



## BRIEFING PAPER

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

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## Summary

This House of Commons Library briefing paper considers the safeguards available to courts when issues of domestic abuse arise in connection with family proceedings.

Practice Direction 12J (PD12J), of the Family Procedure Rules 2010 published by the Ministry of Justice, sets 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”.

Where allegations of domestic abuse, then a court can 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

PD12J is currently in its third iteration and in 2017, new Part 3A and the accompanying new Practice Direction 3AA were introduced which make “special provision about the participation of vulnerable persons in family proceedings and about vulnerable persons giving evidence in such proceedings”.

The Home Affairs Select Committee considered how the courts deal with domestic abuse during family proceedings in their October 2018 report, and made a number of recommendations. The current arrangements have also been considered in a report by Women’s Aid and Queen Mary University School of Law, as well as during a parliamentary debate.

It is possible there will be further reform in this area: the Conservative Party stated in their 2019 manifesto included reference to the issue domestic abuse and the Conservative Government said in March 2019 that it was seeking “significant reforms” to family law in general. The Ministry of Justice has established a Family Justice Panel to consider how the family courts protect children and victims in child arrangement cases where domestic abuse and other serious offences arise – the Panel is expected to produce a full report outlining their findings and recommended next steps in Spring 2020. The judiciary is also considering the matter: a Private Law Working Group headed by Mr Justice Cobb has said it would consider any changes in practice recommended by the Family Justice Panel.

The issue of cross-examination by perpetrators domestic abuse of their victims is a separate matter, but Box 4 provides a brief discussion of this topic.

This note applies to England and Wales only.

# 1. Domestic violence, and contact and residence

When separated parents or others cannot agree contact and residence arrangements for a child, then the applicable family court can make an order to this effect – a “child arrangements order”.

When considering whether to make, vary or discharge such an order (where one party opposes it), the relevant legislation states that court’s “paramount consideration” is the welfare of the child. In considering this matter, the court should have particular regard to “any harm which [the child] has suffered or is at risk of suffering” among other prescribed factors.<sup>1</sup>

## Box 1: Child arrangement orders

A child arrangements order is a court order that specifies matters such as with whom a child is to live and when. It may alternatively, or also, set out with whom a child is to have contact with and when, and what form that contact should take. A judge decides such matters, although the child’s wishes and feelings are sought (subject to their age and understanding) as well as those of their parents and others, and expert evidence may also be sought. If a child arrangement order is not complied with, then there are sanctions that can be taken if there was no “reasonable excuse” not to comply with it. For more information on child arrangement orders, see the Library briefing paper [Children: when agreement cannot be reached on contact and residence \(England\)](#).

To assist the courts, the Family Procedure Rules 2010 (FPR 2010) and the supporting practice directions “set out a comprehensive framework for the family jurisdiction” which “contribute to a common understanding and approach across all three tiers of family court”.<sup>2</sup>

In particular, Part 12 of FPR 2010 concerns court proceedings relating to children (subject to certain exceptions<sup>3</sup>), including child arrangement orders, and is supplemented by several practice directions (PD), one of which is PD12J, entitled “Child Arrangements and Contact Orders: Domestic Abuse and Harm”.<sup>4</sup>

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. 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.

<sup>1</sup> Section 1 of the Children Act 1989 as amended.

<sup>2</sup> Ministry of Justice, [Family Procedure Rules – foreword by Sir Nicholas Wall, \[then\] President of the Family Division](#), updated 30 January 2017

<sup>3</sup> Part 12 does not apply to parental order proceedings, and proceedings for applications in adoption, placement for adoption and relating proceedings.

<sup>4</sup> 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.

and provides further explanation of the terms used in the definition, such as “controlling behaviour”.<sup>5</sup>

In a joint report published in July 2017, the Government’s Children and Family Court Advisory and Support Service (Cafcass) and the domestic abuse charity Women’s Aid published a report which 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.<sup>6</sup>

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 substantial challenge for courts in determining which cases can safely proceed to contact with the child”.<sup>7</sup>

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<sup>5</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, para 3

<sup>6</sup> Cafcass, [Cafcass and Women’s Aid collaborate on domestic abuse research](#), 25 July 2017

<sup>7</sup> 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. An introduction to Practice Direction 12J

### 2.1 The consideration of domestic abuse

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”, and it adds that:

The purpose of this Practice Direction 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.<sup>8</sup>

#### **Box 2: Domestic abuse in the context of PD12J**

PD12J states that domestic abuse “is harmful to children, and/or puts children at risk of harm, whether they are subjected to domestic abuse, or witness one of their parents being violent or abusive to the other parent, or live in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour)”. The consequences of such abuse include that “children may suffer direct physical, psychological and/or emotional harm from living with domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents”.

