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BRIEFING PAPER

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Children: child arrangements orders – safeguards when domestic abuse issues arise (England and Wales)

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Contents:

1. Introduction
2. Practice Direction 12J of the Family Procedure Rules
3. A history of PD12J – its introduction and revisions
4. Additional rules and directions to protect vulnerable witnesses in the Family Court
5. Government reform
6. Review by the judiciary
7. Other sources of information and advice

Contents

Summary **3**

1. Introduction **5**

2. Practice Direction 12J of the Family Procedure Rules **6**
2.1 Application and purpose of PD12J 6
2.2 Investigations into a child's welfare 7
2.3 Fact-finding hearings 8
2.4 Child arrangements order decisions where domestic violence is an issue 9

3. A history of PD12J – its introduction and revisions **12**
3.1 Introduction and rationale 12
3.2 Background to introduction of PD12J 12
3.3 First revision (2014) 14
3.4 Second revision (2017) and accompanying guidance 15

4. Additional rules and directions to protect vulnerable witnesses in the Family Court **18**

5. Government reform **20**
5.1 The Family Justice Panel 20
Background 20
Final report 21
Implementation Plan 23
Progress on implementation 25
5.2 Family Justice Board statement 25
5.3 Domestic Abuse Act 2021 26
Children as victims of domestic abuse 26
Cross-examination of victims 27
Special measures 27
Use of 'barring orders' 27

6. Review by the judiciary **29**
6.1 Private Law Working Group 29
Interim report and consultation (June 2019) 29
Second report (April 2020) 29
Report of the Family Solutions Group (November 2020) 31

7. Other sources of information and advice **32**

Other Library briefings on private child law and related topics **34**

Summary

This briefing provides information on how the family courts address issues of domestic abuse in private law proceedings relating to children, in particular proceedings relating to child arrangements orders. The final two sections of the briefing provide information on proposals for reform in this area. The briefing applies to England and Wales only.

Practice Direction 12J

The Family Procedure Rules 2010 (FPR 2010) and supporting practice directions govern the procedures used in family proceedings in the Family Court and the High Court. Practice Direction 12J (PD12J) of the Family Procedure Rules – Child Arrangements and Contact Orders: Domestic Abuse and Harm – sets out what the courts must do in certain cases where domestic abuse is raised.

Judges must follow PD12J and be alert to the possibility of domestic abuse being a factor throughout a case's hearing. Among other things, PD12J:

- States that a court should consider asking for a report on the welfare of a child (a section 7 welfare 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."
- States that, where disputed allegations of domestic abuse arise, a court can also request a fact-finding hearing. The PD also sets out the factors that a court should consider when determining whether it is necessary to conduct a fact-finding hearing.
- States that, where domestic abuse is admitted or proven, a court must ensure that "any child arrangements order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose either of them to the risk of further harm".
- Sets out a range of factors that a court should consider when determining whether to make a child arrangements order in cases where domestic abuse has occurred.

In addition, a new Part 3A and accompanying Practice Direction 3AA were introduced to the Family Procedure Rules in 2017, which make "special provision about the participation of vulnerable persons in family proceedings and about vulnerable persons giving evidence in such proceedings".

Further information is provided in sections 2-4 of the briefing.

Family Justice Panel

In May 2019, the Ministry of Justice established a Family Justice Panel to examine how effectively the family court responds to allegations of domestic abuse. The Panel's final report, which was published in June 2020, highlighted "continuing concerns" around how the family court system recognises and responds to allegations of domestic abuse. The report made a number of recommendations for change, including around protections in court for victims of domestic abuse. It also recommended that there should be a review of the presumption of parental involvement under section 1 of the Children Act 1989.

The Government published an Implementation Plan in response to the Panel's report. Among other things, this stated that the Government would:

- Review the presumption of parental involvement.

- Pilot "integrated domestic abuse courts (IDAC) that address criminal and family matters in parallel".
- Prohibit the cross-examination of victims by perpetrators of domestic abuse in the family courts (see below).
- Make victims of domestic abuse automatically eligible for special measures in the family court (see below). (Special measures are provisions to help vulnerable and intimidated witnesses give their best evidence in court and can take the form of separate waiting rooms, entrances and screens.)

Further information is provided in section 5.1 of the briefing.

Domestic Abuse Act 2021

The Domestic Abuse Bill 2019-21 was introduced to Parliament on 3 March 2020. It received Royal Assent on 29 April 2021. The Act includes a number of provisions related to how the family courts address issues of domestic abuse in private law proceedings relating to children. The Act:

- Explicitly recognises children as victims of domestic abuse if they see, hear or experience the effects of the abuse.
- Provides for the introduction of a new automatic ban on perpetrators of abuse cross-examining their victims in the family courts (and vice versa), in certain circumstances.
- Makes provision to extend the availability of "special measures" to victims of domestic abuse in the family courts.
- Clarifies the use of so-called "barring orders".

The relevant sections of the Act have not yet been brought into force.

Further information is provided in section 5.3 of the briefing.

Reviews by the Judiciary

In autumn 2018, the President of the Family Division of the High Court announced that a cross-professional Working Group had been established to examine "the approach taken to private disputes between parents with respect to the arrangements for their children's future welfare following a separation."

The Private Law Working Group published an interim report in June 2019, followed by a Second Report in April 2020. In November 2020, the Family Solution Group, a subgroup of the Private Law Working Group, published a further report: "What about me?": Reframing Support for Families following Parental Separation.

All three reports discussed how the family courts responded to allegations of domestic abuse. Further information is provided in section 6 of the briefing.

1. Introduction

Under section 1 of the Children Act 1989, when a court considers any question with respect to the upbringing of a child its "paramount consideration" is the welfare of the child.[1] In addition, when a court is considering whether to make, vary or discharge a child arrangements order (see box 1 below), where one party opposes it, the court is required to have particular regard to a range of prescribed factors, including "any harm which [the child] has suffered or is at risk of suffering".[2]

A joint report from the Government's Children and Family Court Advisory and Support Service (Cafcass) and the domestic abuse charity Women's Aid, published in July 2017, found that 62% of a sample of 216 applications to the family court about where a child should live or spend time featured allegations of domestic abuse.[3]

The report noted that "the sample cases provided a complex picture of domestic abuse within family proceedings and it was uncommon for domestic abuse allegations to feature in isolation from other safeguarding concerns." This demonstrates, the report added, "the substantial challenge for courts in determining which cases can safely proceed to contact with the child".[4]

This briefing provides information on how the family court addresses issues of domestic abuse in private law proceedings relating to children, in particular proceedings relating to child arrangements orders. The final two sections of the briefing provide information on proposals for reform in this area.

Box 1: Child arrangements orders

A child arrangements order is a court order that specifies matters such as with whom a child is to live, when they spend time with each parent, and when and what other types of contact take place (for example, phone calls). A judge decides such matters, although the child's wishes and feelings are considered (subject to their age and understanding) as well as those of their parents and others. Expert advice may also be sought. For more information on child arrangement orders, see the Library briefing paper Children: when agreement cannot be reached on contact and residence (England).

1 Children Act 1989, section 1(1).
2 As above, sections 1(3) & 1(4). This also applies for any other order made under section 8 of the Act (prohibited steps orders and specific issue orders), special guardianship orders and any order made under Part IV of the Act.
3 Cafcass, Cafcass and Women's Aid collaborate on domestic abuse research, 25 July 2017.
4 Cafcass and Women's Aid, Allegations of domestic abuse in child contact cases – Joint research by Cafcass and Women's Aid, July 2017, p4.

