Association of **Lawyers for Children**

Promoting justice for children and young people

MoJ's Call for Evidence: Assessing risk of harm to children and parents in private law children cases

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Response of the Association of Lawyers for Children

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The Association of Lawyers for Children (hereafter “ALC”) is a national association of lawyers working in the field of children law. It has close to 1,000 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners from both sides of the legal profession practising in different areas of the country. Several leading members are specialists with over 20 years’ experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children law and hold judicial office. The ALC exists to promote access to and equality of justice for children and young people within the legal system in England and Wales in the following ways:

i. lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;
ii. lobbying against the diminution of such mechanisms;
iii. campaigning and advocating on against any form of discrimination which may affect children within the family justice system
iv. providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the rights, welfare, health and development of children;
v. providing a forum for the exchange of information and views on the development of the law in relation to children and young people;
vi. being a reference point for members of the profession, governmental organisations and pressure groups interested in children law and practice; and
vii. funding or co-funding research where we perceive gaps in knowledge or evidence relating to changes in policy and practice in children proceedings.

The ALC is a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law and welcomes this opportunity to provide its views in respect of this call for evidence.

Responses to specific questions

[3] Are there any difficulties in raising the issue of domestic abuse or other serious offences against a parent or child, in private law children proceedings? What helps victims of abuse or other offences to raise the issue or might discourage them from doing so?

In our experience, there is a clear mechanism for adult parties to raise allegations of domestic abuse or other serious offences against a parent or a child within private law proceedings. Form C1A can be completed along with any application to set out allegations of domestic abuse/harm. This form is set out in a tabular format, which includes a section for the respondent to provide their views on the allegations made against them. This assists the court to later formulate a schedule of allegations of relevant findings sought (Scott schedule) which can inform the court as to whether the allegations, if proved, would impact on the court's welfare decisions in respect of the child. However, a parent who is a litigant in person may not always be aware of this form and, where they are aware that it exists, the allegations that they set out are often vague and non-specific, making it difficult for the court to evaluate them

The other mechanism for raising allegations is within the safeguarding procedure, which Cafcass undertakes in each case. Cafcass contacts applicant and respondent parents to discuss their views on the applications and to specifically raise any risks/concerns. Cafcass then provide a recommendation to the court as to whether there are safeguarding concerns along with suggestions as to how the court ought to address those within the proceedings.

We are of the view that there are adequate mechanisms for parties to raise concerns regarding domestic violence. However, there are some shortcomings: we are aware of the influence of social media, specifically high profile cases where parents have raised allegations of domestic abuse/harm, which the court subsequently found not to be true. These cases and the discussions which later follow via social media can create mistrust in the family justice system and result in a lack of faith about the robustness of the system to deal with allegations of domestic abuse/harm. There too

have been high profile cases where the court has found that the parent making the allegations has done so to alienate the child (from the other parent) leading to the child being placed in the other parent's care. The concern in both scenarios is a reluctance on the part of a victim of domestic abuse who may fear that raising allegations could lead to similar outcomes.

Another difficulty which can arise is where parents may not recognise domestic abuse or other forms of harm as relevant, or may not recognise themselves as victims or survivors of abuse. The challenge this may present within the proceedings is that the court may make welfare decisions without full knowledge of all relevant facts because a parent has not been able to put into evidence all relevant information. Cultural factors may also be a factor as to why domestic abuse may not be recognised/acknowledged on the part of a parent. What can help victims here is to have access to early legal advice. Lawyers who are experienced in family proceedings are able to ask relevant questions of potential parties to proceedings and to help them understand the issues and matters with which the court will be concerned. Where some individuals may not easily recognise factors of domestic abuse/harm, lawyers have a role to assist parents to understand what may be relevant to the court's consideration of any application or prospective application.

[4] How are children's voices taken into account in private law children proceedings where there are allegations of domestic abuse or other serious offences? Do children feel heard in these cases? What helps or obstructs children being heard?

