



## Association of **Lawyers for Children**

Promoting justice for children and young people

The Rt Hon Elizabeth Truss MP  
Lord Chancellor and Secretary of State  
Ministry of Justice  
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Dear Minister

We write on behalf of the Association of Lawyers for Children (ALC) to welcome your initiative to prevent child and adult victims of physical and sexual abuse being cross-examined in the Family Court by their alleged assailants. We also wish to offer you our help and expertise in this field if that would be useful to you or to your officials.

The ALC is a national association of lawyers and others working in the field of children law. It has over 1,000 members, mainly solicitors and family law barristers who represent children, parents, other adult parties and local authorities, but includes other legal practitioners and academics. The ALC exists to promote access to justice and child friendly court proceedings for children and young people in the following ways:

- It works for the implementation of the United Nations Convention of the Rights of the Child (UNCRC)
- It works to ensure separate and independent legal and welfare representation of children and to maintain properly funded legal mechanisms to enable all children and young people to have access to justice
- It provides high quality training for lawyers and non-lawyers concerned with the rights, welfare, health and development of children.
- It provides a forum for the exchange of information and views involving the development of the law relating to children and young people
- It is a key reference point for members of the profession, governmental organisations, charities and academics.

The ALC is a key stakeholder in all government consultations pertaining to law, practice and legal aid in children law. It provides socio-legal, evidence-based responses to government consultations on public and private law children issues, and oral and written evidence to Select Committees, Bill Committees and All Party Parliamentary Groups concerned with children and family justice.

We wish to emphasise that it is not only adults, mainly women, who find themselves in the humiliating and abusive position of being cross-examined by their alleged abusers, but also the children or step-children of the parties, who may be witnesses to the alleged abuse of adults, other children or victims themselves of physical or sexual abuse. Sometimes, in the most serious cases, the local authority will intervene and take protective measures for the child (who may be at risk of harm) by issuing care proceedings, thereby triggering the automatic right to non-means tested legal aid for their parents or those with parental responsibility for them. This means that if the court decides that live evidence must be taken from the child, that evidence (by way of questions being put) will be handled by specialist family law solicitors and barristers. However, if the young person has reached the age of 17 or adulthood, this protection is not available as a local authority cannot commence care proceedings. In respect of younger children, local authority child protection services are now so stretched that, unless there are other live child protection concerns about the care being given to the child, these cases do not usually trigger the intervention of child protection services.

This is what leads to the situation which has recently gained prominence in the media: where private family law proceedings are afoot, there is an allegation of abuse (to a child or adult) which needs to be tested, the court decides that the alleged victim should give live evidence, but the alleged perpetrator does not have a legal representative. This leads to the position where the court is confronted with the possibility of the alleged perpetrator cross-examining the alleged victim who, whether a child or adult, will in most cases be a vulnerable witness. In many cases the alleged victim (whether a party to the proceedings or not) will not have a legal representative. In a minority of cases, the alleged child victim (if also the subject of the proceedings) may be made a party and may have a children's guardian appointed to represent his/her interests who will instruct a family law solicitor on the child's behalf.

In 2012 the ALC strongly opposed the terms of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill which would lead to litigants in person cross-examining their alleged victims, including children and young people. The government was determined to cut the civil legal aid budget by getting the LASPO Act 2012 through Parliament. The ALC and other organisations working in the family justice system provided detailed responses to the government's consultation. We highlighted the serious issues which would result from an increase in litigants in person, and the effect on vulnerable adults and children of the government's proposals. We pointed out that Government had not understood the findings of research on litigants in person, and drew attention to the fact that their civil servants were keen to know more about this. We brought our concerns to the Justice Select Committee's enquiry into Access to Justice in 2011. We and others were ignored, and the proposals passed into law, with the devastating and predictable effects described in the recent article in the Guardian by Sandra Laville.

In 2016, following the intervention of the ALC in the case of *Re K and H (Children)* [2015] EWCA Civ 543, we wrote to your predecessor Michael Gove in the following terms:

*You may be aware that the ALC intervened (jointly with Coram Children's Legal Centre) in an appeal brought by the Lord Chancellor to the Court of Appeal last*

*year. The appeal in Re K and H (Children) [2015] EWCA Civ 543 was heard on 29-30 April 2015. Judgment was handed down on 22 May 2015 with the Master of the Rolls, Lord Dyson giving the court's reasoning for upholding the Lord Chancellor's appeal on the facts of that case.*

