domestic abuse commissioner

The Family Court and domestic abuse: achieving cultural change

JULY 2023

Acknowledgements

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Foreword

Almost every day I hear from those subject to domestic abuse about their experiences in the Family Court. Far too often the stories they tell me of private family law children proceedings are of re-traumatisation and fear for their children's safety. Changing this is one of my top priorities as Commissioner. In my engagement with government, the judiciary and other family justice agencies, I have been struck by just how committed they are to positive change, and I am hopeful that the next several years will be a turning point in how the Family Court addresses domestic abuse allegations. The recommendations in this report set out my vision of the practical steps needed to achieve the changes we all want to see. Whilst meaningful change cannot be rushed, we owe it to the survivors whose lives have been impacted by the family justice system to deliver these improvements in an expedient manner. The time for change is now.

In the last 30 years or so, there has been a sea change in how domestic abuse is understood and treated both by the public and by the state. Attitudes have changed particularly rapidly in the last ten years, with coercive and controlling behaviour now recognised as an offence, and with the passage of the ground-breaking Domestic Abuse Act 2021. Children are now, thanks to the Act, formally recognised as victims of domestic abuse in their own right.

When measuring progress on justice for adult and child victims and survivors of domestic abuse in England and Wales, understandably, thoughts often turn to the criminal justice response and prosecuting perpetrators. Yet, for victims and survivors with children who are separating from their abusers, engagement with the family justice system will often be the most difficult, yet most important part of their interaction with the justice system. Victims and survivors must rely on the Family Court to keep their children safe from perpetrators. Yet too often victims and survivors do not feel understood or taken seriously in the Family Court. In turn, this undermines the sense of faith held by the public in the family justice system, which often places victims and survivors at further risk.

Marianne Hester describes the experience of victims and survivors navigating different agencies as the 'Three Planet Model':

- the domestic violence planet,[1] where domestic abuse is considered a crime. The perpetrator's behaviour is recognised by the police and other agencies as being abusive and action is taken against the perpetrator;
- the child protection planet, where victims and survivors are expected to remove themselves and their children from the perpetrator and keep them safe; and

1 The three planet model dates from 2011 where the term 'domestic violence' was often used in contrast, whereas we now use the term 'domestic abuse' to encompass all forms of coercive control and psychological abuse, as well as physical violence.

- the child contact planet, where a victim or survivor who has tried to protect their child by calling the police and removing themselves and their child from the relationship, is now ordered to allow contact between the perpetrator and the child.[2]

The issues that victims, survivors and children face in the 'child contact planet' - the Family Court - were set out in the Ministry of Justice's report, Assessing Risk of Harm to Children and Parents in Private Law Children Cases, (the "Harm Panel report"), which made clear that the systemic failings it identified were undermining the ability of the courts to properly assess risk to victims, survivors and children from domestic abuse.

It is my priority as Domestic Abuse Commissioner to ensure that the national response to domestic abuse is improved across the board – and that cannot be achieved without significant and urgent improvements to private law children proceedings. All agencies and professionals that come into contact with child and adult victims and survivors, and take decisions relevant to their welfare, must fully understand domestic abuse, its impact on adult and child victims and survivors, and the risks that perpetrators pose after separation.

There has been progress made since the publication of the Harm Panel Report, which must be acknowledged:

1. The prohibition of cross-examination provisions contained within the Domestic Abuse Act 2021 came into force on 21 July 2022 and has barred cross-examination by a defendant within all family proceedings commencing from the same date;[3]

2. The Qualified Legal Representative (QLR) scheme was established to assist with appointing QLR's to conduct cross-examination in family proceedings.[4]

3. Independent Domestic Violence Advocates (IDVAs) and Independent Sexual Violence Advocates (ISVAs) were permitted access to the Family Court to provide crucial support for victims and survivors of domestic abuse during proceedings on 6 April 2023;[5]

4. The Family Court has made considerable progress in restricting the use of intimate images in family proceedings and on 29 April 2022 guidance about how to approach intimate images in private family law proceedings was handed down in the judgment of *Re M*;[6] and

5. Pilot Pathfinder Courts in North Wales and Dorset have been established to improve information sharing between agencies such as the police, local authorities and the courts; provide better support and safer outcomes for child and adult victims and survivors; and introduce a problem-solving approach that places the child at the centre of family cases.[7] They have been handling private family law cases since early 2022.

2 Hester, M., 2011. The three planet model: Towards an understanding of contradictions in approaches to women and children's safety in contexts of domestic violence. British journal of social work, 41(5), pp.837-853.
3 Section 65 of the Domestic Abuse Act 2021, as implemented by Practice Direction 3AB.
4 Sections 65 and 66 of the Domestic Abuse Act 2021.
5 Practice Direction 27C of the Family Procedure Rules.
6 M (A child: Private Law Children Proceedings: Case Management: Intimate images) [2022] EWHC 986 (Fam).
7 Welsh government (3 March 2022), North Wales Family Court pilots new approach for supporting separated families who come to court | GOV.WALES
Ministry of Justice (8 March 2022), Pioneering approach in family courts to support domestic abuse victims better - GOV.UK (www.gov.uk)

Further, in June 2022, Cafcass published their *Domestic Abuse Learning and Improvement Plan: first year update* outlining a number of measures and initiatives undertaken to establish progress following the Harm Panel report.[8]

Amongst these were:

1. Reference to the original objectives as set out in the Cafcass Domestic Abuse Learning and Improvement Plan in June 2021;[9]
2. A new mandatory Domestic Abuse Learning Harm Panel report update May 2023 and Development Programme in place for all Family Court Advisers, which has since been completed by 95 percent of Cafcass' 1,687 frontline staff and managers; and
3. An updated Domestic Abuse Practice Pathway with revised guidance to support Family Court Advisers.[10]

I strongly welcome the government's commitment to improving the lives of both adult and child victims and survivors of domestic abuse. I know that judges, Cafcass, Cafcass Cymru, and social workers are also committed to improvements – even as they themselves face heavy workloads and lack of resources. Together we can achieve the ambitious vision set out in this report to put in place the long-term changes needed to ensure that child and adult victims and survivors receive the coherent, compassionate response that they deserve, no matter where they turn.

Nicole Jacobs,
Domestic Abuse Commissioner
for England and Wales

8 Cafcass (June 2022), Learning and Improvement Board - Cafcass - Children and Family Court Advisory and Support Service
9 Cafcass (June 2021), Cafcass publishes new Domestic Abuse Learning and Improvement Plan - Cafcass - Children and Family Court Advisory and Support Service
10 Cafcass Domestic-Abuse-Practice-Pathway-Final-version-December-2021 (1).pdf and

Harm Panel report update May 2023

The Harm Panel report was welcomed as a necessary spotlight on the Family Court and was met with significant commitment from the government and judiciary to drive the needed reforms.

This report makes a renewed call for urgent reform and continued momentum of the Harm Panel recommendations and next steps arising from them. Many of these recommendations are reinforced by the Harm Panel report update which was published in May 2023,[11] shortly before this report.

11 Ministry of Justice (May 2023), Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update (publishing.service.gov.uk)

Introduction

Many victims and survivors of domestic abuse who are separating from their abuser will need to go through Family Court proceedings, particularly where there is disagreement about child arrangements (known formally – and referred to in this report - as private law children proceedings, or child arrangements proceedings). In the 12 months to 31st December 2022 alone, 52,204 private law children cases were started.[12] However 10 percent of these did not involve separating parents.[13] A small-scale study by Cafcass and Women's Aid Federation England in 2016 suggested that allegations of domestic abuse are present in up to 62 percent of such cases, meaning that there could be up to an estimated 32,400 private law children cases involving domestic abuse every year.[14]

Whilst the figures are not precise, they indicate an issue of concern on a considerable scale. We appreciate that the role of the Family Court is much wider than simply focusing on cases involving domestic abuse; it is a busy system with multiple stakeholders who are making thousands of decisions every day.