In terms of defining what constitutes domestic abuse for the purposes of the FPR 2010, PD12J states that it “includes 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 can also include “culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment”.<sup>9</sup>

As the legal text Children Law and Practice notes, “judges must follow Practice Direction 12J – Child Arrangements and Contact Order: Domestic Violence and Harm and, in particular, examine the factors at paragraphs 36 and 37”.<sup>10</sup>

The importance of considering whether domestic abuse is a factor is highlighted by PD12J which states that a court must be alert to its possibility throughout a case’s hearing: “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”.<sup>11</sup>

<sup>8</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, paras 1 and 2

<sup>9</sup> As above, paras 3 and 4

<sup>10</sup> Hershman and McFarlane, Children Law and Practice, December 2019, para B331 (based on case law from *Re W (Children: Domestic Violence)* [2012] EWCA Civ 528, [2014] 1 FLR 260; and *Re A (Supervised Contact Order: Assessment of Impact of Domestic Violence)* [2015] EWCA Civ 486, [2015] 3 FCR 185, [2016] 1 FLR 689)

<sup>11</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, para 5

## 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.

The first is a "Section 7" welfare report – under the legislative provisions, a court can ask either a Cafcass officer or a local authority officer to prepare a welfare report. 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".

PD12J states that:

In any case where a risk of harm to a child resulting from domestic abuse is raised as an issue, the court should consider directing that a report on the question of contact, or any other matters relating to the welfare of the child, be prepared under section 7 of the Children Act 1989 by an Officer of Cafcass or a Welsh family proceedings officer (or local authority officer if appropriate), unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests.

[...]

Any request for a section 7 report should set out clearly the matters the court considers need to be addressed.<sup>12</sup>

Alternatively, a Cafcass officer may of their own initiative make a risk assessment of a child if they deem a child to be at risk of harm.<sup>13</sup> This continuing duty<sup>14</sup> arises 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.<sup>15</sup>

Where the officer deems the child to be of risk, they must "make a risk assessment in relation to the child, and provide the risk assessment to the court". The risk assessment, which is "an assessment of the risk of that harm being suffered by the child", 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 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

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<sup>12</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, paras 21 and 23

<sup>13</sup> Section 16A of the Children Act 1989 as amended.

<sup>14</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, para 13

<sup>15</sup> Or other order under Part II of the Children Act 1989 as amended.

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court, the officer should make clear the factor or factors that triggered the decision to carry out the assessment.<sup>16</sup>

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

### 2.3 Fact-finding hearings

Where allegations of domestic abuse, then a court can 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.<sup>17</sup>

As 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”. While it “dictates that the court must decide as soon as possible whether fact-finding is necessary, but does not dictate that there must be a fact-finding hearing in every case”.<sup>18</sup>

The fact finding hearing itself (or other hearing) “can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved”, but all the time “while ensuring that the allegations are properly put and responded to”.<sup>19</sup>

The outcome of a fact finding hearing should include, “wherever practicable”, the court making “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”. This must be recorded in writing by the court. In addition, the court must consider whether it is necessary to give directions for a section 7 report, even if such directions have previously been made.<sup>20</sup>

During family proceedings, it remains possible for someone who has, or is alleged to have, committed abuse to cross-examine their victim. The

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<sup>16</sup> 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

<sup>17</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, para 17

<sup>18</sup> Hershman and McFarlane, Children Law and Practice, December 2019, para B332A

<sup>19</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, para 28

<sup>20</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, para 31

Government has committed to banning this practice – see box 4 for more information.

**Box 3: The tension between 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 the child’s welfare is the court’s “paramount consideration”. Since 2014, amendments to the Children Act 1989 have meant that courts should presume that the involvement of both parents in the life of the child concerned “will further the child’s welfare”. Firstly, this does not trump the paramount consideration of the child’s welfare. Secondly, the legislation states that the presumption of involvement does not apply if it puts the child at risk of suffering harm. As PD12J notes, “the court must in every case consider carefully whether the statutory presumption applies [of parental involvement], 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”.<sup>21</sup>

## 2.4 Child arrangement order decisions where domestic violence is an issue

The legal text Children Law and Practice observes 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 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”.<sup>22</sup>

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”.<sup>23</sup>

In terms of the “factors to be taken into account when determining whether to make child arrangements orders in all 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

<sup>21</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, para 7

<sup>22</sup> Hershman and McFarlane, Children Law and Practice, December 2019, para B333 (based on case law from Re K (Contact) [2016] EWCA Civ 99, [2016] 2 FCR 389, [2017] 1 FLR 530; Q v Q (Contact: Undertakings) (No 3) [2016] EWFC 5, [2017] 1 FLR 438; Re H (Contact: Domestic Violence) [1998] 3 FCR 385, [1998] 2 FLR 42; and Re A (Contact: Domestic Violence) [1999] 1 FCR 729, [1998] 2 FLR 171)

<sup>23</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, para 5

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the individual matters in the welfare checklist 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;
- 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.<sup>24</sup>

Where domestic abuse has occurred but a child arrangements order for direct contact is nevertheless made, PD12J “the court should consider what, if any, directions or conditions are required to enable the order to be carried into effect” including (but not limited to) whether contact should be supervised, the requirement to comply with certain conditions, and whether to time-limit the decision to allow contact.

