

Response ID ANON-CNG1-5H9X-Q

Submitted to **Assessing risk of harm to children and parents in private law children cases**

Submitted on **2019-08-23 17:41:42**

Confidentiality

About you

a What is your name?

Name:

Lucy Reed

b Job title or capacity in which you are responding to this call for evidence (e.g. member of the public etc)

Job title:

Chair, The Transparency Project (also practising barrister in children work)

c What is your email address?

Email:

info@transparencyproject.org.uk

d What is your organisation?

Organisation:

The Transparency Project

YES - I agree to my organisation being named or quoted:

Yes

What is domestic abuse?

The definition of domestic abuse in Practice Direction 12J is:

Your experience of private law children proceedings

1 Please tell us in your own words about how the family court responded to allegations of domestic abuse or other serious offences in your case, and/or the effects on you and/or your children.

write text in box:

N/A

2 Was your experience in the family court:

Raising allegations of domestic abuse or other serious offences in private law children proceedings

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?

Yes

add text in box:

(Our responses are based partly on direct experience as our Chair has 17 years' experience at the Bar, and partly on other evidence that our members have in a professional or academic capacity, together with issues that are brought to The Transparency Project.)

Based on the experience of those in our team and what parents and other practitioners tell us, people are discouraged from raising allegations by:

- Fear of reprisals.
- Fear of counter allegations of hostility or alienation with the risk of removal of their children.
- Fear that their children might be taken into care if they are not seen as protective.
- Reluctance to relive the experience through giving of evidence or at all.
- Learnt behaviour that taking the line of least resistance is safer.
- Failure to appreciate that the behaviour in question is abusive.
- Lack of information about the court process.

They would be helped by:

- Being advised and supported about the importance of raising allegations early.
- Having an advocate for any necessary safeguards, including finding of fact hearings.

A major concern is that victims of abuse may not appreciate the significance of not raising allegations at an early stage, in terms of the need for a fact finding hearing and the binary system of proof. This may lead to criticisms of their credibility if allegations are raised 'late'.

The Transparency Project has produced a guidance note to help explain the law and process when allegations of domestic abuse are raised, and the significance of allegations and findings for decision making in private law proceedings. See www.transparencyproject.org.uk/resources

Children's voices

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?

write text in box:

This is a complex question and difficult to answer in the absence of recent research.

Children can be helped by FPR r 16.4 appointments of a guardian. The tandem model of children's representation can ensure that the child's perspective is put forward in proceedings where neither parent is able to do so objectively.

Children's interests and views being heard and safeguarded depend very much upon their guardian or family court adviser being well-informed about domestic abuse and the legal framework for resolving disputed allegations.

Similar issues arise in the context of private law cases in which local authority children's services have written section 7 reports. or been supporting the family.

During the last few years, The Transparency Project has engaged in dialogue with Cafcass about their approach to allegations of domestic abuse and their suggestion (in earlier drafts of guidance) that it was appropriate for Cafcass officers to decide whether allegations are true or not. Our involvement in consultation about the private law pathways on these issues contributed to the revision of those materials to avoid blurring of roles. We hope those issues are now resolved. See for example here : <http://www.transparencyproject.org.uk/a-fork-in-the-road-cafcass-and-their-pathways/> (and linked blog posts).

We believe that the guidance issued in both Cafcass and Cafcass Cymru during the last year should help children feel that they are being heard, but that this might take a while to bed in.

The procedure where domestic abuse is raised

5 Are fact-finding hearings held when they should be?

No

write text in box:

We have answered 'No' because practice is not consistent but this question would be better framed by having a 'sometimes' option. We think they are sometimes held when they should be, and sometimes not.

The question of when a fact-finding hearing 'should' be held is contentious. On occasion, the decision maker does not think the findings would make any difference - which is dependent on one's understanding of the impact, nature and significance of domestic abuse.

We suggest that it will be difficult for any one individual or organisation responding to this question to give more than an impression based on their experience or self reports of their clients / service users in individual cases.

The experience of our practising lawyer chair over 17 years at the Family Bar is that fact finding hearings are usually held when they should be i.e. that the understanding of the nature and impact of domestic abuse in its widest sense is now better understood, with consequent increase in the number of cases in which a fact-finding is necessary.

On the other hand, one of our members who has recently been delivering training to lawyers and social workers received a great deal of feedback that courts are still reluctant to hold fact-finding hearings when they should.

There is an urgent need for robust quantitative and qualitative analysis that is not based upon self- report.

Our experience suggests that fact-finding hearings continue to be declined for a range of reasons including that:

- the complainant does not wish to proceed with them and accepts that the case will go ahead on the basis the allegations aren't proved,. In some cases both parties request that there should be no fact-finding
- the court does not think that a fact-finding hearing is proportionate because the alleged abuse occurred in the past and there has been substantial contact since without further repeat abusive behaviour,
- there is already a conviction in respect of at least part of the alleged conduct,
- the abusive behaviour is not seen as serious,

- the behaviour is seen as mutual.

The above is an overview and we make no assertions about whether any particular decision was justified. We think that patterns of judicial decision-making, the court file and the positions adopted by the parties would need to be considered before drawing any such conclusions.

See for example: <http://www.transparencyproject.org.uk/how-does-the-family-court-treat-domestic-abuse-a-snapshot-continued-part-5/>

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?

write text in box:

Proven domestic abuse usually results in a risk assessment by Cafcass regarding the children.