This is a difficult question to answer because it depends on whether the child is making the allegations, or is a witnesses to the allegations, or neither. If the child is making allegations or is a witness to the allegations, then their voice is usually taken into account (either through ABE interviews conducted by the police or an intermediary - provided the allegations have been reported to the police). That evidence will be presented to the court. However, it is unusual for the child to be involved in the fact-finding stage and may not be separately represented. Should the court fail to make findings, children may feel that they have not been listened to. Even where children are aware that their parents are involved in court proceedings which relate to the child

and their arrangements to spend time with or live with the parents, they may have little or no awareness that issues of domestic abuse/harm have been raised.

If the child is not a witness or making allegations, then their voice is usually heard through the author of the s.7 welfare report, which should be directed wherever allegations of domestic abuse/harm have been raised. We see the difficulty for the author of a s.7 report in providing firm recommendations to the court pending any fact-finding hearing. Therefore, the child may feel as though their voice has not been heard until the resolution of those factual disputes. Joining children as parties to the proceedings, where there are allegations of domestic abuse which would have a material impact on the consideration of what (if any) order to make about child arrangements, would ensure that the children's voices are clearly heard within proceedings. This is even more important where both parents are litigants in person. The recent increase in the number of Rule 16.4 appointments of children's guardians in private law cases means that more children than before are being effectively represented, however it appears that this is a side-effect rather than the intention behind the increased number of appointments – the intention seems to have been to fill the gap left by the virtual disappearance of legal aid funded representation for parents.

[5] Are fact-finding hearings held when they should be? If they are not held, what reasons are given?

In our experience there is no consistency regarding fact-finding hearings in private law proceedings where allegations of domestic abuse/harm have been raised. There had been a suggestion that Cafcass should undertake a risk assessment using the Domestic Abuse Practice Pathway along with their evidence informed tools. We are concerned that Cafcass are being invited to undertake such assessments where there are disputed facts.

There appears to be some consistency regarding when fact-finding hearings should be held with some members of the judiciary considering that this could be held at the same time as the final hearing rather than a 'split' hearing. We are concerned about this approach for two reasons: the facts of the case ought to be identified as soon as

possible in order for evidence based decisions to be made about child's welfare; and where the court makes findings it may be necessary to undertake a risk assessment to assess whether the risks, if any, can be managed. This assessment can only properly be undertaken where the factual matrix of the case is settled. Either/or analyses are not satisfactory in our view. Without a robust risk assessment on a settled factual basis, we are concerned that children may be put at risk of harm, both physically and emotionally.

[6] Where domestic abuse is found to have occurred, how is future risk assessed and by whom? Is risk assessed only in relation to children, or also in relation to the non-abusive parent?

In our experience the risk assessment is usually undertaken by Cafcass but it could be undertaken by the local authority if it has been involved with the family in the preceding six months. The risk assessment usually considers the child, perpetrator as well as the non-abusive parent to assess their ability to recognise future risk and to protect from it. The assessment should also consider wider family members and their ability to understand risk and to protect from it in the future along with what support, if any, can be provided to the children and their parents.

[7] How effective is Practice Direction 12J in protecting children and victims of domestic abuse from harm?

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

[8] What are the challenges for courts in implementing PD12J? Is it implemented consistently? If not, how and why do judges vary in their implementation of the Practice Direction.

Judicial continuity is vital for effective management of cases under PD12J, but is not always consistently achieved. At the risk of repetition, the absence of legal representation for parents has made it far more difficult for judges[1] to identify the existence of factors that may engage PD12J. Lawyers spend time with clients away from the pressure cooker atmosphere of a court hearing and are better able to identify abuse issues than a judge who has only a few minutes to 'get behind' what a litigant in person has written. Similarly, a Cafcass officer undertaking safeguarding checks has only a few minutes on the phone to attempt to achieve the same result. The increased use of Rule 16.4 helps with some aspects of judicial case management, but not with this one.