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”.<sup>25</sup> Indirect contact includes, for example, sending photographs and progress reports to the other parent, and accepting delivery of cards, letters or presents for the child and reads or shows any such communication to the child, and delivers any present to him.<sup>26</sup>

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<sup>24</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, paras 35–37

<sup>25</sup> Ministry of Justice, [Family Procedure Rules 2010: Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm](#), updated 8 December 2017, paras 38–39

<sup>26</sup> Hershman and McFarlane, *Children Law and Practice*, December 2019, para B328

## 3. A history of PD12J – its introduction and revisions

### 3.1 Rationale for its introduction

The Children Act Sub-Committee of the Advisory Board on Family Law (CASC) issued a report in 2000 which 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”.

In their January 2013 report to the Family Justice Council, Professor Rosemary Hunter and Adrienne Barnett wrote that 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. The Court of Appeal endorsed this particular aspect of the guidelines in the 2001 leading case of *Re L*.<sup>27</sup>

However, fears were subsequently raised that the effect of the good practice guidelines was limited. Hunter and Barnett noted that:

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.<sup>28</sup>

The authors also noted that a separate empirical study of court files in contact cases had 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”.<sup>29, 30</sup>

In addition, the charity Women’s Aid published an influential report in 2004 entitled “Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection”,<sup>31</sup> and in response Nicolas Wall,

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<sup>27</sup> *Re L (A Child) (Contact: Domestic Violence)* [2001] Fam 260

<sup>28</sup> Citing Family Justice Council, Report to the President of the Family Division on the Approach to be Adopted by the Court When Asked to Make a Contact Order by Consent, Where Domestic Violence has been an Issue in the Case, January 2007

<sup>29</sup> Citing A. Perry and B. Rainey, Supervised, Supported and Indirect Contact Orders: Research Findings, 2007, *International Journal of Law, Policy and the Family* 21-47

<sup>30</sup> 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

<sup>31</sup> Women’s Aid, [Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection](#), 2004

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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.<sup>32</sup>

It was subsequently argued that "PD12J was published in its original form in 2008 in response to the first report of Women's Aid into 'Twenty-Nine Child Homicides'".<sup>33</sup>

In their report, Hunter and Barnett noted that the Family Justice Council (FJC) had "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'", with steps including that courts should "ensure that safety was the paramount consideration" and that a "risk assessment" should be undertaken. It also "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".<sup>34</sup>

The Practice Direction 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, told the House that said 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".<sup>35</sup>

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".<sup>36</sup>

### 3.2 First revision (2014)

Professor Rosemary Hunter and Adrienne Barnett's January 2013 report to the Family Justice Council 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 considered: "whether the

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<sup>32</sup> 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

<sup>33</sup> 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

<sup>34</sup> 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

<sup>35</sup> [HC Deb 16 July 2008 c459W](#)

<sup>36</sup> Sir Mark Potter, [Practice Direction: Residence and Contact Orders: Domestic Violence and Harm](#), 14 January 2009

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".<sup>37</sup>

In summary, the authors found that the survey results "suggest that the Domestic Violence Practice Direction is 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.<sup>38</sup>

It was noted that, following the report, a number of changes were made to PD12J in a new version issued in April 2014:<sup>39</sup>

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;
- d. Tighter provisions for the making of interim child arrangement orders.<sup>40</sup>

### 3.3 Second revision (2017) and accompanying guidance

Sir Stephen Cobb, who compiled a report to the then President of the Family Division, Sir James Munby, on PD12J in November 2016 noted that Women's Aid regarded the 2014 version of PD12J as "essentially sound" and providing "a solid framework for the family court judiciary", but said that the charity was "particularly concerned, as is

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<sup>37</sup> 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

<sup>38</sup> 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, p8

<sup>39</sup> The 2014 version is available online [via the Wayback Machine website](#).

<sup>40</sup> 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

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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”.<sup>41</sup>

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 also 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 since the first redrafting of PD12J were the revisions to the Children Act 1989 which, from October 2014, introduced a presumption of shared parenting (although specifically not an even split of time between parents, and not necessarily direct contact) when a court considered a *contested* section 8 order (e.g. a child arrangements order), a special guardianship order or a care or supervision order, although the changes to the Act included safeguards in domestic abuse cases and did not change the requirement that the welfare of the child remained the court’s “paramount consideration” (see Box 3).

