inconsistent with the possibility of a therapeutic approach to the restoration of contact."[233]

[232] *Re G (Children) (Intractable Dispute)* [2019] EWCA Civ 548 [46].
[233] Ibid, [69]–[70].

2.2 Application for a section 91(14) order

The case law is clear that parties should be given ample notice of an application for a section 91(14) order, or if the court is contemplating making such an order of its own motion, particularly where the order is being sought against a litigant in person. An order sought without an application issued in advance, and without supporting evidence, should only be granted in exceptional circumstances – *DJ v MS* [2006] EWHC 1491 (Fam).

In *Re C (Litigant in Person: Section 91(14) Order)* [2009] EWCA Civ 674, Wall LJ stated that care should be taken to ensure that:

- litigants understand that an application for a section 91(14) order is being made, or that consideration is being given to making such an order;
- that they understand the meaning and effect of such an order; and
- that they have a proper opportunity to make submissions to the court.

Re T (A Child) (Suspension of contact) (Section 91(14) CA 1989) [2015] EWCA Civ 719 provides useful guidance on how courts should determine these factors and on section 91(14) orders generally. In the context of very lengthy litigation, the trial judge considered the father's overall conduct and its effect on the mother and child to be so detrimental that "the mother should not be subjected to his behaviour through the courts or otherwise for the foreseeable future".[234] She refused to order direct contact and made a section 91(14) order prohibiting the father from making further applications without permission for five and a half years. The children's guardian supported that order.

However, the court had not served the father, who was a litigant in person, with the mother's application for the section 91(14) order nor with notice of the hearing at which it would be considered. The court stated that because section 91(14) orders involve issues "of such fundamental importance as the cessation of contact", the judge must "acknowledge and weigh in the balance the important Art 8 ECHR rights of the parent and child".[235] It further noted that section 91(14) orders "are very much the exception not the rule, and only where the welfare of the child requires it", having regard to the guidance of the Court of Appeal in *Re P* [1999] (above).[236]

Endorsing the guidance given by Wall LJ in *Re C* (above), the court said that, whether or not a party is represented, it was "imperative" that the judge must be satisfied that the party affected by the making of a section 91(14) order:

- is fully aware that the court is seised of an application and is considering making such an order;
- understands the meaning and effect of the order;
- has full knowledge of the evidential basis on which the order is sought; and

[234] *Re T (A Child) (Suspension of contact) (Section 91(14) CA 1989)* [2015] EWCA Civ 719 [30].
[235] Ibid [47].
[236] Ibid [50].

- has had a proper opportunity to make representations in relation to the making of the order, which may mean adjourning the application for it to be heard on notice.

In this case, the Court of Appeal was satisfied that the father was aware that the court would be considering making a section 91(14) order, which had been "on the cards" since 2013, and that there was sufficient indication that he understood what the order meant. The judge, in exercising her discretion, had correctly considered the "length and intensity" of the litigation, the difficulty of establishing "normal" contact between the father and child, and the father's evident intention to disturb the child's residence with her mother. However, the judge had not considered or referred to: "i) the reasons for the difficulties in the father's contact with E, and whether they may at least in part be attributable to the conduct of the mother; ii) whether all available steps had been taken to maintain contact; and crucially iii) whether, and if so why, such an order would be in E's best interests".[237] The father's appeal was allowed and the case remitted for a rehearing.

The procedural requirements set out by the Court of Appeal in *Re T* are necessary inherent procedural protections before a section 91(4) order will be made, according to *Re N (Children)* [2019] EWCA Civ 903. These requirements are applicable to all parties, whether or not they are represented. In *Re N* the Court of Appeal was concerned with a litigant in person against whom a section 91(14) order was imposed at a hearing at which he was unaware it would addressed and was absent. Again, the order was overturned.

2.3 Duration and terms of a section 91(14) order

In determining the duration of a section 91(14) order, the Court of Appeal in *Re T (A Child) (Suspension of contact) (Section 91(14) CA 1989)* [2015] EWCA Civ 719 said that **"**given its obvious interference with a litigant's fundamental access to justice", an order should be imposed "for the minimum period necessary". In that case, the Court of Appeal held that the trial judge had failed to explain the necessity and proportionality of a five-year embargo on applications concerning a four-year-old child or to give the father an opportunity to make representations about the duration of the order.

Similarly, in *Re G (A Child)* [2010] EWCA 470, while the Court of Appeal accepted that a section 91(14) order was justified because of the stress on the mother of the proceedings, it held that a five-year restriction on applications with respect to a three-and-a-half year old child was excessive, and substituted a two-year order in its place.