Judges are often frustrated by the lack of the tools that they need in order to implement what is in the best interests of the child. This applies to all private law work but two examples are relevant to this consultation. The first is the lack of access to properly supervised contact and the second is the lack of funding for specialist risk assessments. The second of these can sometimes be alleviated by appointing a Rule 16.4 children's guardian and solicitor (to act for the child), although the legal position in relation to this is complex. The first problem is more difficult, save for short periods where the supervision of contact can be categorised as an assessment. The court can find itself unable to progress contact which it has decided is in the best interests of the child but which needs to be supervised for safeguarding reasons.

[9] What has been the impact of the presumption of parental involvement in cases where domestic abuse is alleged? How is the presumption applied or disapplied in these cases?

[1] Here, we follow the widespread practice of including lay magistrates sitting in the Family Court within the meaning of 'judges'.

Our members' experience is that the presumption of parental involvement has not impacted where parents are legally represented. It has always been recognised that it is in children's best interests to have a relationship with both parents where possible and safe. Therefore, the starting point in any case is the presumption that the child should spend time with both parents. Where parents have legal advice, this general principle is explained to parents and parents are assisted to understand it, including circumstances which may lead to the presumption can be departed from.

Our members have seen that setting out the presumption, within the law, has assisted litigants in person in understanding this overarching policy framework within which applications must be considered. While that appears to be the general impact of the presumption – and therefore a positive one, there are instances where the presumption may be misunderstood leading to parents who are the victims of domestic abuse/harm to consider that the presumption is concrete and immovable. This may cause reticence to raise allegations in proceedings if a parent believes that these concerns will not make any difference as the presumption 'trumps' other matters.

If a parent poses a risk to a child, which cannot be safely managed, then our experience is that the court will depart from the presumption. In our experience, the presumption itself is not a dominant feature in proceedings. Generally, the court has an expectation that parties have an awareness of the presumption and the framework it offers. For example, it is rarely the case that a judge will expressly state that the presumption is being disapplied when making orders or not. Judges will usually explain the basis for particular child arrangements being made – referring to welfare and best interests matters, rather than expressly setting out that the presumption has been disapplied.

[10] Where domestic abuse is found to have occurred, to what extent do the child arrangement orders made by the court differ from orders made in cases not involving domestic abuse?

Where domestic abuse is found to have occurred the child arrangements orders could include: prohibited steps orders (preventing the abuser from having contact with the child/removing them from the care/control of the non-abusive parent), no orders for

contact, specific issue orders and live with/spend time with orders. There are also more family assistance orders within similar cases as well as non-molestation orders, s. 37 directions or even interim supervision/care orders. There may also be s.91(14) orders and the restriction/removal of PR in extreme cases.

In cases not involving domestic abuse it is more likely for there to be spend time with/live with orders and potentially prohibited steps/specific issues orders depending on the case.

In our experience, a key difference between child arrangements set out in final orders in cases where domestic abuse are found and those cases where domestic abuse is not involved, is that in the former cases, the court will set a more gradual approach to the development of any spends-time-with arrangements. For example, the court may set out that contact needs to be supervised or limited in duration for a period of time before then building up both in terms of duration and frequency. A natural limitation with that approach is that the court will not have a role in monitoring such arrangements if those are made in the context of a final order. We are aware that the courts are under pressure and so will be more inclined to make orders offering a graduated development of contact arrangements rather than making interim orders with further hearings listed in order to review the arrangements as those develop.

[11] What is the experience of victims of domestic abuse or other serious offences in requesting arrangements to protect their safety at court?

It is our members' experience that where parties are represented, the court is effective in identifying where safety measures are needed but the court is then often hampered by a lack of resources. For example, in many courts there are not enough rooms for a vulnerable person to be sat away from the alleged perpetrator. There are also limited courts with video links to a separate room within the court building, for the witness to give evidence. There are limited court rooms which are of sufficient size to enable adequate safety measures (such as a District Judges' chambers being too small to facilitate a screen etc. where the alleged victim is in court).