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

Following the 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;
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';

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<sup>41</sup> [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]

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.<sup>42</sup>

Application of the PD12J is a matter for the senior judiciary.<sup>43</sup> The circular issued by the President of the Family Division: Practice Direction PD12J – Domestic Abuse on 14 September 2017, to accompany the latest update to PD12J, addresses the issue of 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.<sup>44</sup>

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<sup>42</sup> [“The revised Practice Direction 12J: Child Arrangements & Contact Order: Domestic Violence and Harm”](#), Family Law Week, 17 November 2017]

<sup>43</sup> [PO HL1458 Family Proceedings, 19 September 2017](#)

<sup>44</sup> Courts and Tribunals Judiciary, [President of Family Division circular: Practice Direction PD12J – Domestic Abuse](#), 14 September 2017, original emphasis

## 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.<sup>45</sup>

Part 3A is entitled “Vulnerable Persons: Participation in Proceedings and Giving Evidence” and makes “special provision about the participation of vulnerable persons in family proceedings and about vulnerable persons giving evidence in such proceedings”.<sup>46</sup> 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.<sup>47</sup>

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”.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup>

In terms of the effect of the introduction of Part 3A, the Ministry of Justice provided the following commentary:

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.

If so, the court must consider whether to make “participation directions” for the purpose of assisting such a party or witness, or

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<sup>45</sup> The amendment was made through the [Family Procedure \(Amendment No 3\) Rules 2017](#) (SI 2017/1033)

<sup>46</sup> [SI 2017/1033 explanatory note](#)

<sup>47</sup> [SI 2017/1033 explanatory memorandum](#), p1, para 2.1

<sup>48</sup> As above, p1, para 2.2

<sup>49</sup> Judiciary of England and Wales, [Report of the Vulnerable Witnesses & Children Working Group](#), February 2015

<sup>50</sup> [SI 2017/1033 explanatory memorandum](#), p2, para 7.1

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.<sup>51</sup>

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<sup>51</sup> [SI 2017/1033 explanatory memorandum](#), pp2–3, paras 7.3–7.8

## 5. Commentary on the current version of PD12J in practice

### 5.1 Home Affairs Select Committee report and Government response

#### Home Affairs Select Committee's report

In October 2018 the Home Affairs Select Committee recently concluded its inquiry on domestic violence and published a report on the subject which covered the issue of judicial proceedings.

The Committee said that “much of the evidence we received on justice issues described concerns about child contact proceedings in the family courts ... While we have not published all the details of these powerful testimonies, they have affected our understanding and impacted upon our consideration of the issues”.<sup>52</sup>

The Committee 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.

and that:

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 Committee made the following recommendations in terms of the paramount consideration of the child's welfare and cross-examination in the Family Court by victims of domestic violence by their alleged perpetrator:

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.

[...]

The [draft domestic abuse bill] bill must prohibit the cross-examination of a victim by an alleged perpetrator of domestic abuse in the family court. [see Box 4 for more information]

The Committee also made recommendations on information sharing and the role of Cafcass:

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<sup>52</sup> Home Affairs Committee, [Domestic Violence](#), 2017–19 HC 1015, 22 October 2018, p36, para 108

Improvements would include better sharing of information, and training. We recommend that all judges, magistrates and professionals involved in child contact cases in the family court receive specialist training on domestic abuse, coercive control and on the provisions of Practice Direction 12J.

We have particular concerns about the impact on children of court proceedings, and the lack of co-ordinated support for them. There is a need for more specialist children's workers who are trained to recognise the impact of domestic abuse on children, and to ensure that the relevant statutory organisations respond to their needs. We recommend that the new Commissioner should have, as a priority in the first year of office, to review the impact upon children of the interaction between the family courts, children's services, CAFCASS and the police, with particular reference to contact arrangements in domestic violence cases.<sup>53</sup>

## Government response

In May 2019, the Select Committee published the Government response to its Domestic Violence report.

In regard to the Committee's recommendations on the paramount consideration of the child's welfare and cross-examination in the Family Court by victims of domestic violence by their alleged perpetrator, the Government's response included the following:

- "We recognise that family court proceedings can be incredibly difficult for victims, and that in some cases victims have found the process re-traumatising"
- "We are committed to improving the experience of victims within the family justice system, and over the past year we have introduced several new measures to offer victims better protection within the courts", including:
  - "working with the President of the Family Division and the Family Procedure Rule Committee to bring about the introduction of new court rules and an accompanying Practice Direction 3AA which aims to improve in-court protections";
  - "for vulnerable parties and witnesses, a revised Practice Direction 12J which sets out the procedure for judges to follow in child arrangements and contact order cases involving domestic abuse, and improving the guidance for family judges on vulnerable users of the court system";
  - "In January 2018, we also made changes to legislation that aimed to make it easier for victims of domestic abuse to obtain and provide the evidence required to access legal aid, and to reduce the risk of victims not being able to obtain the required evidence. We introduced new forms of evidence, expanded the scope of existing evidence and removed the time limit from all forms of evidence for domestic abuse and child abuse".
- "We are determined to transform the response to domestic abuse in the family justice system, and in response to the issues raised

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<sup>53</sup> Home Affairs Committee, [Domestic Violence](#), 2017–19 HC 1015, 22 October 2018, p38, paras 115 and 117–119

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we have developed a package of measures in our consultation response”.