That said, it is clear the family justice system's response to domestic abuse is a key piece of the puzzle when considering the national response to domestic abuse as a whole, and improving the family justice system's response to domestic abuse is a priority for the Domestic Abuse Commissioner. Her vision is for a family justice system that has a culture of safety and protection from harm, where children's needs and the impact of domestic abuse are central considerations, and victims and survivors of domestic abuse feel listened to and respected.

The failings identified by the Harm Panel undermine public trust in the courts' ability to fairly assess allegations of domestic abuse and suggest that the risk to child and adult victims and survivors from domestic abuse perpetrators is not always properly understood or taken into account when orders are made. Consequently, unsafe contact may be ordered, putting child and adult victims and survivors at risk of harm from perpetrators, which often has damaging physical, emotional and psychological impacts with potentially lifelong consequences.[15] In addition to the clear dangers to children and families of unsafe contact arrangements, the process and unsafe outcomes result in

12 Ministry of Justice, Family Court Statistics Quarterly: October to December 2022 - GOV.UK (www.gov.uk)
13 Nuffield Family Justice Observatory (April 2023) Uncovering private law: The Other 10% (nuffieldfjo.org.uk)
14 CAFCASS, Women's Aid (2016), Allegations of domestic abuse in child contact cases (cafcass.gov.uk)
15 Barnardo's (2020), Not just Collateral Damage The hidden impact of domestic abuse on children. 'Not just collateral damage' Barnardo's Report_0.pdf (barnardos.org.uk)

> **"Listen to us from the start, these experiences have a long-term effect on our lives."**
>
> **'In Our Shoes', Family Justice Young People's Board (2021)**

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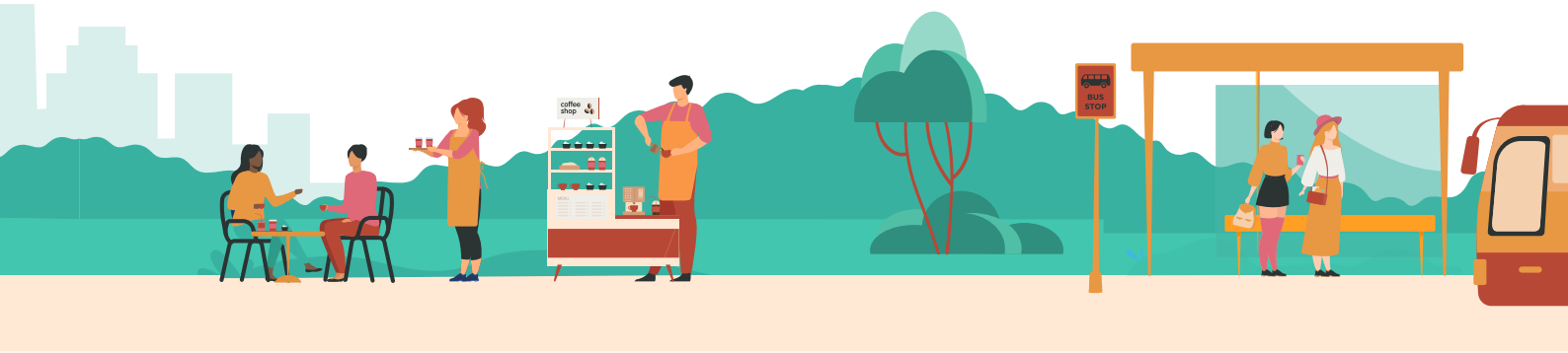

further trauma.

Some of these consequences were devastatingly illustrated in a Channel 4 Dispatches programme, which showed distressed children being removed from their mother against their will in the middle of the night, and – in a separate case - a mother having to fight for many years through the Family Court to prevent her convicted paedophile ex-husband from having contact with her children.[16]

However, we are now at a unique moment in the Family Court's response to domestic abuse, with welcome commitment for change from the Government, the judiciary and all key family justice agencies. In the last three years since the Harm Panel Report, we have seen significant reforms, which this report will discuss. These reforms are a very welcome start: the Government, the judiciary and other family justice agencies such as Cafcass and Cafcass Cymru are to be commended on their continuing commitment to drive forward these, and other, Harm Panel recommendations.

There have been delays to delivering reforms, although this is partly due to the Covid-19 pandemic and increasing demands on the Family Court, it is clear that much more is needed to bring about change. The Commissioner strongly supports the Harm Panel report and has repeatedly emphasised that its recommendations must be implemented at pace in order to reduce unsafe risks to adult and child victims and survivors in a sustainable manner in order to ensure ongoing implementation.

Aim of the Report

This report gives a voice to the concerns held by those raised directly to the Commissioner. It is not, however, the entirety of her developing evidence base. Access to the Family Court by virtue of the Family Court Monitoring and Reporting Mechanism ("FCMRM") will be the first formal and official assessment of the Family Court, and is due to commence in Autumn 2023. The FCMRM will give the Office of the Domestic Abuse Commissioner access to three Family Court sites in order to obtain an insight into engagement with domestic abuse in proceedings. The formal mechanism of direct engagement with the Family Court, and all actors within it, will be a pioneering approach to the family

16 Channel 4 Dispatches, Torn Apart: Family Courts Uncovered, broadcast 20 July 2021, 10pm.

justice system and is outlined in detail on pages 36 – 38 of this report. The FCMRM will be an enormous undertaking and the Commissioner remains aware that much will be uncovered, including aspects of the Family Court which have not been accessed to date. The learning expected from the FCMRM will fundamentally inform the work of the Commissioner going forward and is an opportunity for a clearer evidence base to be provided to determine both progress made and also improvements needed.

This report will outline the key issues victims and survivors face when they come into contact with the Family Court and describe how these failings enable the Family Court to become a tool of post-separation coercive control and abuse for a perpetrator. A key issue is the lack of transparency of court proceedings, which makes it difficult to fully understand the volume of identified inconsistencies and failures in practice and in applying guidance within the Family Court. The report will also discuss the lack of understanding of domestic abuse in the Family Court, leading to the minimisation of domestic abuse and with it, the re-traumatisation of many adult and child victims and survivors. Importantly, the report raises the lack of consideration of the voice of the child and the harm caused to children through unsafe contact orders in private law children proceedings, particularly when allegations of so-called 'parental alienation' are raised.

Addressing the range of issues identified requires a commitment to embed and sustain wholesale cultural change in the Family Court, as recommended in the Harm Panel report.

This report seeks to identify such change and will propose a range of practical recommendations, such as: the creation of a new role of Domestic Abuse Best Practice Lead, and further development of court support from IDVAs, who are now permitted access to the Family Court, or another specialist domestic abuse support worker for adult and child victims and survivors.