It would be helpful for a survey of court files to be carried out to ascertain what the broader picture is and whether or not there is regional variation, as we suspect there might be.

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

write text in box:

We do not think that either we nor this speedy review are in a position to fully answer this question.

Many individuals and campaigners have a fixed view, based on their experience or what they have read, that the courts do not protect victims of domestic abuse, while many others have a fixed view that allegations of domestic abuse are used to delay or block contact. Although there are examples in the system of both these phenomena, which is more prevalent or harmful can only be assessed by proper research. Collecting anecdotal evidence by way of subjective self-report without verification is unlikely to unlock the deadlock between incompatible and polarised views of the alleged failures of the family justice system.

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.

write text in box:

The wide variations in anecdotal evidence suggest inconsistency. We would like to see research asking whether there is inconsistency between tiers of the judiciary including lay justices, or on a geographical basis, or simply on a judge by judge basis.

Resources are a significant challenge in terms of listing availability, implementation of special measures and legal representation. A fact-finding hearing can cause delay, meaning courts are placed in an invidious position vis a vis interim contact issues.

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?

write text in box:

There is scarcely any case law on the statutory presumption - see F. Kaganas (2018) 'Parental Involvement - A Discretionary Presumption'. Legal Studies, 38 (4). pp. 549 - 570.

We believe that the presumption is less influential than the human rights principles emphasised in the leading cases e.g. Re C [2011] EWCA Civ 521, which has subsequently been cited in respect of a positive obligation on the court to ensure contact in private law.

We are aware of the strength of the assertion that family courts operate on a presumption of 'contact at all costs' which we think urgently needs to be interrogated. In our experience, courts generally operate on the basis that some contact should take place unless there is a good reason, but will order no contact or restrict contact (to supervised or indirect) if that is justified. The concern on the part of The Transparency Project is that the continued public assertion that the court operates on a 'contact at all costs' basis affects litigation behaviour and discourages engagement with the court process. If this assertion is found to be accurate through robust research (rather than subjective self-report of aggrieved parents) the law needs reform. If it isn't, it is crucial that family justice professionals are able to rely on research and relevant data.

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?

write text in box:

The court may order no contact, or restrict contact to supervised or indirect.

Safety and protection at court for victims of domestic abuse and other serious offences

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

write text in box:

Some court buildings do not have safe facilities.

We are not confident that all parties are aware of the potential measures that can be put in place, so we have explained these in detail in our Guidance Note.

12 Do family courts make the right decisions about whether an alleged victim of domestic abuse or other serious offences is vulnerable?

Not Answered

write text in box:

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?

write text in box:

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?

write text in box:

15 How effective are these provisions in protecting victims of domestic abuse or other serious offences from harm in private law children proceedings?

write text in box:

Repeated applications to the family court in the context of domestic abuse

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?

add text in box:

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

add text in box:

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

add text in box:

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?

add text in box:

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

add text in box:

Outcomes for children

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 arrangements order which requires them to interact with the other parent in order to facilitate contact).

add text in box:

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)?

add text in box:

We think that Q 22 and 23 should be addressed by reference to existing international and England & Wales research about the impact of domestic abuse and conflict on children, as well as evidence that may be gathered in this exercise.

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?

add text in box:

Any other comments or suggestions

24 Are there any examples of good practices in the family courts or which the family courts could adopt (perhaps from other areas of law) in relation to the matters being considered by the panel?

add text in box:

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

write text in box:

1. We would like the panel to consider the guidance note that we have produced for those involved in children cases where allegations of domestic abuse are raised. That guidance note can be viewed and downloaded at www.transparencyproject.org.uk/resources. It sets out the process that should be adopted pursuant to PD12J in plain English, because we were finding in our communication with parents that many had unrealistic or confused expectations about how the process would work and in particular about the burden and standard of proof, the binary system and the interface between criminal convictions or acquittals and family findings.

2. We would also refer the panel to a recent 'snapshot' series of (currently six) blog posts that we have published, looking at the approach to domestic abuse taken in a range of recently published family court judgments.

<http://www.transparencyproject.org.uk/how-does-the-family-court-treat-domestic-abuse-a-snapshot-continued-part-6/>

3. There are a range of other posts on our blog which can be found here : <http://www.transparencyproject.org.uk/?s=domestic+abuse>

They track in particular the increasingly fractious and polarised public debate about how family courts deal with these issues, and the lack of objective evidence against which one might assess many of the public claims that have now gained popular traction. Taken together, these accounts appear to suggest that there is a problem, but what is required is robust research on the extent and nature of any problems.

4. We would also like to find ways for the media and legal bloggers to be able to scrutinise these issues. Currently, we can attend hearings in private law cases involving allegations of domestic abuse under the legal bloggers pilot (PD36J), though we have not yet done so and are mindful of the particular sensitivities in some cases and the fact that there is a likelihood of LiPs in particular being unsure of our presence. We would very much like to be able to observe FHDRA lists, where in our view the direction of travel in cases is often set - and we surmise that the handling of the FHDRA and safeguarding issues then raised, consideration of PD12J etc is critical to the future conduct of the case. Currently the PD36J scheme does not permit our attendance at such hearings (though individual judges may in theory permit it on request).

5. We have some concerns about unrealistic expectations being held about this review. The way in which the review came about and was publicised has encouraged some individuals and campaigners to expect their accounts to be relied upon as evidence of fact. See here for context:

<https://www.thetimes.co.uk/article/we-must-shed-light-on-family-court-crisis-pkb9360jt>