- “We have committed to allocating £900k funding to organisations based in a number of family courts”;
- “We have also asked all family courts to draw up local protocols setting out their operational procedures for dealing with vulnerable court users, and we are committed to ensuring that court staff are aware of and are implementing these procedures”;
- “We also recognise the importance of introducing new powers to the family court system to prohibit cross-examination of a victim by their abuser. The consultation document reiterated our commitment to legislate on this, and we have included these measures in the draft Domestic Abuse Bill”.<sup>54</sup>

On the Committee’s recommendations on information sharing and the role of Cafcass, the Government provided the following response:

- “we are exploring options to better share information across jurisdictions to prevent this from happening and to ensure there are no safeguarding gaps around either the child or the victim in family proceedings”;
- “We are committed to ensuring all family justice professionals receive the training they need. Training was rolled out to Her Majesty’s Courts and Tribunals (HMCTS) staff from the end of November 2017 around vulnerable court users, including victims of domestic abuse. We are exploring with HMCTS the possibility of extending this training to security guards and volunteers who support vulnerable parties to ensure it reaches all professionals working within the family justice system”;
- “Responsibility for training of the judiciary and magistrates who sit in the civil, family and criminal courts sits with the Lord Chief Justice. There has been considerable training for judges in domestic abuse over a long and sustained period, particularly for the criminal and family jurisdictions. Issues of domestic abuse are addressed on an ongoing basis as part of the Judicial College’s regular training”.
- “All Cafcass practitioners are social workers with at least three years’ post qualifying experience, and all social work staff joining Cafcass receive specialist training on identifying the impact of domestic abuse on children. Cafcass has a comprehensive range of tools for identifying domestic abuse, assessing its impact, and making recommendations to the court about programmes to address perpetrator behaviour and the implications for child arrangements. The tools, guidance and programmes used by Cafcass have been developed in collaboration with a range of organisations with specialist knowledge of domestic abuse”;
- “All Cafcass practitioners are trained in the use of all these resources, and research on domestic abuse and its effects on children has been in the top 10 most commonly requested topics

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<sup>54</sup> Home Affairs Committee, [Domestic abuse: Government Response to the Committee’s Ninth Report of Session 2017–19](#), HC 2172 2017–19, 9 May 2019, p15

from the Cafcass Library since 2015. All these resources have been brought together in the domestic abuse practice pathway in Cafcass' new Child Impact Assessment Framework (CIAF)";<sup>55</sup>

- "The Domestic Abuse Commissioner will play a key role representing the interests of children and will be required by law to consider the impact of domestic abuse on them".<sup>56</sup>

## 5.2 Research by Queen Mary School of Law and Women's Aid

Research undertaken by the Queen Mary School of Law and the domestic abuse awareness charity Women's Aid into family courts (published May 2018) concluded that:

Our findings highlighted clear safeguarding gaps around child contact, both for children and non-abusive parents. In some of the cases in our sample, allegations of child abuse appeared to have been outweighed by a pro-contact approach. In addition, survivors of domestic abuse had been expected to place themselves in very dangerous situations in order to facilitate contact between their child and their former partner.<sup>57</sup>

The report makes a number of recommendations, including the following with regards to PD12J:

### **Improved use and awareness of Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm**

To maximise the impact of the recently revised guidance, the Judicial College, the Magistrates Association and HMCTS should continue with and expand their current educational provisions to ensure that all family court professionals have specialist training on what the guidance means in practice. This training should incorporate the links and overlaps between the practice direction and human rights.

### **Create a national oversight group for the implementation of Practice Direction 12J**

The Ministry of Justice should create a mechanism for oversight of the judiciary in child contact cases involving domestic abuse. This could be an independent, national oversight group overseeing and advising upon the implementation of Practice Direction 12J.<sup>58</sup>

## 5.3 Parliamentary consideration

A Westminster Hall debate entitled Domestic Abuse Victims and Family Courts was held on 18 July 2018.<sup>59</sup>

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<sup>55</sup> For more information, see the Library briefing paper [Children: parental alienation \(England\)](#).

<sup>56</sup> Home Affairs Committee, [Domestic abuse: Government Response to the Committee's Ninth Report of Session 2017–19](#), HC 2172 2017–19, 9 May 2019, pp16–17

<sup>57</sup> Women's Aid and Queen Mary University School of Law, "[What about my right not to be abused?](#)" [Domestic abuse, human rights and the family courts](#), May 2018, p6

<sup>58</sup> As above, p7

<sup>59</sup> A Library debate pack was prepared for the debate, see [Progress on protecting victims of domestic abuse in the family courts](#), 13 July 2018.

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During the debate the Minister for Justice, Lucy Frazer, outlined the steps taken by Government to improve the family justice system and its response to domestic abuse. She also referred to implementation of Practice Direction 12J:

A further positive development came last October, when the president made changes to the guidance for family judges dealing with applications for child arrangements orders where domestic abuse is alleged. As hon. Members have mentioned, that is practice direction 12J. The revisions included a number of important changes, such as making it clear that family courts should have full regard to the harm caused by domestic abuse and the harm that can be caused to children from witnessing such abuse. The revised practice direction also includes an expanded definition of domestic abuse.