The report also builds on the Commissioner's previous report *Improving the Family Court Response to Domestic Abuse* and will set out in detail the planned pilot for the Monitoring and Reporting Mechanism. A Monitoring and Reporting Mechanism for the Family Court was recommended in the Ministry of Justice's Harm Panel report, to be established within the Office of the Domestic Abuse Commissioner and in partnership with the Victims' Commissioner to maintain oversight of and report regularly on the Family Court's performance in protecting adult and child victims and survivors from domestic abuse and other risks of harm in private law children's proceedings. The Commissioner's previous report and recommendations for the design of the mechanism were worked on in collaboration with the former Victims' Commissioner, Dame Vera Baird KC, and it was agreed and conceived of as a partnership of both offices. The mechanism will monitor compliance with existing and new rules and guidance, and seek to assess regional variations in performance to improve consistency.[17] Dame Vera Baird KC resigned as Victims' Commissioner in September 2022 and, at the time of writing this report, a Victims' Commissioner has yet to be appointed. As such, the views and recommendations set out in this policy report are exclusively those of the Domestic Abuse Commissioner.

The Commissioner is encouraged to see a child-centric approach to private law children cases in the Family Court being advanced by various stakeholders and organisations. This report importantly builds on this work and presents a child-centric framework to examine domestic abuse allegations in the Family Court. This framework draws on the existing and established legal provisions and

17 Domestic Abuse Commissioner, (2021) Improving the family court response to domestic abuse, Improving-the-Family-Court-Response-to-Domestic-Abuse-final.pdf (domesticabusecommissioner.uk)

seeks to ensure the voice of the child is meaningfully heard and their safety is prioritised throughout proceedings. The recommendations are set out in parallel with raising ambitions for urgently needed reforms. The two Pathfinder Courts have shown how effective abuse-informed courts are in recognising and effectively engaging with domestic abuse. These pilots give valuable insight into how the legal system can properly address domestic abuse and protect adult and child victims and survivors. The Pathfinder Courts have the capacity to be instrumental in bringing the Domestic Abuse Act 2021 to life for adult and child victims and survivors. The knowledge from these pilots is invaluable and must be incorporated into reform work going forward.

The Commissioner is aware that evaluation of these pilots is ongoing but the present feedback for all partners is positive and indicative of great benefit in preparing to draw from the knowledge gained in a time efficient manner. The Commissioner recommends that learning, development and ongoing resource for these pilots be prioritised as well as incorporating learning from reforms in other countries and pockets of good practice in the UK. The Commissioners appreciate that these early findings and best practice learning will be subject to a full evaluation, and we are looking to explore these themes further as part of the FCMRM.

Methodology and Data

The Domestic Abuse Commissioner conducted a range of primary research activities for the development of this report. This broke down into three key aspects:

1. A review of the correspondence received by the Commissioner from victims and survivors of domestic abuse, as well as from their friends, family members and new partners. Whilst this provided a helpful insight into victims and survivors' experience of procedural justice, we acknowledge the limitations of the sample, in that it was a self-selecting group potentially biased towards individuals who have had difficult experiences or are dissatisfied with the outcomes of their cases. It is not a represented sample of those who have experienced the Family Courts process and any descriptive statistics derived from the data must not be generalised. As such, any findings have not been referred to as evidence within the Family Courts report.

   The full methodology and analysis of this review can be found in the Accompanying Methodology Report on the Commissioner's website: https://domesticabusecommissioner.uk;

2. A range of roundtables with experts from the legal sector, academia, the children's sector, Cafcass, Cafcass Cymru, service organisations supporting domestic abuse adult and child victims and survivors (with a separate roundtable for organisations specifically supporting male victims and survivors), campaigners and members of the Family and Young People's Justice Board in Summer 2021. The methodology of these roundtables can be found in the Commissioner's report: *Improving the Family Court Response to Domestic Abuse 2021;*[18]

3. A survey of solicitors, barristers and chartered legal executives to gain insight into practitioners' views and experiences of private law children cases in the Family Court, which collected data between January to April 2023. A total of 138 family law practitioners completed the survey; and The rationale behind this survey as well as a full account of the methodology and analysis,

18 Ibid Pages 8 and 23

including sample size and timeframe, can be found in the Accompanying Methodology Report on the Commissioner's website: https://domesticabusecommissioner.uk.

Further, this report was also informed by:

4. A rapid evidence review of existing reports and research concerning the handling of domestic abuse in private law children cases; and
5. Findings of two surveys that were conducted by Channel 4's Dispatches programme in 2021.[19] We acknowledge the limitations of these surveys due to the self-selecting nature of the sample.

As outlined above, the full methodology and analysis of this review can be found in the Accompanying Methodology Report on the Commissioner's website: https://domesticabusecommissioner.uk

19 Channel 4 Dispatches (2021), survey conducted for: Torn Apart: Family Courts Uncovered: Dispatches. Dispatches conducted two surveys: one for legal professionals (to which 297 family solicitors and barristers responded) and one through an online questionnaire for those who have used The Family Courts (to which over 4000 users responded).

The parameters of this report

This report has been written by the Office of the Commissioner three years after the publication of the Harm Panel report, some two months after the publication of the Ministry of Justice's Harm Panel update, and ahead of the Commissioner's Monitoring and Reporting Mechanism Pilot, which will feed into the President of the Family Division's objectives to increase transparency of the Family Court ('the Transparency Project').[20]

The timing of this report is, therefore, specific: access to the Family Court is imminent and there is considerable support from the senior judiciary to facilitate and enable this. Domestic abuse training has been emphasised and propelled by the President of the Family Division, Sir Andrew McFarlane, and the domestic abuse sector remains steadfast in supporting an abuse-informed approach to family law proceedings.

Given that the Family Court could not be accessed at the point in time that this report was published, the Commissioner has drawn on the resources available to her to shine a light on voices which have emerged from the Family Court. These voices come from victims and survivor of domestic abuse who have written to her outlining their concerns. Whilst these views cannot be said to be representative of all those in Family Court proceedings, the legitimate concerns raised within the correspondence received by the Commissioner assist with obtaining an insight into some experiences.

Whilst this provided a helpful insight into victims and survivors' experience of procedural justice, it is important to recognise that the sample is a self-selecting and potentially biased towards individuals who have had a difficult experience or are dissatisfied with the outcomes of their cases. We also acknowledge that the sample included correspondence from two months prior to the Harm Panel publication.

In order to obtain a further insight into the Family Court, the Commissioner developed a Family Court practitioner survey. The Commissioner understands that the views of legal professionals in this survey are subjective and reliant on their own thoughts and experiences of private children family law proceedings. We recognise these findings are, therefore, limited and have only been used to support the Domestic Abuse Commissioner's understanding of the Family Court.

Furthermore, within the parameters of her appointment, the Commissioner:

1. Interacts with victims and survivors at events and visits;
2. Published a mapping report *A patchwork of provision* which states 69 percent of respondents wanted support for Family Court proceedings in the last three years (the report was based on the views of over 4,000 victims and survivors of domestic abuse);
3. Receives feedback from and engagement with frontline services who interact with thousands of survivors of domestic abuse day to day; and
4. Has a Practice and Partnerships Team within her Office, containing Geographic Leads, who all regions of England and Wales, and inform her of their areas.

20 The Transparency Project, Making Family Justice Clearer

Human Rights

The Commissioner is aware that the Family Court engages a number of human rights provisions, and these are considered as part of the wider approach taken by her Office.

What is the family justice system, and what are private law children proceedings?

Family Court

The Family Court as a single entity was established under Part 2 of the Crime and Courts Act 2013 (previously family matters were heard in the Magistrates' Court, County Court or the Chancery Division of the High Court, but the Family Court did not exist as a single entity). The Family Court judiciary is made up of lay magistrates, District Judges (Magistrates Court), District Judges, Circuit Judges and High Court Judges. Where a case is allocated will depend on its complexity. The Family Court is based on 43 local centres (each presided over by a 'Designated Family Judge') and at the Royal Courts of Justice.