Where parties are litigants in person our members understand there are misunderstandings about safety measures (i.e. this may make them look less truthful as they are not willing to look the alleged perpetrator in the eye) and therefore may not request safety measures as a result. This could cause considerable emotional harm to the alleged victim and impact on their presentation of the case/evidence. It is also the case that where parties are not represented, they may not have sufficient knowledge or confidence to raise concerns in advance of hearings in order to request safety measures. This is perhaps something which Cafcass could raise with litigants in person as part of the initial safeguarding checks and, as appropriate, raise with the court in advance of the hearing (it is not sufficient to include it in the Schedule 2 letter as that is unlikely to be read until the day of the hearing).

Our members are aware of many cases which needed special measures but which have not been provided and therefore hearings were adjourned which caused all parties distress and delay.

[12] Do family courts make the right decisions about whether an alleged victim of domestic abuse or other serious offences is vulnerable? What helps or hinders the court in making these decisions?

Where parties are represented then it is our members' experience that family courts do make the right decision about whether an alleged victim of domestic abuse is vulnerable. The parties will have legal advice on the likelihood of the court making findings along with how to present their case. In the event that the court fails to make any findings, and legal advice being provided on the merits of appeal, there is an appropriate mechanism for challenging those decisions. In relation to vulnerability of a victim of domestic abuse, lawyers have a role in bringing such issues to the attention of the court.

However, litigants in person often find the conduct of litigation very difficult. An alleged victim of domestic abuse/harm may feel the need to present their case in a way which may give the impression that they are not vulnerable and this will hinder a court's ability to recognise vulnerability.

[13] What is the experience of victims of domestic abuse and other serious offences of being directly cross-examined by their alleged abuser/alleged perpetrator? What is their experience of having to ask questions of their alleged abuser/perpetrator?

Our members are aware of many instances where direct cross-examination was allowed and required where parties are not represented (or the respondent, specifically, is not represented). It is distressing for an alleged victim to be questioned on serious allegations of rape or other forms of harm. A specific case was put before the President of the Family Division who took the view that exceptional case funding (ECF) should be invoked to ensure that the respondent is represented and conducts the cross-examination of the alleged victim. However, there are two problems with this: ECF is means/merits tested (and the threshold for means testing is very low) and the application for ECF itself is extremely complex (one member confirmed it had taken her 6 hours to navigate and complete the form). Another issue is that the criteria that the Legal Aid Agency (LAA) applies when considering the merits of applications usually will relate to the 'need for representation' of the person applying for legal aid and so not necessarily take into account how legal advice/representation for the respondent (who seeks legal aid) may also assist the court, the alleged victim and the child. These wider considerations are not necessarily factors which the LAA will view as relevant.

The President stated that in the circumstances where ECF is not available that HMCTS should cover the cost of representation for the respondent, at least in relation to the conduct of cross-examination. Our members are not aware of this being used. In order to avoid direct cross-examination, the court has often asked the respondent to put questions in writing and the judge asks them or the court has joined the child as a party and requests that the child's legal representative assist the court by exploring the allegations during the fact-finding hearing. A further option that our members are aware of is the use of intermediaries which HMCTS fund although this is usually for the alleged victim who is assessed as vulnerable and not the alleged perpetrator.

It goes without saying that alleged victims will certainly struggle or find it distressing to have to ask questions of their alleged abuser. They may not know what to ask, how to ask questions or simply find the process too overwhelming.

[14] What are the challenges for courts in implementing FPR Part 3A and PD3AA? Are they implemented consistently? If not, how and why are they inconsistent?