The court may make an 'open-ended' order (without a specified duration), or state that the order is to last until the child's 16th birthday, but only in exceptional cases, and the reasons

[237] Ibid [53].

must be clearly given for orders made without a time limit – *Re S (Permission to Seek Relief)* [2006] EWCA Civ 1190.

Re F (Children) [2014] EWCA Civ 1474 is an example of a case in which the Court of Appeal upheld a section 91(14) order made to last until the children, then aged 11 and 14, reached 18. The lengthy, acrimonious and bitter proceedings were having such an adverse effect on the children that both refused to have contact with their father and required mental health interventions and one child was taken into care at one point. The court had removed the father's parental responsibility, and refused his repeated applications for residence orders. The Court of Appeal refused permission to appeal the section 91(14) order which was held to have been entirely justified on the facts.

Likewise in *M v CF* [2018] EWHC 2658 (Fam) Keehan J imposed a section 91(14) order until the youngest child reached the age of 18 where two children aged four and five lived at a confidential address with their mother, having been moved by the UK Protected Persons Scheme as a result of the high risk of grave harm or death that the father posed to their mother, and attendant harms to them. The father had served a sentence of imprisonment for assaulting her and threatened her life upon release from prison. The court removed his parental responsibility, limited the information that may be given to him about the children to the fact of their death (if it were to occur in childhood), permitted a change of the children's names and made the section 91(14) order stating, "I am wholly satisfied that the children need protection from the father and the mother needs the confidence to know that the father cannot make any application to the court for any s.8 order in respect of the children without the permission of the court."

The court cannot attach conditions to a section 91(14) order, beyond stating how long it is to last and identifying the type of relief to which it applies – *Re S (Permission to Seek Relief)* [2006] EWCA Civ 1190. In *Stringer v Stringer* [2006] EWCA Civ 1617, the father was restricted from applying for residence or contact with the children until they reached the age of 16. A condition was attached to the order that permission to apply for such orders would only be granted if the father produced a psychological or psychiatric report confirming that he had engaged in treatment. In granting the father's appeal, Wall LJ drew a distinction between conditions in these terms being attached to an order, which is not permitted, and a judge indicating that leave would be unlikely to be granted unless particular issues were addressed.

2.4 Applications for permission to apply following a section 91(14)

If a party wishes to seek permission to apply for a barred order while a section 91(14) order is in place, the relevant test is whether there is "any need for renewed judicial investigation" – Re A [1998] 1 FLR 1, which means asking whether the applicant has an

'arguable case' with some chance of success – Re P (A Minor) (Residence Order: Child's Welfare) [2000] Fam 15.

The correct procedure for considering an application for permission to apply for a barred order while a section 91(14) order is in effect was set out by the Court of Appeal in Re S (Permission to Seek Relief) [2006] EWCA Civ 1190:

- the court has a degree of flexibility on the question of whether or not the other parent needs to be served with an application for permission to apply. In the first instance, and where the circumstances are sensitive (such as where the stress of the previous litigation had destabilised the family), the court should not serve the other party until it has decided whether or not this is necessary
- a judge, when making a section 91(14) order, may direct that any application for permission to apply during its currency shall not, in the first instance, be served on the respondent but should be considered on the papers
- if a judge refuses such permission on the papers the applicant should then be afforded an oral hearing if he/she is dissatisfied with a paper refusal
- if a judge hearing an application on paper considers that there is an arguable case, the matter should be listed for an inter partes hearing.

The test to be applied on an application for permission was considered by Cobb J in Re P & N (s 91(14): application for permission to apply: appeal) [2019] EWHC 421 (Fam). After lengthy proceedings concerning the father's contact with two children, and adverse findings against the father, a section 91(14) order was made preventing the father from making further section 8 applications for three years. The father applied for permission to apply for a 'spend time with' order. HHJ Plunkett heard the father's application without notice to the mother or the children's solicitor and granted it. The mother appealed against the grant of permission. Cobb J allowed the mother's appeal and determined the correct procedure for permission applications:

- the 'welfare test' does not apply to a permission application, though the welfare of the child is a 'relevant consideration'
- the court should have regard to the overriding objective in Rule 1 FPR 2010, particularly 'to deal with applications "justly", "fairly", "ensuring that the parties are on an equal footing" and "saving expense"'
- the application should be considered 'in the first instance' on the papers or at an oral hearing without notice to the respondent, particularly if there are concerns about the effect on a respondent of learning of a fresh application
- an applicant should not be denied an oral hearing
- if the application is without merit, it can be dismissed at that stage
- if the application demonstrates an arguable case, the court should list the application for an 'on notice' hearing to allow the respondent to make representations.