Family Court leadership

The Family Court is overseen by the President of the Family Division (a post currently held by Sir Andrew McFarlane).

The Family Justice Board is a ministerial-led cross-government board made up of family justice leaders, set up to improve the performance of the family justice system.

Local Family Justice Boards exist at a local level to support the work of the Family Justice Board by bringing together the key local agencies, including decision makers and front-line staff, with the aim of driving significant improvements in the performance of the family justice system in their local areas.

As with all judiciary, in line with the important principle of judicial independence, Family Court judges and magistrates are independent of government. Neither the government nor the Domestic Abuse Commissioner can intervene in individual cases.

Other agencies that make up the family justice system

Cafcass and Cafcass Cymru (Children and Family Court Advisory and Support Service): Cafcass represents children in the Family Court and independently advises and prepares reports for the Family Court about what they consider to be in their best interests of children.

Local authorities/social services: If a local authority is already involved with a family, they may be asked to advise the court instead of Cafcass. However, this is dependent on a number of factors, including the amount of time which has passed since the last point of social services engagement.

Private law children proceedings

Where separating parents cannot agree on contact or other arrangements for their children, such as where children should live, they can make an application to the Family Court under the Children Act 1989. The court is then asked to decide the aspects of child arrangements that parents do not agree on. These are known as private law children proceedings, or child arrangements proceedings.

With the removal of legal aid for many private law cases in 2013, the proportion of applicants and respondents who are legally represented is low with many parents navigating the complex legal system themselves.[21]

Mediation

Initial applications to the Family Court under section 8 of the Children Act 1989 for a private family law order require justification as to why mediation is not suitable. This is presently not required in cases where domestic abuse has been evidenced, where there are child protection concerns and where there is an urgency (including alleged risks to the child or unlawful removal from the jurisdiction, amongst others).[22]

Public law children proceedings

Where the local authority believes a child is at risk of significant harm, they can apply to the Family Court for a Care Order or Supervision Order under the Children Act 1989 in respect of the child. Legal aid is available for parents whose children are subject to these proceedings. Although this report focuses on issues relating to private law children proceedings, it is worth highlighting that domestic abuse is also involved in many public law children cases.[23]

Domestic Violence Remedy Orders

Under the Family Law Act 1996, victims and survivors of domestic abuse can apply to the Family Courts for an injunction to protect them and any children from a perpetrator of domestic abuse. A non-molestation order protects victims and survivors and any relevant children from abuse or harassment. An occupation order states who should live in the family home and can exclude a perpetrator from the surrounding area.

In 2022, 32,049 applications were made for domestic violence remedies, up 4 percent compared to 2021. There were 38,475 orders made, similar to the previous year. Non-molestation orders formed 84 percent of orders applied for and 95 percent of orders made, whilst occupation orders comprised 16 percent and 5 percent of the totals respectively.[24]

Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) introduced from 2014 by the Crime and Security Act 2010, are measures that provide short term, emergency protection to victims and survivors of domestic abuse.

The Domestic Abuse Act 2021 introduced the creation of Domestic Abuse Protection Orders (DAPO), which seek to replace the existing protection order frameworks with one order which can mandate a range of restrictions and requirements on the individual against whom it is made. This can range from mandating attendance to a perpetrator programme, to outlining exclusion zones or occupation restrictions. The Government will be commencing the pilot stage of the introduction of the DAPOs in Spring 2024.[25]

21 Ministry of Justice, Family Court Statistics Quarterly: October to December 2022 - GOV.UK (www.gov.uk)
22 HMCTS, Application under section 8 of the Children Act 1989 for a child arrangements, prohibited steps, specific issue order or to vary or discharge or ask permission to make a section 8 order C100 - Application under section 8 of the Children Act 1989 for a child arrangements, prohibited steps, specific issue order or to vary or discharge or ask permission to make a section 8 order (publishing.service.gov.uk)
23 Department of Education, Characteristics of children in need, Reporting year 2022 – Explore education statistics – GOV.UK (explore-education-statistics.service.gov.uk). Although there is little data about domestic abuse in public law proceedings, in the 12 months to 31st March 2022, the Department of Education's Children in Need Census identified the most common factor identified at the end of a needs assessment was a concern about the child's parent or carer being a victim of domestic abuse.
24 Ministry of Justice, Family Court Statistics Quarterly: October to December 2022 - GOV.UK (www.gov.uk)
25 Home Office, Policy paper Domestic Abuse Protection Notices / Orders factsheet, https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet

Chapter 1:

History, transparency, and consistency in the handling of domestic abuse in the Family Court

"The secrecy around the Family Court creates a lot of trauma. Women go into the process thinking that they are going to get justice and their abuse will be acknowledged, but that is not what the Family Court can offer."

Victim/survivor of domestic abuse who attended the Domestic Abuse Commissioner's roundtable discussion on the Family Court (September 2021)

Many victims and survivors of domestic abuse enter the family justice system hoping, and expecting, a fair hearing and prioritisation of their children's safety. The literature review accompanying the Harm Panel report noted that the majority of victims and survivors entering the Family Court process wanted to obtain an outcome whereby children could have contact with the other parent in a manner which is safe for both them and their children.[26] For too many, however, this is not the case, and they face lengthy, retraumatising proceedings, where domestic abuse is minimised and their children's safety is not prioritised.[27] Rather, the demands of the perpetrator are advanced, centring around parental rights, seemingly at the expense of the rights of adult and child victims and survivors.[28]

For over two decades now, it has been acknowledged that risks to and the impact on the child should be a central consideration in cases involving domestic abuse in the Family Court. In 2000, in the case of Re L, V, M and H,[29] the England and Wales Family Court for the first time recognised (when considering child arrangements cases) that there needed to be a heightened awareness of the existence and impact of domestic violence on the children of adult victims and survivors (as the court referred to it at that time). Guidance was handed down that court hearings of these kinds of cases, in which allegations of domestic abuse were made, should consider holding fact-finding hearings at the earliest opportunity. Similar guidance was simultaneously issued by the Children Act Subcommittee of the Lord Chancellor's Advisory Board on Family Law following a consultation process.[30]

However, in 2004, Women's Aid Federation England published the 'Twenty-Nine Child Homicides' report, which told the stories of 29 children who had been killed by perpetrators of domestic abuse in circumstances relating

26 Ministry of Justice, (2020) Domestic abuse and private law children cases: A literature review (publishing.service.gov.uk)
27 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases
28 Linda C. Neilson, 2018 Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights? (FREDA Centre for Research on Violence Against Women and Children)
Jenny Birchall and Shazia Choudhry, 2018 What About My Right Not to Be Abused: Domestic Abuse Human Rights and the Family Courts, Modern Law Review.
29 [2000] 2 FCR 404; [2000] 2 FLR 334.
30 Lord Chancellor's Advisory Board on Family Law: Children Act Sub-Committee, Guidelines for Good Practice on Parental Contact in cases where there is Domestic Violence (TSO 2001).

"What astounds me is that the same court that grants a non-molestation order and says this person is not safe to be around you, is the same court that says this person is safe to be around your children. […] You are told to leave an abusive relationship but when you do, you are very definitely penalised for it by the Family Court system."