2. Practice Direction 12J of the Family Procedure Rules

The Family Procedure Rules 2010 (FPR 2010) and supporting practice directions govern the procedures used in family proceedings in the Family Court and the High Court.[5] Part 12 of FPR 2010 concerns court proceedings relating to children (subject to certain exceptions[6]), including child arrangement orders. It is supplemented by several practice directions (PD), including PD12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm.[7]

2.1 Application and purpose of PD12J

PD12J applies in any case "in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact between a child and a parent or other family member, where the court considers that an order should be made".[8] Its purpose is "to set out what the Family Court or the High Court is required to do in any case in which it is alleged or admitted, or there is 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.[9]

Judges must follow PD12J and be alert to the possibility of domestic abuse being a factor throughout a case's hearing. The PD states: "The court must, at all stages of the proceedings, and specifically at the First Hearing Dispute Resolution Appointment ('FHDRA'), consider whether domestic abuse is raised as an issue".[10]

Box 2: Definition of domestic abuse in PD12J

PD12J defines domestic abuse as including "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." It adds that this can encompass, but is not limited to, "psychological, physical, sexual, financial, or emotional abuse" and also includes "culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment.". The PD also provides

5 Ministry of Justice, Family Procedure Rules, last updated 21 December 2020.
6 Part 12 does not apply to parental order proceedings, and proceedings for applications in adoption, placement for adoption and relating proceedings.
7 The term "contact order" (and also "residence order") as originally stated in the Children Act 1989 were replaced by the single "child arrangements order", which cover both residence and/or contact, from 2014.
8 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, para 1.
9 As above, para 2.
10 Hershman and McFarlane, Children Law and Practice, December 2020, para B331; Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, para 5.

additional explanations of some of the terms used in this definition, including "coercive behaviour" and "controlling behaviour".[11]

2.2 Investigations into a child's welfare

There are two ways in which a child's welfare can be investigated when a court is considering a child arrangements order.

Firstly, a court can ask either a Cafcass officer or a local authority officer to prepare a welfare report under section 7 of the Children Act 1989. The court can ask the officer "to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report".[12]

PD12J states that a court should consider asking for a section 7 welfare report on the question of contact, or any other matters relating to the welfare of the child, "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." It adds that "any request for a section 7 report should set out clearly the matters the court considers need to be addressed".[13]

Where a court has directed that there should be a fact-finding hearing on the issue of domestic abuse (see section 2.3 below), it will not usually request a section 7 report until after that hearing.[14]

Alternatively, under section 16A of the Children Act 1989, a Cafcass officer must of their own initiative make a risk assessment of a child if they deem them to be at risk of harm. This duty applies when a Cafcass officer is carrying out any function in regard to family proceedings in connection with either an order made by a court, or where a court has the power to make a child arrangements order (or other order under Part II of the Children Act 1989).[15]

The risk assessment in relation to a child who is at risk of suffering harm of a particular sort is "an assessment of the risk of that harm being suffered by the child".[16] The assessment must be presented to the court even if no risk is found to exist:

> The duty to provide the risk assessment to the court arises irrespective of the outcome of the assessment. Where an officer is given cause to suspect that the child concerned is at risk of harm and makes a risk assessment in accordance with section 16A(2), the officer must provide the assessment to the court, even if he or

11 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, para 3.
12 Children Act 1989, section 7.
13 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, paras 21 and 23.
14 As above, para 22.
15 Children Act 1989, section 16A; Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, para 13.
16 Children Act 1989, section 16A(3).

> she reaches the conclusion that there is no risk of harm to the child.
>
> The fact that a risk assessment has been carried out is a material fact that should be placed before the court, whatever the outcome of the assessment. In reporting the outcome to the court, the officer should make clear the factor or factors that triggered the decision to carry out the assessment.[17]

For more information on the role of Cafcass, see the Library briefing paper Children: when agreement cannot be reached on contact and residence (England).

Box 3: Disapplication of requirement to undertake mediation where evidence of domestic abuse

Under section 10(1) of the Children and Families Act 2014, before a person can make an application to the family court for certain private law proceedings relating to children (including those in respect of child arrangement orders and other orders under section 8 of the Children Act 1989), they must attend a family mediation information and assessment meeting ("MIAM"). However, this requirement does not apply to certain proceedings, including, for example, for an order relating to a child or children in respect of whom there are ongoing emergency proceedings.[18]

In addition, there are other circumstances where the requirement to attend a MIAM does not apply, including in cases where there is evidence of domestic violence or there are child protection concerns.[19]

PD12J additionally stipulates that, where any information provided to the court indicates that there are issues of domestic abuse that may be relevant to its 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."[20]

2.3 Fact-finding hearings

Where disputed allegations of domestic abuse arise, a court can also request a fact-finding hearing (also known as a finding of fact hearing).

PD12J sets out the factors that a court should consider when determining whether it is necessary to conduct a fact-finding hearing, which include, among other factors:

- the views of the parties and of Cafcass;
- whether there are admissions by a party which provide a sufficient factual basis on which to proceed; and
- whether the nature and extent of the allegations, if proved, would be relevant to the issue before the court.[21]

As the legal text Children Law and Practice highlights, "PD12J does not prevent a judge from making an order for a child to spend time with a parent without first making findings of fact….[It] dictates that the court must decide as soon as possible whether fact-finding is necessary, but

17 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12L – Children Act 1989: Risk Assessments under Section 16A, updated 30 January 2017, paras 1.3–1.4

18 Ministry of Justice, Family Procedure Rules 2010 – Practice Direction 3A, 11 April 2017, para 12.

19 A full list of exemptions is set out in Ministry of Justice, Family Procedure Rules 2010 – Part 3: Non-Court Dispute Resolution, 30 January 2017, rule 3.8.

20 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, para 9.

21 As above, para 17.

does not dictate that there must be a fact-finding hearing in every case".[22]

"While ensuring that the allegations are properly put and responded to", PD12J states, "the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved." It adds that the court "should, wherever practicable, make findings of fact as to the nature and degree of any domestic abuse which is established and its effect on the child, the child's parents and any other relevant person." The findings must be recorded in writing.[23]

At the conclusion of any fact-finding hearing, the court must consider whether it is necessary to give directions for a section 7 report, even if such directions have previously been made.[24]

During family proceedings, it remains possible for someone who has, or is alleged to have, committed abuse to cross-examine their victim. However, the Domestic Abuse Bill, currently progressing through Parliament, provides for the banning of this practice (see section 5.3 for more information).

Box 4: The presumption of shared parenting and the risk of domestic violence

As noted above, when a court is considering whether to make, vary or discharge a child arrangements order which is contested, then its "paramount consideration" is the child's welfare.

Since 2014, amendments to the Children Act 1989 have meant that the court should presume, unless the contrary is shown, that the involvement of both parents in the life of the child concerned "will further the child's welfare".

This does not, however, trump the paramount consideration of the child's welfare. The legislation also provides that the presumption of involvement only applies where a parent can be involved without putting the child at risk of significant harm.[25]

PD12J states that "the court must in every case consider carefully whether the statutory presumption [of parental involvement] applies, having particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm".[26]

The Government is currently carrying out a review of the presumption of parental involvement (see section 5.1 below).

2.4 Child arrangements order decisions where domestic violence is an issue

In a summary of relevant case law, the legal text Children Law and Practice states that "it is almost always in the interests of a child to have contact with a parent, past domestic abuse is not, as a matter of

22 Hershman and McFarlane, Children Law and Practice, December 2020, para B332A

23 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 8 December 2017, paras 28-29.

24 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, para 30.

25 *Children Act 1989,* section 1(2A) and 1(6)(a). This also applies for other section 8 orders (e.g. specific issue orders and prohibited steps orders) and orders relating to the acquisition of parental responsibility by persons other than a child's mother.