*The ALC intervened as the case raised issues of some public importance, and the decision under appeal impacted considerably on both children who are the subject of private law applications and children who are required to give evidence to the court who may not themselves be the subject of the proceedings. The court granted the ALC and CCLC permission to intervene and heard oral submissions as well as taking into account written submissions. Although on the facts of that case, the appeal was upheld, the Lord Dyson MR stated at § 65 of the judgment:*

*"I acknowledge that there may be cases where the position is different. I have in mind, for example, a case where the oral evidence which needs to be tested by questioning is complicated. It may be complex medical or other expert evidence. Or it may be complex and/or confused factual evidence, say, from a vulnerable witness. It may be that in such cases, none of the options to which I have referred can make up for the absence of a legal representative able to conduct the cross-examination. If this occurs, it may mean that the lack of legal representation results in the proceedings not being conducted in compliance with article 6 or 8 of the Convention. This is the concern expressed by Sir James Munby at para 76 in Q v Q. In order to avoid the risk of a breach of the Convention, consideration should be given to the enactment of a statutory provision for (i) the appointment of a legal representative to conduct the cross-examination and (ii) the payment out of central funds of such sums as appear to be reasonably necessary to cover the cost of the legal representative, i.e. a provision in civil proceedings analogous to section 38(4) of the Youth Justice and Criminal Evidence Act 1999 and section 19(3)(e) of the Prosecution of Offenders Act 1985."*

*The ALC remains concerned about cases coming before the family court where these difficulties are present. The ALC is concerned for the Convention rights (Articles 8 and 6) of the subject children and the non-subject children called to give evidence. In light of the strong view expressed by Lord Dyson MR that consideration should be given to the enactment of statutory provisions analogous to those in the criminal jurisdiction, we write to ask whether you have given such consideration to this matter and if so where your deliberations have taken you. In the event that you have not yet considered this matter, we should be grateful if you could confirm that you will consider the matter and let us know when you intend to formulate a policy position on behalf of the Government.*

No steps have yet been taken to address the problem and your determination to do so is greatly welcomed. This is a situation which our members meet with in practice on a regular basis. For instance, in a very recent case, a judge has made findings of rape and physical assault against a man who represented himself and cross-examined the mother, his ex-partner, as well as the child of the relationship, a young person now 18 years old, who gave evidence in support of the mother's case. We consider that this procedure (forced upon the courts and on the parties by the operation of LASPO Act)

not only risks breaching Article 6 and 8 Convention rights, but in certain cases also the Article 3 right not to be subjected to inhuman or degrading treatment.

Although this is not the primary issue, the grant of legal aid for representation at family court hearings for both accused and accuser where domestic, sexual or child abuse is alleged, will also deal with the very real problem of cases where the former partner (usually the father) is falsely accused of physical or sexual abuse by the mother, on herself and/or the children, in an attempt to frustrate the father's contact with the children of the family.

We remain concerned about the direct impact of this on proceedings, and in particular whether it may result in judges descending into the fray by undertaking questioning of witnesses in a way which is inquisitorial and compromises the tribunal. In reality also a solution proposed by the Lord Chancellor in the case of K and H that questioning of witnesses could be undertaken by court clerks does not happen in practice in our experience, and that of our members.

It is therefore an issue which presents acute and difficult practical and legal challenges, and we are particularly concerned as to its impact on the rights of children directly and indirectly involved in such cases.

This is one of the areas where, in pre-LASPO Act discussions with the MoJ and the Legal Aid Agency (LAA), we had expected the 'exceptional case funding' provision to be a safety net, but it is widely accepted that the ECF scheme is not working as those concerned with access to justice had originally hoped.

In criminal cases, we understand that the court issues a letter confirming that permission is given for cross-examination of a vulnerable witness, and then funding is triggered essentially for the trial only, outside the usual criminal legal aid process. A similar mechanism could be considered for family law cases where allegations of domestic abuse and/or sexual abuse are made. These grants of legal aid would have to be provided irrespective of financial means in order to be fully effective. There are a small number of alleged perpetrators who will choose to represent themselves, even if they are more than able to afford legal representation.

We would be very happy to communicate further with, or to meet you and/or your officials, in order to assist with the creation of a scheme which will stop the continuing abuse of victims, both adult and child, in the family justice system. This has in our opinion been the most serious and most shameful consequence of the LASPO Act reforms.

Yours sincerely



**Martha Cover and Debbie Singleton**  
**Co-Chairs, Association of Lawyers for Children**

cc.

- (1) The Rt Hon Sir Oliver Heald QC MP,  
Parliamentary Under Secretary of State, Minister for Courts and Legal Aid
- (2) Edward Timpson MP  
Minister of State for Children and Education
- (3) Sir James Munby,  
President of the Family Division