Correspondence from a victim/survivor of domestic abuse to the Domestic Abuse Commissioner

to child contact between 1994 and 2004.[31] This prompted a review by the Family Justice Council which found that the Re L guidance was not being followed.[32] As a result, a new Practice Direction (PD) 12J was introduced in 2008, with the aim of ensuring best practice in the Family Court in the hearing of child arrangements cases involving allegations of domestic abuse. Since its introduction, PD12J has been updated twice (in 2014 and 2017), to reflect the developing understanding of the impact of domestic abuse on children and parents.

What are the rules that the Family Court should be following in cases involving allegations of domestic abuse?

Practice Directions are guidance that civil courts must follow when hearing cases. There are a number of Practice Directions specific to the Family Court and domestic abuse.

Practice Direction 12J – This applies to all child arrangements proceedings where domestic abuse is involved, or alleged to be involved, in a case. It sets out details of how domestic abuse should be understood, what hearings should take place and how they should be managed, and factors to be taken into account when determining whether to make a child arrangements order where domestic abuse has occurred.

Other relevant Practice Directions include:

- Practice Direction 3AA on special measures (i.e. the measures that can be provided in court to reduce the traumatising nature of proceedings and enable victims and survivors to give their best evidence, such as use of screens, provision of separate entrances and exits, and waiting rooms, and the option of attending hearings via video link;
- Practice Direction 25B on use of experts; and
- Practice Direction 3AB which deals with the prohibition of cross-examination in person by perpetrators or alleged perpetrators of domestic abuse.

Yet 2016 saw the publication of another Women's Aid Federation England report, 'Nineteen Child Homicides', which told the stories of 19 children killed by perpetrators of domestic abuse between 2005 and 2015, in circumstances relating to child arrangements (formally or informally arranged).[33]

PD12J is reasonably comprehensive guidance, however, despite this and the mandatory nature of many of its provisions, the Family Court was still proving to be unsafe for adult and child victims and survivors, therefore undermining the Family Procedure Rules that apply when the most

31 Women's Aid (2004), Twenty-Nine Child Homicides: Lessons still to be learnt on Domestic Violence and Child Protection.
32 Barnett, A (2015) 'Like Gold Dust These Days': Domestic Violence Fact-Finding Hearings in Child Contact Cases. Fem Leg Stud 23, 47–78, 9.
33 Women's Aid (2016), Nineteen Child Homicides.

vulnerable legal subjects are implicated.[34]
The Harm Panel Report found that, due to deep-seated and systemic failings, domestic abuse allegations and related risks to adult and child victims and survivors were not sufficiently taken into account by the Family Court when making contact arrangements for children,[35] meaning that the courts were failing to adequately assess risks to children and protect them from harm.[36] In summary, these included:

- **A culture of disbelief** for victims and survivors raising issues of domestic abuse, with a lack of understanding and/or minimisation of domestic abuse by the courts. Victims and survivors and their advisors reported concerns that raising domestic abuse as an issue often risked the retaliatory use of so-called 'parental' alienation narratives by parties against whom domestic abuse had been alleged as a counter-claim, leading to worse outcomes for adult and child victims and survivors;
- **A pro-contact principle enshrined in law**, which judges are under a duty to follow. Evidence suggested that the presumption of contact was rarely disapplied, and domestic abuse allegations, and impact on the child being required to have contact with an abusive parent, sometimes against their will, were not sufficiently taken into account. The pro-contact principle is reinforced by a statutory presumption of parental involvement that was included in the Children Act 1989 in 2014;
- **The retraumatising nature of the Family Court** due to the culture of disbelief, the adversarial nature of proceedings, lack of access to special measures and specialist court support such as Family Court IDVAs as well as the impact of being subjected to repeated applications to court by their ex-partner as a mechanism for continuing abuse;
- **Inappropriate use of mediation** or other out of court resolution, which was not appropriate for domestic abuse victims and survivors;
- **Siloed working**, with a lack of joined up and consistent communication between the criminal justice system, child safeguarding (public law children's cases) and the private law family system;
- **Under-resourcing of the family justice system, and lack of availability of legal aid**; and
- **Additional barriers to justice in the Family Court for marginalised and minoritized adult and child victim and survivors of domestic abuse.**

Furthermore, the Harm Panel Report found that PD12J was not being consistently followed in practice. The report found that many judges and other professionals in the family justice system did not fully understand domestic abuse, especially coercive control (which, compared to physical abuse, often manifests as a recurring pattern of low severity/high harm incidents rather than as acute high harm singular incidents), or the impact it has on children. Consequently, adult and child victims and survivors were being failed repeatedly.[37]

The Government accepted the report's findings, with the Minister at the time and present Lord Chancellor and Secretary of State for Justice (re-appointed on 21 April 2023), Alex Chalk, acknowledging that the "report lays bare many hard truths about long-standing failings in the family justice system, especially in protecting the victims and survivors of abuse and their children from harm."[38]

34 In addition to the Women's Aids reports, concerns about the treatment of domestic abuse allegations in private law children proceedings were documented in a growing body of academic research, as set out in the literature review accompanying the Harm Panel report. See Adrienne Barnett, Domestic abuse and private law children cases: A literature review, particularly sections 7.1, 7.2 and 7.3.
35 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 39, 47.
36 Ibid, 39.
37 Ibid
38 Statement by Alex Chalk (Parliamentary Under-secretary of State for Justice) (June 2020).

The failure to implement the provisions of PD12J compromises family court hearings by undermining a victims and survivors' ability to give evidence. Further, PD12J seeks to mitigate the trauma experienced by victims and survivors recounting abuse in court, which is widely accepted to be distressing and challenging if not appropriately supported; this is often compounded by the intimidating, unfamiliar and overwhelming setting of the Family Court. While security and special measures are more consistently applied in criminal courts, the Family Court lacks the consistent infrastructure and practices to ensure victims and survivors feel safe when in court buildings with perpetrators.[39]

Furthermore, in March 2021, the Court of Appeal in Re H-N and others found that, while PD12J was fit for purpose, "the challenge relates to [its] proper implementation".[40] The court also handed down guidance on the importance of judges needing to properly understand the nature of coercive control as a pattern of behaviour, and stipulated that this should be taken into account when assessing future risk of harm to children.[41] The court highlighted the importance of taking a broad approach when such allegations are made, rather than being limited to singular sets of fact as set out in Scott Schedules, with the court holding that looking solely at the allegations set out in Scott Schedules acted as "a potential barrier to fairness and good process, rather than an aid".[42] Practitioners and domestic abuse advocates welcomed the critique of Scott Schedules, which were perceived as being overly restrictive, and therefore, inherently ill-suited for ascertaining and engaging with broad patterns of coercive and controlling behaviour.

With inconsistencies in the use of PD12J and continued poor practice, such as looking solely at allegations set out in Scott Schedules, it is no surprise that for the victims and survivors who contact the Commissioner, problems in the Family Court are one of the most common issues raised; albeit this is a self-selective sample and therefore not representative of all victims and survivors. Thirty five percent (153 of 443) of correspondence received from victims and survivors, from May 2020 to May 2022, mention family court proceedings. One hundred and eight of the 153 (71 percent) of these specifically mention private family law proceedings.[43]

Furthermore, the Commissioner's practitioner survey indicated the majority (nearly 80 percent) of respondents lacked confidence in the efficacy of magistrates in the Family Court to handle domestic abuse cases. When asked to what extent the Family Court could effectively engage with domestic abuse, just over half felt that the ability of the court to engage with domestic abuse was very positive or somewhat positive, but just under a third responded 'somewhat negatively' or 'very negatively.'