26 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, para 7.

principle, a bar to making a child arrangements order that makes provision for contact; however, the parent's past behaviour (and the reasons for it) may provide sufficient cogent reason for refusing contact".[27]

Where domestic abuse is admitted or proven, PD12J states that a court must ensure that "any child arrangements order in place protects the safety and wellbeing of the child and the parent with whom the child is living, and does not expose either of them to the risk of further harm". It adds that "in particular, the court must be satisfied that any contact ordered with a parent who has perpetrated domestic abuse does not expose the child and/or other parent to the risk of harm and is in the best interests of the child".[28]

In terms of the factors a court should take into account when determining whether to make child arrangements orders in cases where domestic violence or abuse has occurred, PD12J states that:

> When deciding the issue of child arrangements the court should 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.
>
> In the light of any findings of fact or admissions or where domestic abuse is otherwise established, the court should apply the individual matters in the welfare checklist [set out in section 1(3) of the Children Act 1989] with reference to the domestic abuse which has occurred and any expert risk assessment obtained. In particular, the court should in every case consider any harm which the child and the parent with whom the child is living has suffered as a consequence of that domestic abuse, and any harm which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made. The court should make an order for contact only 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 by the other parent.
>
> In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same. In particular, the court should consider –
>
> a) the effect of the domestic abuse on the child and on the arrangements for where the child is living;
>
> b) the effect of the domestic abuse on the child and its effect on the child's relationship with the parents;
>
> c) whether the parent 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;

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27 Hershman and McFarlane, Children Law and Practice, December 2020, para B333.

28 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, para 5.

d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and

e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse.[29]

Where domestic abuse has occurred but a child arrangements order for direct contact is made, PD12J states that "the court should consider what, if any, directions or conditions are required to enable the order to be carried into effect". In particular, its adds, the court should consider a rage of factors, including (but not limited to) whether contact should be supervised, and whether any conditions should be imposed on the party in whose favour the order for contact has been made.[30]

It adds that "where the court does not consider direct contact to be appropriate, it must consider whether it is safe and beneficial for the child to make an order for indirect contact". The possible forms of indirect contact may, for example, include requiring the resident parent to send photographs and progress reports to the other parent, or to accept delivery of cards or presents for the child.[31]

29 Ministry of Justice, Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm, updated 6 April 2020, paras 35–37.
30 As above, para 38.
31 As above, para 39; Hershman and McFarlane, Children Law and Practice, December 2020, para B328.

3. A history of PD12J – its introduction and revisions

3.1 Introduction and rationale

PD12J originally came into force in May 2008 (although it was not called PD12J at that point, but simply the "Practice Direction: Residence and Contact Orders: Domestic Violence and Harm"). The then Parliamentary Under-Secretary at the Ministry of Justice, Bridget Prentice, stated that the new Practice Direction "changed current procedures in private law proceedings to give better protection for children in cases where domestic violence has been raised as an issue".[32]

It was subsequently revised in January 2009 following a ruling in the House of Lords which stated that a fact-finding hearing "is part of the process of trying a case and is not a separate exercise and that where the case is then adjourned for further hearing it remains part heard".[33]

3.2 Background to introduction of PD12J

In a report published in 2000, the Children Act Sub-Committee of the Advisory Board on Family Law (CASC) argued that there "needed to be greater awareness in private law residence and contact cases of the adverse impact of domestic violence on children (as both witnesses and victims of violence) and on resident parents, and that a major concern of the courts in such cases should be to safeguard the child and the resident parent from the risk of further physical and/or psychological harm".[34]

The CASC issued "good practice guidelines" for such cases, which included the "suggestion" that where the issue of violence was raised as a reason for limiting or refusing contact, the court should make findings of fact on the allegations at the earliest opportunity, and decide on the effect of those findings on the question of contact. In 2001, the Court of Appeal endorsed this particular aspect of the guidelines.[35]

However, concerns were raised that the Court of Appeal's decision and the CASC guidelines were not being followed in practice. A January 2013 report to the Family Justice Council, written by Professor Rosemary Hunter and Adrienne Barnett (see section 3.3 below), provided the following summary:

> In the years following Re L, however, concerns were raised that the Court of Appeal's decision and the CASC guidelines were not being followed in practice, and that issues of domestic violence in residence and contact cases continued to be sidelined, or ignored

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32 HC Deb 16 July 2008 c459W.

33 Sir Mark Potter, Practice Direction: Residence and Contact Orders: Domestic Violence and Harm, 14 January 2009.

34 Hunter, R. and Barnett, A., Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm – A Report to the Family Justice Council, January 2013, p9.

35 As above; Re L (A Child) (Contact: Domestic Violence) [2001] Fam 260.

> in the process of arriving at consent orders. In 2006 the Family Justice Council reviewed the implementation of Re L and the CASC guidelines and found that the guidelines relating to allegations of domestic violence were more honoured in the breach than in the observance, that victims of domestic violence were being pressured to agree to contact, and contact agreements were being made without proper consideration of the child's or the resident parent's safety. Similarly, in empirical research on court files in contact cases, Perry and Rainey found that despite serious allegations of violence being raised in a substantial proportion of the files reviewed, factual hearings were held in only a tiny minority of cases, while the majority ended up with orders for unsupervised direct contact with the allegedly violent non-resident parent.[36]

The report explained that the introduction of the Practice Direction followed a recommendation from the Family Justice Council:

> In order to remedy this situation, the FJC called for a cultural shift in the approach of legal and child welfare professionals, so that rather than pursuing contact at all costs, they should promote and facilitate contact only when it was "safe and positive for the child". Courts should ensure that safety was the paramount consideration when determining whether contact was in the child's best interests, and should also undertake a risk assessment before making consent orders for contact.
>
> The FJC report called for a Practice Direction to embody the decision in Re L, suitably updated to reflect current best practice, to incorporate the CASC guidelines, and to clarify what should happen in cases where there had been allegations of domestic violence but the court was requested to make a consent order for contact.
>
> The then President of the Family Division issued the Practice Direction: Residence and Contact Orders: Domestic Violence and Harm on 9 May 2008, subsequently revised on 14 January 2009.[37]

It has also been suggested that that the introduction of the Practice Direction was "in response" to a 2004 report published by Woman' Aid: "Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection".[38] Nicolas Wall, then a Lord Justice of Appeal (who was later to become President of the Family Division of the High Court), produced a report in March 2006 which focussed on the five cases identified in the Women's Aid report where there was judicial involvement.[39]

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36 Hunter, R. and Barnett, A., Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm – A Report to the Family Justice Council, January 2013, p9.

37 As above, pp10-11.

38 Women's Aid, Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection, 2004; Sir Stephen Cobb, Report to the President of the Family Division – Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm, p2, para 7.

39 Wall, Nicholas (Sir), A Report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled Twenty-Nine Child Homicides: Lessons Still to be Learnt on Domestic Violence and Child Protection with Particular Reference to the five cases in which there was Judicial Involvement, March 2006

3.3 First revision (2014)

A 2013 report to the Family Justice Council, written by Professor Rosemary Hunter and Adrienne Barnett, presented the results of a national survey of judicial officers and practitioners on the implementation of the new Practice Direction. The aim of the survey was to understand:

- whether the Practice Direction is operating in the way it was intended; and if not
- what problems are being experienced with its implementation; and
- what steps may be necessary to overcome any such problems.[40]

The report stated that the survey results suggested "that the Domestic Violence Practice Direction [was] not operating as intended", with both "cultural and material" problems with its implementation:

> The survey responses clearly indicate that the 'cultural shift' called for by the Family Justice Council before the Practice Direction was issued remains incomplete, and the implementation of the Practice Direction is hampered by severe resource limitations. It must be acknowledged, however, that in the current climate of austerity and cutbacks, more resources are extremely unlikely to materialise. It is important, then, to have a system which operates as effectively as possible within resource constraints, rather than one which adapts dysfunctionally to resource limitations by attempting to minimise the relevance of domestic violence. Cultural issues may be addressed by means of training and revision of the Practice Direction, and there are also a number of practical suggestions which may assist in streamlining the process. In addition, in cases in which one or both parties are unrepresented, it may make more sense to proceed directly to a welfare hearing and to consider allegations of domestic violence in that context rather than to hold a split hearing.[41]