These changes are a positive development. At a roundtable on domestic abuse that I held recently, I heard from family judges and practitioners how they were working. I was asked during the course of this debate whether we can review the practice direction. That is primarily a matter for the judiciary, but I am happy to discuss it with the incoming president of the family court, whom I am meeting tomorrow.<sup>60</sup>

On the new Part 3A and associated PD3AA, the Minister said:

The Government have already taken a number of measures, to which some hon. Members have referred, to improve the court process. We have made practical changes following work with the senior judiciary. Last November saw the introduction of new rules requiring the court to consider whether those involved in family proceedings are vulnerable and, if so, whether they need assistance, such as a video link or protective screen, to participate or give evidence.<sup>61</sup>

The Minister also noted that “fresh training for family court staff” had been introduced on how to support vulnerable court users, citing as an example that ensuring “separate waiting rooms or secure entry into and exit from the building are available”. The training had rolled out across England and Wales, Ms Frazer added, while “courts are also preparing local protocols on vulnerable court users, in consultation with their designated family judges”.

Ms Frazer also noted that “the president of the family division and the Judicial College have also taken steps to improve domestic abuse training for family judges. Issues of domestic abuse continue to be addressed on an ongoing basis as part of the college’s regular training for family judges”.<sup>62</sup>

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<sup>60</sup> [WH Deb 18 July 2018 c150WH](#)

<sup>61</sup> [WH Deb 18 July 2018 c149WH](#)

<sup>62</sup> [WH Deb 18 July 2018 c149WH](#)

## 6. Further possible reform of PD12J

### 6.1 Family law reform

The Conservative Party's 2017 manifesto stated that "we shall explore ways to improve the family justice system. The family courts need to do more to support families, valuing the roles of mothers and fathers, while ensuring parents face up to their responsibilities".<sup>63</sup>

On 1 February 2018, in response to the written parliamentary question "To ask the Secretary of State for Justice, when he plans to publish his Department's Green Paper on family justice", the Minister for Justice, Lucy Frazer, told the House: "I am clear that we need to look across the entire family justice system to make sure it is delivering the best outcomes for children and families, and protecting its most vulnerable users. We are working to consider what further changes are needed and will bring forward any proposals in due course".<sup>64</sup>

However, in March 2019 the Ministry of Justice subsequently dropped the proposed Green Paper, and instead said that it was "developing" what it called "significant reforms" to private (and public) family law – it is not clear if this will include the issue abuse and family proceedings.<sup>65</sup>

The Conservative Party's manifesto for the December 2019 General Election stated that:

We will support all victims of domestic abuse and pass the Domestic Abuse Bill. We will increase support for refugees and community support for victims of rape and sexual abuse. We will pilot integrated domestic abuse courts that address criminal and family matters in parallel.<sup>66</sup>

### 6.2 Ministry of Justice review: the Family Justice Panel

The Advocate-General for Scotland (who is also the Ministry of Justice spokesperson in the Lords), Lord Keen of Elie, told Peers on 21 May 2019 that "the Government have today announced the establishment of an expert panel, which will 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.

The Minister stated that "the panel will report within three months" i.e. by 21 August 2019. He added "the intention is that the expert panel

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<sup>63</sup> Conservative and Unionist Party, [Forward, Together: Our Plan for a Stronger Britain and a Prosperous Future](#), April 2017, p73

<sup>64</sup> [PO 125250 1 February 2018](#)

<sup>65</sup> [PO 228670 21 March 2019](#)

<sup>66</sup> Conservative and Unionist Party, [Get Brexit Done – Unleash Britain's Potential: The Conservative and Unionist Party Manifesto 2019](#), November 2019, p19

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should meet in June, that it should report in a very short period and that we should then be guided by its findings”.<sup>67</sup>

In a press release also published on 21 May, the Government said that responses received through the government’s domestic abuse consultation had raised concerns “around the family courts’ response to potential harm to children and victims”, and that claims had been made that “domestic abusers are using the court system to re-traumatise their victims”. While acknowledging the “outstanding” work of judges in cases concerning children, it was noted that “Ministers now want to take a closer look at how existing safeguards in the court process are working in practice and, if necessary, strengthen them”.

The Ministry of Justice stated that the review would:

- examine the courts’ application of Practice Direction 12J – this relates to child arrangement cases where domestic abuse is a factor
- examine the courts’ application of ‘barring orders’ which prevent further applications being made without leave of the court under the Children Act 1989 [under section 91(14)]
- gather evidence of the impact on the child and victim where child contact is sought by someone alleged to have, or who has, committed domestic abuse or other relevant offences.<sup>68</sup>

In a further press release a month later – on 21 June 2019 – the Ministry of Justice announced that the panel would be called the Family Justice Panel, stated that its inaugural meeting had taken place on 14 June 2019, and that this marked the start for the three-month call for evidence.