It is clear many victims and survivors of domestic abuse are negotiating their way through the Family Court every year, trying to protect the safety of their children and themselves. Currently, there is no monitoring or scrutiny of proceedings or the extent to which courts are following the practice directions and rules. Accredited journalists and legal bloggers are only able to report what they see and hear in the Family Court in three courts in England and Wales, provided reporting maintains the anonymity of parties. [44] Confidentiality rules governing the Family Court make it challenging for press reporting, although prior to the three transparency court

39 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 111
40 Re HN and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448, paragraph 28.
41 See Re HN, paragraph 53: "Where…an issue properly arises as to whether there has been a pattern of coercive and/or controlling abusive behaviour within a family, and the determination of that issue is likely to be relevant to the assessment of the risk of future harm, a judge who fails expressly to consider the issue may be held on appeal to have fallen into error."
42 Ibid, paragraph 43 For explanation of a Scott Schedule, please see: https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/scott-schedule-note
43 Domestic Abuse Commissioner, (2023) Accompanying Methodology Report to the Family court and Domestic abuse: achieving cultural change (domesticabusecommissioner.uk)
44 Family Court Transparency Implementation Group – First Progress Report: Family Court Transparency Implementation Group - First Progress Report - Courts and Tribunals judiciary

pilots mentioned above, some journalists did report on Family Court cases, but the process to apply was burdensome and costly making such reports rare. However, recently Kate Kniveton MP waived her right to anonymity, which required a huge amount of perseverance, and secured permission from the court to publish the judgment in her case.[45] Ms Kniveton's case shared publicly some deeply distressing issues experienced in the Family Court, such as being required to pay for half her abuser's legal costs. However, at present, it is not possible to gain a complete sense of the challenges faced by the thousands of adult and child victims and survivors going through the Family Court each year. This is a direct consequence of the limited access permitted to the Family Court by non-litigants.

The Transparency Review conducted by the President of the Family Division, Sir Andrew McFarlane, recommended that courts be opened up to more press and public scrutiny (whilst maintaining parties' confidentiality). As the President recognises, some of the desired greater transparency will be achieved by improved data collection and publication.[46] A one year pilot was launched in January 2023 for three courts (Cardiff, Carlisle, and Leeds) to allow accredited journalists and legal bloggers to attend subject to complying with restrictions to what could be reported and who can be identified.[47] While this pilot will begin to give an insight into the workings of the Family Court, which will be incredibly valuable, it will not per-se develop a clear evidence base to understand the operations of the Family Court.

More will need to be done in order to understand the scale and types of issues in more granular detail. As acknowledged by the President, "**The lack of judgments being published and the lack of consistent data on the operation of the family justice system means that it is hard to conduct any evidence-based assessments of what we do**."[48]

It is clear that poor practice is taking place in the Family Court and the lack of transparency inhibits the ability for all stakeholders, services and systems to identify what is going wrong, where it is going wrong, and what can be done to improve the operations.

Examples of the Family Court failing to implement special measures can be clearly found in the High Court case of GK v PR [2021] where 29 separate allegations of domestic abuse, including sexual abuse, verbal abuse and coercive and controlling behaviour, were made. The judge in the lower court dismissed most of the allegations of domestic abuse which GK had made. He made an order reinstating contact between PR and the child, as well as allowing for overnight contact. GK appealed. The appeal judge considered procedural failings and made a number of concerning findings that show the challenges that some victims and survivors face in the Family Court.

The appeal judge found that the judge in the lower court:

- Did not properly consider and weigh in the balance of the police and medical disclosure that GK presented regarding her allegation of rape;
- Minimised the nature of some of the allegations of domestic abuse and their potential impact upon GK;
- Did not consider the totality of the evidence in the round, nor fully address how the individual pieces of evidence played into a narrative of coercive and controlling behaviour; and

45 Independent (December 2021), MP to campaign for domestic abuse victims after rape ruling against ex-husband. See also the published judgment: Griffiths v Griffiths fact finding judgment (judiciary.uk)
46 Family Court Transparency Implementation Group – First Progress Report: Family Court Transparency Implementation Group - First Progress Report - Courts and Tribunals Judiciary
47 Sir Andrew McFarlane, President of the Family Division, The Reporting Pilot - Guidance.docx (judiciary.uk)
48 Sir Andrew McFarlane, President of the Family Division (October 2021), Confidence and Confidentiality: Transparency in the Family Courts.

- Relied heavily upon an assessment of each party as a witness, without factoring in the likely impact on GK of giving evidence of traumatic episodes as a vulnerable witness, in the context of a pressurised court setting.

The Commissioner notes that the appeal judge made clear that his judgment should not be taken as suggesting that GK's allegations are proved. However, the findings illustrate some of the problems that can arise when the Family Court hears allegations of domestic abuse in private law children proceedings.

For further detail of this case study, please see Appendix B.

However, it is important to acknowledge the progress that has been made since the publication of the Harm Panel Report three years ago, including changes such as:

- Court of Appeal guidance (in Re. H-N and F v M);
- The establishment of the Cafcass Learning and Improvement Board,[49] Cafcass Domestic Abuse Learning and Improvement Plan and accompanying domestic abuse training programme for all Cafcass practitioners;[50]
- Cafcass Cymru created a two-year secondment from Welsh Women's Aid for a Harm Panel Change Manager to ensure that the panel's recommendations are embedded into Cafcass Cymru policy and practice;[51]
- A renewed drive for data and transparency;[52]
- A new presumption in favour of special measures, and prohibition of cross-examination in person in the Domestic Abuse Act;[53]
- Two Pathfinder Courts piloting an investigative approach to private law children proceedings;
- An ongoing government review of the presumption of parental involvement contained in the Children Act 1989 due to end in October 2023;
- The drafting of a new overarching statement of practice;[54] and
- New compulsory one day training on domestic abuse for judges.[55]

These reforms are a very welcome start and the government, judiciary and other family justice agencies such as Cafcass and Cafcass Cymru are to be commended on their continuing commitment to drive forward these, and other, Harm Panel recommendations. Further details on progress since the Harm Panel report is illustrated in the report published in May 2023 entitled: Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update ("Harm Panel Delivery Update").[56]

There have, however been delays in change, although this is partly due to the Covid-19 pandemic and increased demand on the Family Court. It is clear that much more is needed to bring about change. The Commissioner still hears of concerning and unacceptable practice taking place in the Family Court, which is traumatising to adult and child victims and survivors and often places them at significant risk of harm.

Continuing issues

49 Cafcass (2020) Terms of Reference for Learning and Improvement Board (cafcass.gov.uk)
50 Cafcass (2021) Domestic Abuse Learning and Improvement Plan (cafcass.gov.uk)
51 Ministry of Justice (May 2023), Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update, 12-13.
52 Sir Andrew McFarlane (October 2021), Confidence and Confidentiality: Transparency in the Family Courts (judiciary.uk)
53 As implemented by Practice Direction 3AB of the Family Procedure Rules
54 Ministry of Justice (January 2023), Standards for domestic abuse perpetrator interventions (publishing.service.gov.uk)
55 Sir Andrew McFarlane (October 2021), Supporting Families in Conflict: There is a better way. See our further comments on training for the judiciary and other family justice professionals below at section 7.1.
56 Ministry of Justice (May 2023), Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update.

Chapter 2:

for adult and child victims and survivors of domestic abuse in the Family Court

In addition to the evidence outlined in the Harm Panel report, this section draws from roundtables held by the Commissioner in Summer 2021; correspondence from victims and survivors received by the Commissioner between May 2020 and May 2022; and a survey conducted with solicitors, chartered legal executives, and barristers between January and April 2023. The Accompanying Methodology Report provides more details on the methodology of these sources.