The challenges for courts in implementing FPR 3A and PD3AA are that litigants in person may not understand the use of special measures or the impact, if any, on the court's assessment of veracity. It is our members' experience that courts are now alive to the issues of vulnerable witnesses and take steps to ameliorate the difficulties. However, the lack of available resources can cause delay and further anxieties to the parties.

[15] How effective are these provisions in protecting victims of domestic abuse and other serious harms from harm in private law children proceedings?

It is our view that, when used correctly, they can be an effective measure to protect victims of domestic violence provided the perpetrator does not question the witness directly. It is vital, in our view, for both parties to be legally represented within proceedings where there are allegations of domestic abuse to ensure that victims are adequately protected and so that alleged perpetrators are properly able to respond to allegations in a meaningful and appropriate way which will assist the court.

[16] What evidence is there of repeated applications in relation to children being used as a form of abuse, harassment or control of the other parent?

It is our members' experience that this happens on a regular basis. There are some private law cases where litigation has been ongoing for a number of years. One member is dealing with a case where there have been 3 sets of private law proceedings, with a number of cross applications, over many years. It is hard to say definitely that this is used as a form of abuse, harassment or control of the other parent but it does have this effect on them.

It is inevitable that the arrangements for children evolve over time as the child increases in age. This often leads to changes being needed for the arrangements for children and, in the absence of agreement, leaves the only avenue available to resolve the dispute through a further application to the court.

[17] Under what circumstances do family courts make orders under s.91(14)?

The family court will make a s.91 (14) order (often referred to as barring orders) where there have been repeated and unreasonable applications. A barring order is a tool of last resort although where the welfare of the child requires it, orders can be made notwithstanding the absence of such features. In practice, our members are of the view that these orders are rarely made save for the most serious cases. There is a tranche of reported cases where barring orders have been successfully challenged in the Court of Appeal which has informed the courts of how rarely these orders should be made. This is another area where representation can affect the outcome. The case law is clear that proper notice must be given of an application for a s.91(14) order, but a litigant in person is unlikely to be aware of the need to do this and the issue is likely to be raised for the first time at the hearing. This makes it difficult for the court to make the order unless it adjourns the hearing.

[18] How do courts deal with applications for leave to apply following a s.91(14) order?

How courts deal with applications for leave to apply following a s .91(14) order varies. The point of the requirement for permission to apply to make an application where a barring order has been made, is to prevent the children/other party being distressed by the prospect of further litigation when there could be little prospect of success. Therefore, the court generally does not provide notice to the other parties unless and until the court is of the view that there is an arguable point and there is a need for further judicial intervention. Usually, and where possible, it is the same judge, who made the original order, who will deal with the application for permission. Generally, these applications are dealt with on the papers (without the need for an oral hearing). However, there may be circumstances where the court needs further information and

therefore makes directions for further evidence to be filed and an oral hearing to be listed. The onus is on the applicant to show that the legal test is satisfied.

[19] What are the challenges for courts in applying s.91(14), including applications for leave to apply? Is there consistency in decision-making? If not, how and why do inconsistencies arise?

The challenges for courts in applying s.91 (14), including applications for leave to apply is the sheer volume of cases being listed before them and a lack of judicial time. It is our members' experience that there is consistency in decision making given the clear case law which has emerged over time. The effectiveness of s.91(14) orders in protecting children and non-abusive parents from harm depends on the abusive parent respecting the court's order. There are circumstances where the abusive parent has continued to contact the children and abused parent, which is not prevented under the barring order. We recommend that the court considers other orders available to protect the children/abused parent such as a non-molestation order/exclusion order.

[20] How effective are s.91(14) orders in protecting children and non-abusive parents from harm?

We are unable to answer this question. A s.91(14) order is generally effective in protecting the child and/or the non-abusive parent from the potential emotional harm which further litigation can cause, but we cannot comment on whether the barring of further court proceedings leads abusers to take other forms of action that may be harmful.