Following the report, a number of changes were made to PD12J in a new version issued in April 2014. The following summary of the changes was provided in Sir Stephen Cobb's 2016 report to the President of the Family Division of the High Court (see section 3.4 below):

> The 2014 version saw the following key revisions/amendments:
>
> a. A substantially revised definition of domestic abuse in accordance with the revised cross-government definition;
>
> b. The inclusion of a statement of General Principles as a judicial aid to the application of the Practice Direction;
>
> c. The prescription of clearer expectations in relation to fact-finding hearings;

40 FJC Domestic Abuse Committee, Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm – A Report to the Family Justice Council, January 2013, p5

41 As above, p8.

d. Tighter provisions for the making of interim child arrangement orders.[42]

3.4 Second revision (2017) and accompanying guidance

In November 2016, a report on PD12J by Sir Stephen Cobb for the then President of the Family Division, Sir James Munby, was published. The report stated that Women's Aid regarded the 2014 version of PD12J as "essentially sound" and providing "a solid framework for the family court judiciary". It added, however, that the charity was "particularly concerned, as is Rights of Women, that the Practice Direction is not effectively or consistently implemented by the judges (including the Magistrates) of the Family Court when dealing with child arrangement (contact) cases where domestic abuse is alleged".[43]

As well as Women's Aid's 2016 report, Nineteen Child Homicides – What must change so children are put first in child contact arrangements and the family courts, Sir Stephen cited the recommendations of the All-Party Parliamentary Group (APPG) on Domestic Violence and a 2012 report by the domestic abuse awareness charity, Rights of Women.

A further development following the first redrafting of PD12J were revisions to the Children Act 1989 which, from October 2014, introduced the presumption of shared parenting when a court is considering whether to make, vary or discharge a contested child arrangements order (see box 4 above).[44]

Sir Stephen recommended a further redrafting of PD12J, and his draft amended practice direction was published by Sir James Munby.

Following a consultation, the revised PD12J came into force in October 2017. Its "biggest and most fundamental changes" have been described as follows:

1. The presumption of contact can now (explicitly) be displaced;
2. The practice direction is (still) mandatory - there is stronger language: 'the court is required'… (although the previous wording 'the court should' could be argued in that sense);
3. The court must be satisfied any contact ordered does not expose to the 'other parent' and/or the child to risk of harm, rather than considering the risk just to the child;

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42 Sir Stephen Cobb, Report to the President of the Family Division – Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm, 18 November 2016, p2, para 7; The 2014 version of the Practice Direction is available online via the Wayback Machine website.

43 Sir Stephen Cobb, Report to the President of the Family Division – Review of Practice Direction 12J FPR 2010: Child Arrangement and Contact Orders: Domestic Violence and Harm, p2, para 8.

44 Children Act 1989, section 1(2A) and 1(6)(a). This also applies for other section 8 orders (e.g. specific issue orders and prohibited steps orders) and orders relating to the acquisition of parental responsibility by persons other than a child's mother.

4. The definition of 'domestic abuse' is widened and specifically includes cases of abandonment for the first time (where a spouse is abandoned abroad);
5. There are changes in relation to arrangements at court;
6. There is a presumption against making interim contact orders where there are disputed allegations of domestic abuse;
7. There are mandatory requirements as to what conclusions of the court must be recorded in orders or schedules to orders;
8. The introduction of the 'expert safety and risk assessment';
9. The introduction of the concept of whether the risk of harm is unmanageable or manageable';
10. The requirement on the court to give reasons if (i) it finds domestic abuse proved and makes an order for contact with the perpetrator and (ii) why it takes the view the order made will not expose the child to risk of harm;
11. Where a risk assessment has concluded that a parent poses a risk to the child or to the other parent, supported contact either by a supported contact centre or by a parent or relative is not appropriate.[45]

A circular issued by the President of the Family Division in September 2017 to accompany the updated PD12J stated the following regarding implementation:

> There have been recurring complaints in Parliament and elsewhere of inadequate compliance with PD12J. I am unable to assess to what extent, if at all, such complaints are justified. However, **I urge all judges to familiarise themselves with the new PD12J and to do everything possible to ensure that it is properly complied with on every occasion and without fail by everyone to whom it applies.**
>
> The Judicial College plays a vitally important role in providing appropriate training on the new PD12J to all family judges. As I have said previously, "I would expect the judiciary to receive high quality and up-to-date training in domestic violence and it is the responsibility of the Judicial College to deliver this." The Judicial College has risen to the challenge, as many judges will already have experienced, and I am confident that it will continue to do so.
>
> Domestic abuse in all its many forms, and whether directed at women, at men, or at children, continues, more than forty years after the enactment of the Domestic Violence and Matrimonial Proceedings Act 1976, to be a scourge on our society. Judges and everyone else in the family system need to be alert to the problems and appropriately focused on the available remedies. PD12J plays a vital part.[46]

In response to a parliamentary question in 2017 regarding what the Government was doing to ensure that finding of fact hearings were being undertaken, the Justice Spokesperson in the Lords, Lord Keen of

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45 "The revised Practice Direction 12J: Child Arrangements & Contact Order: Domestic Violence and Harm", Family Law Week, 17 November 2017.

46 Courts and Tribunals Judiciary, President of Family Division circular: Practice Direction PD12J – Domestic Abuse, 14 September 2017, original emphasis.

Elie, stated that the application of PD12J is a matter for the senior judiciary.[47]

Box 5: Home Affairs Committee report on domestic violence (October 2018)

In October 2018, the Home Affairs Committee published a report on domestic violence, which covered the issue of judicial proceedings. The report noted that much of the evidence received on justice issues "described concerns about child contact proceedings in the family courts."[48] It concluded that:

> We heard evidence that there is a lack of consistency in the way in which criminal and family courts treat the seriousness and impact of domestic abuse, with family courts tending to prioritise contact with both parents even when there has been a criminal conviction for violence, or a history of other domestic abuse.
>
> […]
>
> Witnesses described family court proceedings for victims of domestic abuse as traumatising and harrowing. It is unacceptable that navigating the justice system can be as distressing for some victims as the abusive behaviour which they are seeking to escape, and that children may be placed in danger because of a lack of coherence between different parts of the justice system.
>
> The report urged the President of the Family Division to consider the steps needed "We urge the President of the Family Division to consider what further steps are necessary to ensure practice in the family courts fully recognises the paramount importance of the welfare of the child as set out in section 1(1) of the Children Act 1989, and the safeguards to protect children from any harm that might arise through parental contact which are set out in section 1(6) of the Act, as amended by the Children and Families Act 2014." It additionally recommended that the then draft Domestic Abuse Bill should prohibit the cross-examination of a victim by an alleged perpetrator of domestic abuse in the family court [see section 5.3 below].

The Committee also made recommendations relating to better information sharing and training, and on the role of Cafcass.[49]

The Government's response to the Committee's report was published in May 2019. The response stated that the Government was "committed to improving the experience of victims within the family justice system" and outlined measures it had taken to "offer victims better protection within the Courts" (including the introduction of PD3AA and the revised PD12J [see sections 3.4 and 4 above]). It also outlined measures taken in response to issues around the family justice system raised in the 2018 consultation on the Domestic Abuse Bill.[50]

It added that the Government recognised "the importance of introducing new powers to the family court system to prohibit cross-examination of a victim by their abuser" and noted that it had committed to legislate on this in response to the Domestic Abuse Bill consultation (see section 5.2 below for further information).