The range of issues discussed here are not exhaustive and the Harm Panel report should be consulted as the most comprehensive explanation of the issues in private law children proceedings. Furthermore, although the findings of many reports and academic research outline similar concerns, the Commissioner wishes to highlight concerns which victims and survivors have chosen to share with her directly. Again, we acknowledge the limitations of victims and survivor's correspondence analysis as this was a self-selecting sample and potentially biased towards individuals who have had difficult experiences or are dissatisfied with the outcomes of their cases. It is not a represented sample of those who have experienced the Family Courts process.

Section 1: A lack of understanding, a practice of minimising, and an experience which is re-traumatising within the Family Court

The evidence received by the Harm Panel showed that victims and survivors of domestic abuse find going through the Family Court retraumatising.[57] Special measures,[58] while in theory available, were found often not to be successfully deployed, and the panel noted how perpetrators may use the Family Court as a tool to perpetrate ongoing forms of abuse, for example by repeated applications.[59] The retraumatising nature of proceedings was exacerbated by the long delays victims and survivors face in going through court, the lack of legal representation[60] (due to legal aid thresholds that exclude all but those on the lowest incomes), and the lack of specialist support.[61] The findings of the Harm Panel were echoed in this respect by research commissioned by the Domestic Abuse Commissioner and carried out by SafeLives into the availability of specialist domestic abuse support to victims and survivors going through the justice system in England and Wales.[62]

The findings of the Harm Panel and the Commissioner's report are strongly reflected in the correspondence received by the Office of the Domestic Abuse Commissioner on family court issues. The review of correspondence received

57 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 130 (publishing.service.gov.uk).
58 The measures that can be provided in court to reduce the traumatising nature of proceedings and allow survivors to give their best evidence (such as screens, separate entrances, exits and waiting rooms, use of video link).
59 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 125 (publishing.service.gov.uk).
60 Ibid, 102
61 Ibid 120
62 Domestic Abuse Commissioner (June 2021), SafeLives, Understanding Court Support for Victims of Domestic Abuse, 19, 7.

"A punch will hurt for a day or so, but you can't get rid of the pain and trauma of mental and emotional abuse which you have to relive in court."

Victim/survivor of domestic abuse who attended the Domestic Abuse Commissioner's roundtable discussion on the Family Court (September 2021)

"A lot of people think that court will be a safe space, but instead they find themselves caught in a minefield which they struggle to navigate.... I think I was punished for raising domestic abuse."

Victim/survivor of domestic abuse who attended the Domestic Abuse Commissioner's roundtable discussion on the Family Court (September 2021).

between May 2020 and May 2022 found that over half of the correspondence from victims and survivors (62 of 108), where private family law proceedings were discussed, reported finding these proceedings traumatic. Many of these victims and survivors stated the perpetrator had used the Family Court to continue the abuse and control against them by keeping the survivor engaged in aggressive, expensive and stressful litigation.

Several victims and survivors went as far as to say that they had found their experience of the Family Court as difficult and traumatic as their experience within the relationship, with the lack of effective resolution leaving them feeling trapped and fearful for their future. Accounts such as these diffuse through society and discourage victims and survivors from leaving coercively controlling and abusive partners. Fear of what the perpetrator might do post-separation within the Family Court should not be a barrier to leaving an abusive relationship.

The victim and survivor correspondence received by the Commissioner included six examples of failures to adhere to special measures, resulting in victims and survivors having to face the perpetrators on the day of the hearing and feeling intimidated and fearful for their safety. Around a fifth (21 of 108) said that key rules such as PD 3AA and PD 12J had not been followed in their case, thereby making the proceedings more difficult to endure. Victims and survivors who said that they found the proceedings difficult also noted that the adversarial nature of the Family Court was retraumatising, particularly when having to recount their experiences of domestic abuse in front of the perpetrator and be cross-examined in a manner which was intimidating, condescending, and deeply distressing.

Many victims and survivors who wrote to the Commissioner's office also stated that they had found the way in which they had been treated by some judges and Cafcass workers to be upsetting, rude and antagonistic, some reported experiencing victim-blaming behaviour from professionals, which was felt to be far harsher than their treatment towards the perpetrator. The Commissioner does note that these concerns would most likely be raised by victims and survivors who have had highly negative experiences in the courts and cannot be taken as a blanket understanding, or indication of the volume of poor practice, or the treatment from all judges and Cafcass workers.

The retraumatising nature of proceedings was repeatedly emphasised in our roundtables and victim and survivor sessions. There appears to be a particular lack of cultural competency and inclusive practice when engaging with domestic abuse. For example:

- Victims and survivors we spoke with, who did not have English as their first language, mentioned issues with interpreters being inexperienced, untrained and who miscommunicated domestic abuse experiences. Given that the nuances of abuse need to be effectively communicated, particularly with coercive control, this is unacceptable. This was exacerbated where interpreters spoke in a different dialect from victims and survivors;
- Organisations supporting male victims and survivors felt that stereotypes held by judges and court staff about what a 'typical' victim looked like undermined their evidence and contributed to the traumatic nature of proceedings;
- Specialist 'by and for' services supporting Black and Minoritised victims and survivors raised the need for a better understanding of what distinguishes cases involving Black and Minoritised women, including understanding issues such as shame and the social isolation victims and survivors can face within their communities if seen to be actively pursuing family court proceedings;

- Services supporting women with disabilities highlighted how stereotypes of women with disabilities as inadequate mothers could be deployed and negative assumptions about their parenting ability due to their disability held by professionals operating within the Family Court; and
- With respect to migrant victims and survivors, emergency applications to seize their passports and/or prohibit them from travelling emerged as a consistent narrative. These applications are made even when a victim or survivor lacks sufficient funds to travel, has no intention of travelling and/or requires the presence of the non-resident parents to obtain permission for the child to travel to certain countries. The unnecessary nature of these applications is highly indicative of the aggressive and abusive approach adopted by perpetrators in the Family Court system;[63]

Victims and survivors participating in our roundtables also spoke of proceedings going on for years, and the devastating impact this had on their lives and mental health. The appeals process was highlighted as a particular source of trauma: victims and survivors, especially litigants in person, said they found this hard to understand, and the short appeal deadlines were hard to manage.

Many legal professionals working in the Family Court also felt that proceedings could be traumatic for victims and survivors of abuse. The Commissioner's survey asked how likely legal practitioners felt it was that the Family Court would re-traumatise victims and survivors of domestic abuse. Just over 80 percent of the legal practitioners who completed the survey felt the Family Court were 'Likely' or 'Very likely' to re-traumatise victims and survivors of domestic abuse. Nearly three quarters of legal practitioners answering the survey also felt that proceedings in the Family Court are likely to cause distress to victims and survivors of domestic abuse.

In eighty five percent (92 of 108) of correspondence sent to the Commissioner discussing private family law proceedings, victims and survivors described how they felt that their experiences of domestic abuse had been minimised throughout their Family Court proceedings, and/or that professionals who were involved in the Family Court, (i.e. Family Court staff, Cafcass and legal representatives) did not understand the nuances of domestic abuse. Many victims and survivors expressed that when they mentioned the coercive control that they had suffered to Cafcass or judges, this was not taken seriously, or not regarded as significant enough to constitute domestic abuse. A further concern was that the extent of the impact of the abuse on their mental health was deemed by professionals to be poorly appreciated.