[21] What evidence is there of children and parents suffering harm as a result of orders made in private law children proceedings, where there has been domestic abuse or other serious offences against a parent or child? (This can include harm to a parent caused by a child arrangement orders which requires them to interact with the other parent in order to facilitate contact).

In our members' experience, it is unusual for the court to require a child to interact with an abusive parent where serious findings have been made against them. It is more

likely that the court has declined to make findings that domestic abuse has occurred and therefore determines that the child should spend time with that parent. Alternatively, the court will determine that although domestic abuse was found to have occurred, this was of a degree or extent that does not preclude some form of contact with that other parent. Our view is that, although the court may have declined to make a finding, the child is often living with the parent who raised the allegation and who may not accept the court's finding. Therefore, the child may continue to believe that domestic abuse has occurred, or know that it has occurred but the court declined to make the finding.

Should the court order the child to spend time with the parent who has been accused of harm then this can cause significant emotional harm to the child. Our members have experienced cases where the court has declined to make findings, the alleged victim has not accepted the court's decision and failed to make the child available to spend time with the other parent, which then led to the court determining that the alleged victim is alienating the child from the non-abusive parent. There have been instances where the court has ordered a change of residence but the child also did not accept the court's finding. Children have been forcibly removed (sometimes by the police) and placed with the alleged abusive parent which has caused significant emotional harm. In other cases, the court has responded by making a s.37 direction and an interim care order with a view to the child being removed from both parents.

Given the closure of contact centres, it is more often that a victim of domestic violence is asked to facilitate contact with an abusive parent or members of their family. This can lead to children being exposed to relationships strained by conflict along with the fear usually emanating from the abused parent.

[22] What evidence is there about the risk of harm to children in continuing to have a relationship – or in not having a relationship – with a domestically abusive parent (including a parent who has exercised coercive control over the family)?

The evidence is well known. There are many studies that conclude (such as Sturge & Glaser) that children continue to be exposed to emotional harm if they continue to

have a relationship with an abusive parent should they not have addressed their issues.

In a case in which one of our members was involved, a psychologist provided an analogy of what it is like to live within a domestically violent environment. In summary, he said: imagine a circle of young people and an adult in the middle holding a balloon. The adult has a pin in his hand and states that he is going to move the balloon around the circle close to the children's faces. As some point he will pop the balloon. Throughout the experiment, all of the children were flinching and displaying anxiety despite the balloon not being near them. The expert explained that is what it is like for children living in a domestically abusive environment: even if calm, they are waiting in anticipation for the next explosion which causes emotional harm and anxiety.

The evidence of the risk of harm to children not having a relationship with a domestically abusive parent is less clear. Our members are aware of children who have idolised the abusive parent, especially when they reach their teenage years and the non-abusive parent is setting boundaries, which leads them to think life would be better with the abusive parent (especially if the allegations of abuse have not been witnessed by the child).

In the current age of social media and technology, it is difficult to prevent children having contact with abusive parents whether they wish to be in touch with them or not. Our members are aware of no contact orders being breached by an abusive parent who continues to exert control over a child, who then believes that the non-abusive parent is actually perpetrating abuse against the child which is causing emotional and physical ham.

There are risks to the lack of identity from not seeing a parent when the alleged victim parent may well find it difficult to provide life story work about the abusive parent.

[23] What evidence is there about the risk of harm to children in continuing to have a relationship – or in not having a relationship – with a parent who has committed other serious offences against the other parent or a child, such as child abuse, rape, sexual assault or murder?

Our members are aware of a case that a trauma expert has recommended that a young person spends time with their father who had murdered their mother whilst the children were in the home. These are highly complex cases and the risk of harm in these cases are high.

[25] Do you wish to make any other comments on the matters being considered by the panel?

It cannot be emphasised enough that the legal aid cuts under LASPO have impacted on private law cases. The family court is struggling to deal with the sheer volume of cases, mainly with litigants in person, which is putting children at risk.

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