It also announced the 13-strong membership of the panel (including joint representatives), which would be co-chaired by Melissa Case and Nicola Hewer, the Joint Directors of Family and Criminal Justice Policy at the Ministry of Justice and would receive support from analysts, researchers and relevant policy officials from the Ministry of Justice.<sup>69</sup>

Almost a month later, the next development was the launch of a public consultation.<sup>70</sup> The Ministry said that it was inviting “survivors of domestic abuse and other harmful conduct ... to share their experiences of how well the family courts protects them and their children in private family law proceedings”.<sup>71</sup>

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:

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<sup>67</sup> [HL Deb 21 May 2019 c1862 and c1863](#)

<sup>68</sup> Ministry of Justice, [Spotlight on child protection in family courts](#), press release, 21 May 2019

<sup>69</sup> Ministry of Justice, [Family Justice Panel update](#), news story, 21 June 2019

<sup>70</sup> The consultation’s webpage, which will feature updates, is available at the [Ministry of Justice’s consultation microsite](#).

<sup>71</sup> Ministry of Justice, [Domestic abuse survivors invited to shape future of family court](#), Press release, 19 July 2019

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, 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.<sup>72</sup>

It also stated amended areas for inquiry (changed from the original 21 May 2019 announcement):

- 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 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 offences against the other parent or a child such as child abuse, rape, sexual assault or murder.<sup>73</sup>

The call for evidence set out 25 questions, although respondents could choose which questions to answer.<sup>74</sup>

In October 2019, following the closing date for the call for evidence, the Panel published a “Progress Update” which noted that there had been over 1,200 responses and that roundtable and focus group sessions had taken place.

In terms of the “emerging themes”, the Progress Update noted that:

Initial analysis of the evidence gathered shows a high level of consistency between the different elements of the panel’s work. Whilst the 1,200 respondents to the written call for evidence were from a broad range of perspectives, there were clear parallels in the experiences reported. Many of these submissions pointed to challenges faced within the family justice system in the application of Practice Direction 12J, the use of Section 91(14) orders and FPR Part 3A, and Practice Direction 3AA. Evidence from the roundtable events and focus groups, echoed these concerns whilst offering suggestions for potential improvements to the

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<sup>72</sup> Ministry of Justice, [Call for Evidence: Assessing risk of harm to children and parents in private law children cases](#), July 2019, p3

<sup>73</sup> As above, p4

<sup>74</sup> As above, pp6–15

processes. The evidence from the written call and from the roundtables and focus groups resonate with the main messages identified in the literature review.

The evidence gathered highlights systemic issues in relation to how risk is identified and managed which need to be addressed to ensure that victims and children involved in these proceedings are better protected from further harm. Much of this evidence relates to both the experience of the family justice process and to the outcomes it delivers. For example, many respondents who were victims of abuse felt that their experience of family court process (including but not limited to direct cross-examination by their abuser) was degrading and re-traumatising. In respect of outcomes, respondents often raised concerns about how the family court prioritised the child's relationship with a non-resident parent over the welfare of the child and the risks to which this could expose the child and other parent.<sup>75</sup>

In terms of next steps, the Panel said that it had "concluded the evidence gathering stage and are now engaged in further analysis of the wealth of data gathered". It added that "the evidence is being analysed against each of the objectives to identify difficulties with the current practices within family justice, the outcomes for parties to private law children proceedings, and potential improvements".

In terms of further analysis, the Panel would conduct "reflective engagement with key stakeholders", so allowing it to "discuss their provisional findings with stakeholders in detail to ensure a better collective understanding of the issues whilst ensuring greater collaboration across the organisations involved in private law children proceedings".

The Progress Update did not set a date for the completion of the Panel's report. Indeed, it noted that "it is crucial that the panel can dedicate sufficient time to fully considering the vast amount of evidence gathered" and that the Panel's "aim [is] to publish a report outlining their findings in the coming months".<sup>76</sup>

On 30 January 2020, Lord Keen told Peers that the Panel was "in the process of finalising their report", adding that "it is right that they take the time to analyse this data and to consider their recommendations for how the family courts can be reformed to improve the experiences of victims of harm". In terms of a publication timescale, the Minister stated that "a full report outlining their findings and recommended next steps will be published by Spring 2020".<sup>77</sup>

### 6.3 Review by the judiciary

In terms of reform, in autumn 2018 the incoming President of the Family Division, Sir Andrew McFarlane, invited Mr Justice Keehan (public

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<sup>75</sup> Ministry of Justice, [Assessing risk of harm to children and parents in private law children cases – Progress Update](#), October 2019, p8

<sup>76</sup> Ministry of Justice, [Assessing risk of harm to children and parents in private law children cases – Progress Update](#), October 2019, p8

<sup>77</sup> [PQ HL492 30 January 2020](#)

law) and Mr Justice Cobb (private law) to lead two cross-professional Working Groups to look at practices and processes in these two areas.<sup>78</sup>

In his June 2019 report, entitled [A Review of the Child Arrangements Programme](#), Mr Justice Cobb noted 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”.