The response acknowledged issues around information sharing and stated that the Government was "exploring options to better share information across jurisdictions…to ensure there are no safeguarding gaps around either the child or the victim in family proceedings."

The response also provided information on training for family justice professionals around vulnerable court users and for judges in domestic abuse, and on the role of Cafcass (including its Child Impact Assessment Framework).[51]

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47 PQ HL1458 Family Proceedings, 19 September 2017.
48 Home Affairs Committee, Domestic Violence, 2017–19 HC 1015, 22 October 2018, p36, para 108
49 As above, paras 115 and 117–119
50 Home Office and Ministry of Justice, Domestic Abuse Bill consultation, last updated 21 January 2019.
51 Home Affairs Committee, Domestic abuse: Government Response to the Committee's Ninth Report of Session 2017–19i, HC 2172 2017–19, 9 May 2019, pp15–17.

4. Additional rules and directions to protect vulnerable witnesses in the Family Court

In addition to the changes to PD12J that took effect from October 2017, in November 2017 the Family Procedure Rules 2010 were further amended to introduce Part 3A - Vulnerable Persons: Participation in Proceedings and Giving Evidence.[52]

Part 3A makes "special provision about the participation of vulnerable persons in family proceedings and about vulnerable persons giving evidence in such proceedings".[53] In particular:

> The purpose of Part 3A is to set out the court's duties and powers in relation to assisting parties whose ability to participate in family proceedings may be diminished by reason of their vulnerability, and in relation to assisting parties and witnesses in family proceedings where the quality of their evidence is likely to be diminished by reason of their vulnerability.[54]

In addition, Practice Direction 3AA (PD3AA) – Vulnerable Persons: Participation in Proceedings and Giving Evidence – was added separately "which provides guidance to the court on matters of practice and procedure under the new Part 3A".[55]

The addition of Part 3A and PD3AA followed the February 2015 report of the Report of the Vulnerable Witnesses & Children Working Group which was established by the then President of the Family Division, Sir James Munby.[56]

The Government noted at the time of the report's publication that:

> The 2015 report found that the family justice system lagged behind the criminal justice system in its procedures for taking evidence from vulnerable witnesses. It recommended, among other things, a new rule, to be supplemented by a practice direction, to improve support and protections for vulnerable witnesses when giving evidence.[57]

The Ministry of Justice provided the following summary of Part 3A in the explanatory memorandum to the amendment regulations that introduced it:

> The new Part 3A of the 2010 Rules sets out the court's duties to consider whether a party's participation in family proceedings is likely to be diminished by reason of vulnerability, and whether the quality of evidence of a party or witness in such proceedings is likely to be diminished by reason of vulnerability.

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52 The amendment was made through the Family Procedure (Amendment No 3) Rules 2017 (SI 2017/1033).
53 SI 2017/1033 explanatory note.
54 SI 2017/1033 explanatory memorandum, p1, para 2.1.
55 As above, p1, para 2.2.
56 Judiciary of England and Wales, Report of the Vulnerable Witnesses & Children Working Group, February 2015.
57 SI 2017/1033 explanatory memorandum, p2, para 7.1.

If so, the court must consider whether to make "participation directions" for the purpose of assisting such a party or witness, or to give the party or witness the assistance of one or more specified "measures". A participation direction may be either a general case management direction, or a direction that a party or witness should have the assistance of one or more of the measures listed in new rule 3A.8.

The new Part 3A sets out the matters which the court must have particular regard to when deciding whether to make participation directions. These are specified in new rule 3A.7 and include matters such as the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of any other party to the proceedings, and whether the party or witness suffers from mental disorder or has a physical disability.

The measures which the court could direct be put in place are set out in rule 3A.8 and include, for example, measures to prevent a party from seeing another party. The court will determine how best to achieve this. For example, the court could direct measures such as protective screens to prevent a party or witness from seeing another party or witness, participation or giving of evidence from outside the courtroom by video link, and appointment of an intermediary to assist a party or witness with problems of communication or understanding.

The same duties and powers of the court apply in relation to someone who is a protected party, meaning a party who lacks capacity within the meaning of the Mental Capacity Act 2005 to conduct proceedings.

The new Part 3A makes clear that when deciding whether to make a participation direction the court must have regard to the measures available to the court and the cost of any available measures. The new rules do not give the court power to direct that public funding be made available to provide a measure and that they do not enable the court to direct that an officer of the Children and Family Court Advisory and Support Service (known as Cafcass) or of CAFCASS Cymru should perform any new functions.[58]

[58] SI 2017/1033 explanatory memorandum, pp2–3, paras 7.3–7.8

5. Government reform

5.1 The Family Justice Panel

Background

In May 2019, the Government announced that it would establish an expert panel (subsequently named the Family Justice Panel), which would hold a public call for evidence about how the family courts protect children and victims in child contact and other child arrangements cases relating to domestic abuse and other serious offences.[59]

The membership of the Panel was announced in June 2019 and a public consultation was launched the following month.[60] The call for evidence, entitled "Assessing risk of harm to children and parents in private law children cases", ran until 26 August 2019 and stated that:

> The call for evidence will specifically focus on the application of Practice Direction 12J, Practice Direction 3AA, The Family Procedure Rules Part 3A, and s.91(14) orders [barring orders], and will build a more detailed understanding of any harm caused to parents and/or children during or following private law children proceedings. The overarching aim of the call for evidence is to better understand how effectively the family courts respond to allegations of domestic abuse and other serious offences in private law children cases, having regard to both the process and outcomes for the parties and the children.[61]

It also set out the following areas for inquiry (which had changed from the original announcement in May 2019):

- How Practice Direction 12J is being applied in practice, and its outcomes and impact for children and parents, including its interaction with the presumption of parental involvement in s.1(2A) of the Children Act 1989;
- How FPR Part 3A and Practice Direction 3AA are being applied in practice, and their outcomes and impact in cases involving domestic abuse or other serious offences against parties and/or children;
- How s.91(14) of the Children Act 1989 [regarding barring orders] is being applied in practice, and its outcomes and impact in cases involving domestic abuse;
- In each case, the challenges of implementing these provisions and the nature and causes of any inconsistency and inadequacy in their operation;
- The risk of harm to children and non-abusive parents in continuing to have a relationship and contact with a parent who has been domestically abusive (including coercive and controlling behaviour) or who has committed other serious

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59 Ministry of Justice, Spotlight on child protection in family courts, press release, 21 May 2019.

60 Ministry of Justice, Family Justice Panel update, news story, 21 June 2019; Ministry of Justice, Assessing risk of harm to children and parents in private law children cases, last accessed 29 January 2021.

61 Ministry of Justice, Call for Evidence: Assessing risk of harm to children and parents in private law children cases, July 2019, p3

> offences against the other parent or a child such as child abuse, rape, sexual assault or murder.[62]

In October 2019, the Panel published a "Progress Update", which noted that there had been over 1,200 responses to the consultation and that roundtable and focus group sessions had taken place.[63]

Final report

In June 2020, the Family Justice Panel published its final report: Assessing Risk of Harm to Children and Parents in Private Law Children Cases.

The report stated that evidence submitted to the panel demonstrated "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." It added that:

> 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.[64]

The panel found that these issues were underpinned by a number of themes:

- 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.[65]

The report provided further detail on concerns in a number of other areas, including:

- The barriers faced by victims to raising domestic abuse.

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62 As above, p4
63 Ministry of Justice, Assessing risk of harm to children and parents in private law children cases, last updated 6 October 2020.
64 Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report, June 2020, pp3-4.
65 As above, p4. Emphasis in original.