3. Civil restraint orders

CROs were formerly called ‘Grepe and Loam’ orders and can be traced back to the decision of the Court of Appeal in *Bhamjee v Forsdick (Practice Note)* [2003] EWCA Civ 113, which emphasised that they are appropriate only in cases involving persistent applications that are totally devoid of merit. CROs restrain applications being made without the permission of the court in cases of vexatious litigants.

3.1 CROs – the rules

The power to make CROs is set out in rule 4.8 of the Family Procedure Rules 2010 and the accompanying Practice Direction, PD4B. There are three type of CROs:

- **Limited** CROs can be made in the County Court and the High Court where there have been at least two applications made ‘totally without merit’. They apply only to the proceedings in which they are made, and last for the life of those proceedings.
- **Extended** CROs can restrain applications in other, loosely related, proceedings where a party has ‘persistently’ made applications which are ‘totally without merit’.
- **General** CROs prohibit the making of any application in any court without the permission of the court where a party has ‘persistently’ made applications which are ‘totally without merit’ in circumstances where an extended CRO would not be sufficient or appropriate. Extended and general CROs can only be made by a High Court Judge and can last for up to two years.

CROs can be made on application or on the court’s own initiative. PD4B states that the court *must* consider making a CRO when it strikes out a statement of case or dismisses an application (including an application for permission to appeal) and considers the application is totally without merit.

The CRO is registered and upon the restrained person issuing an application in any court the proceedings are automatically dismissed under either para 3.3 of PD4B or para 3.3 of the Civil Procedure Rules, Practice Direction 3C which are in identical terms.

3.2 Case law

PD4B clarifies that CROs are separate from, and do not replace section 91(14) orders. For this reason, CROs are very rarely made in private law children proceedings and are more commonly (although still rarely) made in financial remedies proceedings.

A recent family law case where a CRO was made is *AEY v AL (Family Proceedings Civil Restraint Order)* [2018] EWHC 3253 (Fam). The father had made multiple applications for permission to appeal child arrangements orders in proceedings that had been ongoing since 2013. He had been convicted of domestic abuse against the mother and child abduction. He had made numerous allegations against the mother and attempted to involve the children in proving those allegations. He had also made numerous allegations against the trial judge and the local authority. An exclusion order had been made against him when he repeatedly attended the foster home of the oldest child. Prior to hearing the applications, Knowles J had directed the father to address why an extended CRO should not be made if his applications were determined to be without merit. On hearing the father's applications for permission to appeal, Knowles J considered all seven of them to be totally without merit and refused permission to appeal.

Knowles J referred to the purpose underlying the making of CROs as summarised by Leggat J in *Nowak v The Nursing and Midwifery Cou*ncil [2013] EWHC 1932 (QB):

> [T]he rationale for the regime of civil restraint orders is that a litigant who makes claims or applications which have absolutely no merit harms the administration of justice by wasting the limited time and resources of the courts. … Litigants who repeatedly make hopeless claims or applications impose costs on others for not good purpose and usually at little or no cost to themselves. … In these circumstances there is a strong public interest in protecting the court system from abuse by imposing an additional restraint on their use of the court's resources.[238]

Knowles J acknowledged that CROs are not commonly made in the context of children proceedings "given the availability of section 91(14) orders to restrain applications in such proceedings".[239] However, although "the primary purpose of civil restraint orders is to manage the court's resources fairly and justly for all litigants and to protect the court system from abuse", in this case the welfare issues justified the making of an extended CRO. Knowles J also directed that any subsequent applications made by the father for permission to apply during the currency of the extended CRO should be made without notice to the mother or the children in order to avoid causing them anxiety and distress.

[238] *Nowak v The Nursing and Midwifery Cou*ncil [2013] EWHC 1932 (QB) per Leggat J at [58].
[239] *AEY v AL (Family Proceedings Civil Restraint Order)* [2018] EWHC 3253 (Fam) [68].

K v K [2015] EWHC 1064 (Fam) was a case in which both a section 91(14) order (with respect to child arrangements proceedings) and a CRO (with respect to financial remedies proceedings) were made. The father had repeatedly applied to relitigate matters that had been concluded against him in both sets of proceedings. His applications were all found to be totally without merit.

Mostyn J in *Veluppillai v Chief Land Registrar and Ors* [2017] EWHC 1693 (Fam) identified a failure of the notification system in a case where the application was not flagged and automatically struck out. He stated:

> Attention needs to be given, in my respectful opinion, to putting in place effective machinery whereby there is an up-to-date fully accessible register of all civil restraint orders together with an automatic flagging system when an application is made in breach of that order which brings about automatic dismissal as the terms of the Practice Directions provide.[240]

[240] *Veluppillai v Chief Land Registrar and Ors* [2017] EWHC 1693 (Fam) [27].

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