The Private Law Working Group stated that should the Family Justice Panel (see section 7.2) recommend any changes in practice, then these would be incorporated into the Group’s “further work in this area following consultation”.<sup>79</sup>

The Working Group set out a number of questions for consultation.<sup>80</sup>

Noting that the report “aimed at improving the ability of the system, and those who work within it, to apply the existing law as it relates to children”, the President of the Family Division and Head of Family Justice, Sir Andrew McFarlane, announced in July 2019 a consultation on the Working Group’s report.<sup>81</sup>

In terms of next steps, Sir Andrew said in December 2019 that the Private Law Working Group’s work “must necessarily move forward at a slower pace” compared to the sister Working Group on public law because “the problems in Private Law are of a different order”. The President noted that there was “the need, rightly, for the Group to await the report of the MOJ [Ministry of Justice] Panel on Domestic Abuse in the Family Court which is not expected until February 2020”.

Sir Andrew thought it likely that “the PLWG will wish to proceed on a staged basis, by trialling some of its recommendations through pilot schemes before forming final conclusions”, and that they would “therefore likely to produce a series of further interim reports, starting with one which records the outcome of the consultation process and the impact that the consultation responses have had on its current thinking”.

In terms of implementation, this would be led by a steering group “formed by the national leaders of each of the key agencies, including the judiciary, under the umbrella of the National Family Justice Board

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<sup>78</sup> Courts and Tribunal Judiciary, [Closing soon: Consultation on Children Cases in the Family Court – Interim Proposals for Reform](#), 23 September 2019

<sup>79</sup> 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

<sup>80</sup> See Annex 12 of the Report to the President of the Family Division Private Law Working Group, [A Review of the Child Arrangements Programme \[PD12B FPR 2010\]](#), June 2019

<sup>81</sup> Courts and Tribunals Judiciary, [Children Cases in the Family Court: Consultation on Interim Proposals for Reform](#), 3 July 2019

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[FJB]. Locally, implementation will be coordinated and led by each Local FJB".<sup>82</sup>

### **Box 4: Cross-examination in family proceedings**

Unlike the criminal courts,<sup>83</sup> there is currently no specific power to prevent perpetrators of abuse (alleged or otherwise) from cross-examining their victims in person during family proceedings.

As the then President of the Family Division, Sir James Munby, said in March 2018: "as can readily be appreciated, such cross-examination lends itself to abuse, not least the abuse that the court has to stand by, effectively powerless, while the abuse continues in court and, indeed, as part of the court process", and cited a Judge who described it as "a stain on the reputation of our Family Justice system."<sup>84</sup>

Legislation to prevent such cross-examination has been tabled by the Government twice recently: in the Prisons and Courts Bill (2017) and the Domestic Abuse Bill (2019).<sup>85</sup> However, both Bills fell before they had completed their Parliamentary stages because Parliament was prorogued (for the two most recent General Elections).

In their manifesto for the 2019 General Election, the Conservative Party said that it would pass the Domestic Abuse Bill. The Bill was included in the October 2019 Queen's Speech,<sup>86</sup> and the Government said in January 2020 that it was committing to "enacting [it] ... at the earliest opportunity and implementing it quickly".<sup>87</sup> The Government have said that the Bill would include provision "prohibiting perpetrators of abuse from cross-examining their victims in person in the family courts".<sup>88</sup>

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<sup>82</sup> Courts and Tribunals Judiciary, [View from The President's Chambers – December 2019](#), pp2 and 3

<sup>83</sup> Since 2000, in the criminal courts, defendants have been prohibited from cross-examining victims in sexual offences cases.

<sup>84</sup> Changing families: family law yesterday, today and tomorrow – a view from south of the Border – A Lecture by Sir James Munby, 20 March 2018, pp 16 and 17

<sup>85</sup> For more information on the proposed legislation, see section 12 of the Library briefing paper [Domestic Abuse Bill 2017-19](#).

<sup>86</sup> [HL Deb 14 October 2019 c2](#)

<sup>87</sup> [PO 6709 30 January 2020](#)

<sup>88</sup> Cabinet Office, [The Queen's Speech and Associated Background Briefing, on the Occasion of the Opening of Parliament on Monday 14 October 2019](#), 14 October 2019, p57

## 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;
- [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;

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- [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](#).<sup>89</sup>

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.

As noted in section 6.2, the Family Private Panel, established by the Ministry of Justice, is considering how the family courts protect children and parents in private law children cases concerning domestic abuse and other serious offences. The call for evidence is now closed, but [their website will provide updates](#) – the most recently development was the publication of the Progress Report in October 2019.

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<sup>89</sup> 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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