- That "too often the voices of children go unheard or are muted in various ways where domestic abuse was raised."
- That, "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."
- That respondents felt there was "little difference in the orders made between cases that did and did not feature domestic abuse", with the courts "almost always ordered some form of contact, frequently unrestricted, and usually without requiring an alleged abuser to address their behaviour."
- 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."
- That the threshold for barring orders (orders that prevent a person applying for any further orders under the Children Act 1989 without leave of the court) is too high, meaning that they are "ineffective to protect victims from further abuse through repeated applications for child arrangements orders."

The report also stated that the evidence "raised concerns that PD12J is not operating as intended and is being implemented inconsistently." The concerns raised included:

- 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.[66]

Recommendations

The report made a number of recommendations "for next steps to be taken forward by the family justice system." The recommendations included (the full list of recommendations is set out in chapter 11 of the report):

- A Statement of Practice should be promoted by the President of the Family Division of the High Court "to ensure a consistent and ethical approach to cases raising issues of domestic violence and other serious offences." This should be incorporated into the Child Arrangements Programme (PD12B).[67] The report set out a

[66] As above, p6.

[67] The report notes that the Child Arrangements Programme 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". (Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report, June 2020, pp27-28).

number of points that should be included in the Statement of Practice.[68]

- There should be a review of the presumption of parental involvement in section 1 of the Children Act 1989.
- 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 provisions in the Domestic Abuse Bill (see section 5.3 below) concerning special measures in criminal courts for victims of domestic abuse should be extended to family courts.
- The Domestic Abuse Bill should be amended to bar direct cross examination in any family proceedings in which there is evidence of domestic abuse.
- The Domestic Abuse Bill should be amended to reverse the requirement that barring orders can only be made in exceptional circumstances.
- There should be additional investment in a number of areas, including Cafcass and legal aid.
- There should be 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."
- The Ministry of Justice should "commission an independent, systematic, retrospective research study on the implementation of the current [Child Arrangements Programme], PD12J and section 91(14) in cases in which allegations of domestic abuse, child sexual abuse or other serious offences are raised."[69]

Implementation Plan

The Ministry of Justice published an implementation plan alongside the Family Justice Panel's final report.

In the forward to the Plan, the Minister, Alex Chalk, stated that he was "determined to take action to improve the experience of victims of domestic abuse in our family courts" and that the Plan sets out "the first, immediate steps we will take towards doing this." He also emphasised, however, the need for more fundamental reform and stated that the Government planned to trial a new, investigative approach to private family law children cases:

> But change needs to go further than this. Many of the problems identified in the report are long-standing, systemic issues which require more fundamental reform. The adversarial nature of our family justice system is an issue which has been highlighted by many of those with direct experience of the system, as a barrier to meaningful reform, both in the panel's report and in previous external reviews of our family courts. I am therefore pleased to

68 Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report, June 2020, pp173-174.

69 Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report, June 2020, pp3-12.

> announce our commitment in this Implementation Plan to trial a new, investigative approach to private family law children cases, which we plan to implement in our forthcoming Integrated Domestic Abuse Court pilots later this year.[70]

The Implementation Plan's response to the Panel's recommendations included (this list is not exhaustive):

- The Ministry of Justice will **design a statement of practice** in partnership with key stakeholders and will "ensure that this is effectively implemented and drives cultural change across the system as a whole."
- The Government will **review the presumption of parental involvement** under the leadership of the Family Justice Board (comprised of senior leaders from across the Family Justice System and jointly chaired by MoJ and DfE ministers).
- The Government will pilot "**integrated domestic abuse courts (IDAC)** that address criminal and family matters in parallel" (this was a commitment in the 2019 Conservative Party Manifesto[71]). The plan noted that the Covid-19 pandemic "presents particular challenges to the immediate launch" of the pilots and stated that the Government would keep the start date "under review dependent on the duration and impact of Covid-19, but will commence it as soon as it is practical and safe to do so."[72]
- "**A more investigative approach to the family courts**" will be piloted with the learning from the IDAC pilots "used to inform wider reform, led by the Family Justice Board."
- As part of the Domestic Abuse Bill (see section 5.3 below) **the cross-examination of victims by perpetrators of domestic abuse will be prohibited.** (This will also apply when certain other offences have been committed, such as child abuse).
- The provisions in the Domestic Abuse Bill will be amended so that **victims of domestic abuse are automatically eligible for special measures in the family court** (see section 5.3 below).
- The Government agreed that "**further clarification is required to the law on barring orders**" and will "immediately explore whether this aim can best be achieved via an amendment to the Domestic Abuse Bill, through other primary legislation, or through non-legislative means" (see section 5.3 below).
- The Ministry of Justice "**intends to commission a study on the implementation of the current [Child Arrangements Programme], PD12J and s.91(14) in cases in which allegations of harm are raised**."[73]

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70 Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Implementation Plan, June 2020, pp2-3.
71 Get Brexit Done: Unleash Britain's Potential. The Conservative and Unionist Party Manifesto 2019, p19.
72 Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children cases: Implementation Plan, June 2020, pp5-7
73 As above, pp4-17.

In his forward, the Minister stated that "a more detailed delivery plan" would be published later in 2020.[74]

An overview of the Government's plans was also provided in a ministerial statement by Alex Chalk on 25 June 2020.[75]

Progress on implementation

In a written statement on 9 November 2020, the Minister, Alex Chalk, announced the commencement of a review into the presumption of parental involvement in child arrangements, and certain other private law children, proceedings. The review would, he said, "focus both on the courts' application of the presumption, as well as on the impact on children's welfare of the courts' application of these provisions." The Minister added that he anticipated "being able update the House before summer recess with the outcomes of the review."[76]

In response to a parliamentary question on 23 December 2020, the Minister, Alex Chalk, stated the following with regards to the government's progress in implementing the recommendations of the Family Justice Panel's report:

> The report identified a number of long-standing, systemic issues that require fundamental reform. The Family Justice Reform Implementation Group (FJRIG) is overseeing delivery of the reform agenda.
>
> We are making good progress against several of the commitments outlined in our Implementation Plan published alongside the report. We have launched the review into the 'presumption of parental involvement' in private law children cases, and we are developing the 'Independent Domestic Abuse Courts' (IDAC) pilot. We are also implementing changes within the Domestic Abuse Bill, including the prohibition of cross examination of victims by perpetrators or alleged perpetrators and automatic eligibility for special measures in the Family Court.
>
> A more detailed delivery updated will be published in the new year.[77]

In a further parliamentary response on 22 February, the Minister stated that the private law reform pilots, including the Integrated Domestic Abuse Court, which were committed to in the Government's implementation plan, would be launched "later this year."[78]

5.2 Family Justice Board statement

On 10 December 2020, the Family Justice Board published a statement setting out "the priority actions it intends to pursue in response both to immediate pressures within the family justice system, and to bring about longer-term reform."[79]

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74 As above, p3.
75 HCWS313 Final Report of the MoJ Expert Panel on Harm in the Family Courts and Implementation Plan: Written statement, 25 June 2020.
76 HCWS562, 9 November 2020.
77 PQ 130236, 15 December 2020.
78 PQ 153268, 11 February 2021.
79 Courts and Tribunals Judiciary, Family Justice Board statement: Priorities for the family justice system, 10 December 2020.

Regarding longer term reform plans in private law, the statement said that the Family Justice Reform Implementation Group "will continue developing a programme of pilot projects to test a revised Child Arrangements Programme." It added that "work to design this reform programme is underway now, and further information will be cascaded in due course."[80]

Two further documents published alongside the statement presented "more detailed discussion of the priorities pertaining to public family law and private family law matters respectively."[81]

The report by the Private Law Advisory Group stated that "promoting the family court's ability to respond consistently and effectively to domestic abuse and other serious offences" was among a number of the main reform objectives. It added that "reforms to court procedures will be encapsulated in a revised 'Child Arrangements Programme' (PD12B), supported by a 'statement of good practice' for cases involving domestic abuse."[82]

The report set out a plan to develop a number of pilots to test longer-term reform options (a draft table of options was included in an Annex to the report). In terms of a timeline, the report stated that it was hoped pilots would be ready to launch in spring 2021 and will conclude in spring 2022.[83]

5.3 Domestic Abuse Act 2021

The Domestic Abuse Bill 2019-21 was introduced to Parliament on 3 March 2020. It received Royal Assent on 29 April 2021. The Act makes a number of changes related to how the family courts address issues of domestic abuse in private law proceedings relating to children. The relevant sections of the Act have not yet been brought into force.

Further information on the Bill and its passage through Parliament is available in the following Library Briefings:

- CBP8787, Domestic Abuse Bill 2019-20, 23 April 2020.
- CBP8959, Domestic Abuse Bill 2019-21: Progress of the Bill, 10 April 2021.

Children as victims of domestic abuse

During the Bill's Report Stage in the House of Commons, the Government introduced an amendment to explicitly recognise children as victims of domestic abuse if they see, hear or experience the effects of the abuse. The amendment was agreed and became section 3 of the Domestic Abuse Act 2021.[84]

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80 Family Justice Board Statement: Priorities for the family justice system, 10 December 2020.
81 Courts and Tribunals Judiciary, Family Justice Board statement: Priorities for the family justice system, 10 December 2020.
82 Private Law Advisory Group, Final Report, 9 December 2020, pp5-6.
83 As above, pp13-15.
84 Domestic Abuse Act 2021, section 3.

Further information is available on pages 11-13 of the Library Briefing on the progress of the Domestic Abuse Bill.

Cross-examination of victims

Unlike the criminal courts,[85] there is currently no specific power to prevent perpetrators of abuse (alleged or otherwise) from cross-examining their victims in person during family proceedings.

Legislation to prevent such cross-examination has been tabled by the Government previously: in the Prisons and Courts Bill (2017) and the Domestic Abuse Bill (2019).[86] However, both Bills fell before they had completed their Parliamentary stages because Parliament was prorogued (for the 2017 and 2019 general elections respectively).

The Domestic Abuse Act 2021 provides for the introduction of a new automatic ban on perpetrators of abuse cross-examining their victims in the family courts (and vice versa), in certain circumstances. The courts will have discretion to prohibit cross-examination in other circumstances.[87]

For further background information see section 10 of the Library's briefing on the Bill as introduced and pages 14-15 of the Library Briefing on the progress of the Bill in the Commons.

Special measures

As originally introduced, the Domestic Abuse Bill 2019-21 made provision to extend the availability of "special measures" for intimidated witnesses in criminal cases to complainants of any offence involving allegations of domestic abuse. Special measures are provisions to help vulnerable and intimidated witnesses give their best evidence in court and can take the form of separate waiting rooms, entrances and screens.

As discussed in section 5.1 above, the Family Justice Panel recommended that the provisions in the Bill concerning special measures should be extended to family courts, and the Government accepted this recommendation. An amendment to this effect was introduced and accepted during the Commons Report Stage on the Bill and it became section 63 of the Act.[88]

For further information see section 9 of the Library's briefing on the Bill as introduced and pages 13-14 of the Library Briefing on the progress of the Bill in the Commons.

Use of 'barring orders'

Certain categories of people, such as a child's parents, are able to apply for a child arrangements order (or other order under the Children Act 1989) without first obtaining the leave of the court – i.e. they can apply for an order as of right. However, section 91(14) of the Children Act

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85 Since 2000, in the criminal courts, defendants have been prohibited from cross-examining victims in sexual offences cases.

86 For more information on the proposed legislation, see section 12 of the Library briefing paper Domestic Abuse Bill 2017-19.

87 Domestic Abuse Act 2021, section 65.

88 HC Deb 6 July 2020, cc683-770; Domestic Abuse Act 2021, section 63.

1989 allows a court to impose a leave condition on somebody who would not normally be subject to such a condition:

> On disposing of any application for an order under this Act [such as a child arrangements order], 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.[89]

On 1 March 2021 the Government announced that it would introduce a number of amendments to the Domestic Abuse Bill during its Report Stage in the House of Lords. This included an amendment to "clarify the use of 'barring orders' in the family courts to prevent abusive ex-partners from repeatedly dragging their victims back to court."[90] The amendment was based on recommendations made in the report by the Family Justice Panel's Risk of Harm report (see section 5.1 above).

Introducing the amendment, Lord Wolfson of Tredegar QC said:

> As it is currently formulated, Section 91(14) of the Children Act 1989 does not include any detail as to the circumstances in which such barring orders should be used. Courts have therefore elaborated the principles for when such barring orders may, and should, be made. Last year we heard compelling evidence from the expert panel in its report Assessing Risk of Harm to Children and Parents in Private Law Children Cases that, while they can be an effective measure, Section 91(14) barring orders are not being used sufficiently to prevent perpetrators continuing their abuse through the use of court applications under the Children Act 1989.[91]

He added that the Government was "confident that the amendment will mean that barring orders are used more often by courts to protect victims of domestic abuse where further applications put them at risk of harm".[92]

The amendment was agreed and became section 67 of the Domestic Abuse Act. Section 67 inserts a new section 91A into the Children Act 1989 which, among other things, clarifies that the circumstances in which a barring order may be made include where the court is satisfied that the application for an order under the Act (e.g. a child arrangements order) would put the child concerned or another individual at risk of harm (harm referring to "ill-treatment or the impairment of physical or mental health."[93]

89 Children Act 1989, section 91(14).
90 Gov.uk, New laws to protect victims added to Domestic Abuse Bill, 1 March 2021.
91 HL Deb 10 March 2021 c1689-1690.
92 HL Deb 10 March 2021 c1691.
93 Domestic Abuse Act 2021, section 67.

6. Review by the judiciary

6.1 Private Law Working Group

In autumn 2018, the President of the Family Division of the High Court, Sir Andrew McFarlane, invited Mr Justice Cobb to lead a cross-professional Working Group to look at "the approach taken to private disputes between parents with respect to the arrangements for their children's future welfare following a separation."[94]

Interim report and consultation (June 2019)

The Interim Report of the Private Law Working Group was published in June 2019: A Review of the Child Arrangements Programme. The report stated that, while a "review of the operation of PD12J is outwith the specific remit of the Private Law Working Group's terms of reference", the Working Group considered it "timely to emphasise that the integrated provisions of PD12J "forcibly remind the court of the seriousness with which it needs to consider domestic abuse in its widest sense wherever it is alleged"". It was also opportune, the report added, "to highlight the fact that the Family Court is not obliged to conduct fact-finding hearings in relation to all allegations of domestic abuse for instance, in some cases domestic abuse is established by admission(s), or conviction(s)."

The report noted the establishment of the Family Justice Panel (see section 5.1 above) and stated that any changes in practice recommended by the review "will be incorporated into the Private Law Working Group's further work in this area following consultation."[95]

The review made 30 recommendations (an executive summary of the recommendations is provided in Annex 3 of the report).[96] A consultation on the report was held between 3 July and 30 September 2019.[97]

Second report (April 2020)

In April 2020, the Private Law Working Group published its second report, the purpose of which was described as being "to draw together the key themes that were highlighted during consultation and to describe how the Group's thoughts have developed as a result during the past 6 months."[98]

The report also noted, however, that it was "necessarily a further interim report, while we await the publication of the report of the

94 Courts and Tribunals Judiciary, Message from the President of the Family Division: Private Law Working Group Report, 2 April 2020.
95 Report to the President of the Family Division Private Law Working Group, A Review of the Child Arrangements Programme [PD12B FPR 2010], June 2019, pp42 and 43, paras 90 and 91
96 As above, pp65-8.
97 Courts and Tribunals Judiciary, Closing soon: Consultation on Children Cases in the Family Court – Interim Proposals for Reform, 23 September 2019.
98 Courts and Tribunals Judiciary, Message from the President of the Family Division: Private Law Working Group Report, 2 April 2020.

[Family Justice Panel]" (see section 5.1 above).[99] This was also a point emphasised by Sir Andrew McFarlane when launching the report:

> Alongside the PrLWG's work, the Ministry of Justice has established a panel to consider the ability of the Family Court to engage with issues of domestic abuse and other serious offences when they arise. The work of this Panel is of importance. The PrLWG wish to take full account of the MOJ Domestic Abuse Panel's recommendations and the report published today should not, therefore, be seen as in any way 'final'. It is, rather, a description of work in progress and will, in time, be followed by a third and probably further reports.[100]

The report set out the Working Group's "increasingly firm belief…that the time has come now to seize the initiative to plan for fundamental, long-term and sustained system change in the way our 'private law' family disputes are resolved." This need for change was driven, the report said, by a number of factors, including "the perceived failings of the family court to manage some domestic abuse cases appropriately, calling into question the outcomes of such cases."[101]

The report accepted "the importance and validity" of a number of points raised by consultees regarding domestic abuse and stated that they warranted "further close attention when designing reformed systems." It added that the Private Law Working Group would "properly take account of the [Family Justice Panel], which is studying this issue in greater depth, and its recommendations."

The Working Group noted that consultees were "on the whole supportive of PD12J, though less confident about its application." However, the report stated that the Working Group considered "it essential to await the conclusions and recommendations of [Family Justice Panel] before committing itself to a view…on any revisions to procedure which are affected by PD12J."[102]

Government position

On 17 November 2020, the Minister Alex Chalk responded to a parliamentary question regarding the Working Group's second report:

> **Fiona Bruce**: To ask the Secretary of State for Justice, what assessment he has made of the implications for his policies of the second report of the Private Law Working Group entitled, The Time for Change, The Need for Change, The Case for Change, published in March 2020.
>
> **Alex Chalk**: The work of the Private Law Working Group, set up by the President of the Family Division, has been invaluable in helping to inform our programme of reform currently underway in the private family law system.

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99 Private Law Working Group, The Time for Change. The Need for Change. The Case for Change, March 2020, p4. The Family Justice Panel is referred to as the Panel into 'Harm in Private Law Cases' in the report.

100 Courts and Tribunals Judiciary, Message from the President of the Family Division: Private Law Working Group Report, 2 April 2020.

101 Private Law Working Group, The Time for Change. The Need for Change. The Case for Change, March 2020, pp3-4.

102 Private Law Working Group, The Time for Change. The Need for Change. The Case for Change, March 2020, pp17-18.

> The report features a number of recommendations which we are working to develop alongside our colleagues in the judiciary and other representatives from the family justice system through the Family Justice Board.[103]

Report of the Family Solutions Group (November 2020)

In November 2020, the Family Solution Group, a subgroup of the Private Law Working Group, published a report: "What about me?": Reframing Support for Families following Parental Separation.

The report highlighted evidence in the report of the Family Justice Panel's report (see section 5.1 above) of "mothers who were the victims of abuse feeling required or directed to engage in conciliation or mediation despite the risks to them physically and psychologically and the likely furtherance of unequal power relationships."

It endorsed the recommendation of the Family Justice Panel that "at the first hearing, since allegations of domestic abuse are yet to be 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.""[104]

The report recommended triaging the family circumstances and needs at an early Information and Assessment Meeting (IAM) as soon as possible after separation. It set out two possible pathways:

- The safety pathway - those needing safety to be immediately signposted to appropriate legal and other support.
- The cooperative parenting pathway – parents to be supported in understanding the long-term needs of the child and offered options for resolving issues with the other parent.

The report stated that the correct pathway must be identified at the outset using safe screening methods. It added that in cases of domestic abuse "the language of cooperative parenting is inappropriate and safety is the overriding factor."[105]

Annex 4 to the report set out recommendations for managing safe and reliable screening for domestic abuse. The recommendations included:

- All mediators "should have specific training in safe screening for domestic abuse, with ongoing annual CPD requirements to ensure they remain up to date."
- Mediators must "understand the importance of assessing mediation as unsuitable in certain cases, even if the client might seem willing, or even keen, to engage." This should be acknowledged as a MIAM standard.

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103 PQ114830, 12 November 2020.
104 Family Solutions Group, "What about me?": Reframing Support for Families following Parental Separation, November 2020, p58.
105 Family Solutions Group, "What about me?": Reframing Support for Families following Parental Separation, November 2020, p9.

- A mediator's Statement of Practice should be adopted "to affirm standards and safe practice when working with families for whom abuse is a factor."[106]

7. Other sources of information and advice

For families who are experiencing or have survived domestic abuse, the following organisations are among those able to help:

- Women's Aid – 0808 2000 247
- The Men's Advice Line (for male domestic abuse survivors) – 0808 801 0327
- The Mix (free information and support for under 25s in the UK) – 0808 808 4994
- Childline (provide free help to anyone under 19 years of age) – 0800 1111
- Galop (National LGBT+ Domestic Abuse Helpline) – 0800 999 5428
- Rights of Women – 020 7251 6577 or (for women working or living in London) 020 7608 1137

The NSPCC provides a list of organisations who can help with private law matters, such as contact and residence, on their webpage Separation and divorce.

The Family Mediation Council can provide information about family mediation and how to find the nearest mediation service (including those providing a MIAM).

A guide about the family courts for separating parents and children and is available from Cafcass.

For advice about Contact Centres, which are neutral places for contact to take place between children of separated families and family members, contact the National Association of Child Contact Centres.

The Library note Legal help: where to go and how to pay sets out information about where to seek legal help or advice.

Organisations that may be able to help with queries related to contact and residence include:

- AdviceNow (run by the charity Law for Life: the Foundation for Public Legal Education) – contact form;
- Child Law Advice (part of the charity Coram Children's Legal Centre) – 0300 330 5480;
- Citizens Advice – 03444 111 444;

106 As above, pp113-117.

- Families Need Fathers (a single parents' charity not just for fathers) – 0300 0300 363;
- Family Law Panel (offers initial information free of charge and reduced fee scheme for low income individuals) – links to find local solicitors, barristers and mediators.
- Family Lives (a charity providing advice to families) – 0808 800 2222;
- Family Rights Group (a charity that works with parents whose children are in need, at risk or are in the care system and with members of the wider family who are raising children unable to remain at home) – 0808 801 0366;
- Gingerbread (a single parents' charity) – 0808 802 0925;
- GOV.UK, Making child arrangements if you divorce or separate;
- Grandparents Plus (a grandparents' charity) – 0300 123 7015;
- Resolution (a member organisation for professional who believe "in a constructive, non-confrontational approach to family law problems") - online directory.[107]

The NSPCC also provides a list of organisations who can help with private law matters, such as parental responsibility, on their webpage Separation and divorce.

In terms of the legislation and related guidance, the following is relevant:

- Children Act 1989 as amended;
- Children Act 1989: court orders, statutory guidance, April 2014, Department for Education (in particular chapter 1);
- Family Procedure Rules 2010, Ministry of Justice.

[107] Organisations include those listed on the Advice Now website's "Help Directory" under the heading "Family Problems".

Other Library briefings on private child law and related topics

- Children: parental responsibility – how it's gained and lost, and restrictions (England and Wales)
- Children: child arrangements orders – when agreement cannot be reached on contact and residence (Great Britain)
- Children: child arrangements orders – grandparents and court orders for contact with grandchildren (Great Britain)
- Children: parental alienation and the role of Cafcass (England)
- Confidentiality and openness in the family courts: current rules and history of their reform (England and Wales)
- International child abduction – preventing abduction and recovering children (England and Wales)

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