Furthermore, in April 2022, the Court of Appeal's decision in *K v K* raised fresh concerns into how judges were minimising domestic abuse allegations in the Family Court. In its decision, the court held that a Fact-Finding Hearing, which is typically used to ascertain the likelihood that domestic abuse has occurred by way of a distinct hearing within the wider proceedings, – should only take place where "the alleged abuse is likely to be relevant to what the court is being asked to decide relating to the children's welfare".[64] This position is established by PD 12J, paragraphs 5 and 17.

The protection within PD12J is compromised by the Family Court requiring to determine if the abuse/alleged abuse is likely to be 'relevant', and this decision may be utilised by the court to avoid establishing domestic abuse.

63 For the avoidance of doubt, Passport orders are commonly made in international child abduction proceedings to prevent re-abduction of the child to another jurisdiction. Those orders are entirely appropriate in such cases.

64 K v K [2022] EWCA Civ 468, paragraph 8

The element of 'relevance' can create a problematic position within private family law proceedings:

a. the Family Court is able to dismiss the need to establish abuse, thereby minimising abuse as experienced by the adult victim or survivor; and

b. a pro-contact principle enshrined in law is reinforced without ascertaining if domestic abuse is present, thereby minimising abuse as experienced by the child victim or survivor.

The Commissioner contends that all allegations of domestic abuse are relevant to considerations about a child's welfare and, if disputed by an alleged perpetrator, should be considered in detail by the court by way of Fact-Finding Hearings which assess whether a pattern of abusive behaviour exists.

Section 2: A lack of consideration of the risk and harm to the child from the presence of domestic abuse

The extent of the harm to children who experience domestic abuse is well-established and widely accepted.[65] This culminated in the formal recognition of children as victims of domestic abuse in their own right in the Domestic Abuse Act 2021.[66]

In the context of the Family Court, it is therefore vital to reflect on what it actually means for a child to be a victim of domestic abuse and the impact which unsafe contact orders can have on children and how orders impact on the rights established in this recent legislation.

Exposure to domestic abuse can severely impact children's emotional, social and cognitive development, and physical health. Children who are exposed to domestic abuse experience increased levels of fear, inhibition, anxiety and depression compared to their peers.[67] Increased risk of mental and physical health problems continues into adulthood.[68] Exposure to domestic abuse can severely impact a child's neurological development, speech, language and communication and result in behavioural issues, including aggressive behaviours.[69] Domestic abuse can undermine the relationship between children and the parent who is also the victim of abuse. Victims' parenting of their child may be controlled or undermined by the perpetrator, while their usual parenting capacity and emotional availability can be eroded by mental ill health and trauma resulting from abuse.[70]

Domestic abuse is also linked to other harms to children, such as child abuse and neglect.[71] A 2016 Cafcass study cited found that 119 of 133 cases with domestic abuse allegations also featured an additional allegation, such as substance abuse or child maltreatment.[72]

As outlined in the Harm Panel Literature Review, studies by Cafcass and Women's Aid Federation England (2017), Harne (2011), Harrison (2008), Holt (2018), Radford and Hester (2006), Stanley (2011) and Thiara and Harrison (2016) 'reveal that the effects on, and outcomes for children are poorest when post-separation contact becomes a site

65 For example, Barnardo's (2020), Not just collateral damage.
66 Section 3, Domestic Abuse Act 2021 which states that children are victims of domestic abuse when they "see, hear or experience the effects of domestic abuse".
67 Kitzmann KM, Gaylord NK, Holt AR, Kenny ED. (2003) Child witnesses to domestic violence: a meta-analytic review), cited in Barnardo's (2020), Not just collateral damage: the hidden impact of domestic abuse on children. See also: Diez, C. et al (2018) Adolescents at serious psychosocial risk: what is the role of additional exposure to violence in the home? Journal of Interpersonal Violence, 33(6): 865-888, cited in NSPCC (2021) Protecting children from domestic abuse (barnados.org.uk).
68 Barnardo's (2020), Not just collateral damage: the hidden impact of domestic abuse on children.
69 James (1994), Domestic violence as a form of child abuse: identification and prevention. Australian Institute of Family Studies and Hester (2007), Making an impact: children and domestic violence: a reader, cited in Barnardo's (2020), Not just collateral damage: the hidden impact of domestic abuse on children. Royal College of Speech and Language Therapists, (2021), RCSLT welcomes Domestic Abuse Bill receiving Royal Assent Policy statement - 29 April 2021, Domestic-Abuse-Act-Royal-Assent-Statement-April-2020.pdf (rcslt.org)
70 Callaghan et al, (2015), Beyond "witnessing": Children's experiences of coercive control in domestic violence and abuse, Journal of Interpersonal Violence, 33(10), 1,551–1,581; Humphreys et al (2006), Talking to my mum: Developing communication between mothers and children in the aftermath of domestic violence. Journal of Social Work, 6, 53–63.
71 Lamers-Winkelman et al (2012), Adverse Childhood Experiences of referred children exposed to Intimate Partner Violence: Consequences for their wellbeing, Child Abuse & Neglect, 36(2), 166–179.
72 CAFCASS, Women's Aid (2016), Allegations of domestic abuse in child contact cases (cafcass.gov.uk).

for continuing domestic abuse.'[73] Children can, however, recover from the impact of domestic abuse when they are in a safer environment, but ongoing contact with the abusive parent can create difficulties for children's ability to recover and sustain recovery (Katz, 2016).[74]

It is clear that the presence of domestic abuse can pose a high risk to and has severe impacts for children. Article 5 of the Convention on the Rights of the Child 1989 requires state parties to uphold the rights of the child. This is done by respecting the rights of the parents to provide care for the child in a manner consistent with the evolving capacities of the child. The presence of domestic abuse undermines this right, and abuse perpetrated by one parent against the other represents "a very serious and significant failure in parenting."[75]

PD12J is unequivocal in reflecting the contemporary recognition of children as direct victims of domestic abuse,[76] clearly stating that: "Domestic abuse is harmful to children, and/or puts children at risk of harm."

Yet many respondents to the Harm Panel told of "professionals displaying a lack of understanding of the complexities of domestic abuse and the effects of that abuse post-separation on both the parent, typically the mother, and the children". It concluded that the "lack of understanding of domestic abuse and ongoing trauma resulted in the allegations being perceived as irrelevant to contact."[77] Positive experiences were "dependent on the 'lottery" of encountering better informed Cafcass officers and judges."[78] There was found to be a particular issue with a lack of understanding of coercive control, with too much focus on single, recent incidents of physical violence.[79]

Many victims and survivors expressed how, when they mentioned the coercive control they had suffered to Cafcass officers or judges, this was not taken seriously, or not regarded as significant enough to constitute domestic abuse.[80] A further concern raised by victims and survivors was that the extent of the impact of the abuse on their mental health was often deemed by professionals to be exaggerated.

The children's organisations the Commissioner engaged with emphasised the importance of understanding how domestic abuse impacts children. For example, participants highlighted the importance of distinguishing between risk and harm, stating that family justice professionals must ensure they understand the harm already done to a child by a perpetrator of domestic abuse (whose decision to perpetrate domestic abuse is, as set out above, also a parenting choice) and to take that into account when making contact decisions, as well as the risk posed in the future by such contact. The need for specialist risk assessment of perpetrators was also highlighted.

Furthermore, the lengthy and traumatic nature of proceedings also impact on children's wellbeing, regardless of what orders are finally made. The Dispatches survey reported that 67 percent of parents who responded agreed or strongly agreed that their children's mental health had been affected by participation in the family court proceedings.[81]

This was also reflected in last year's 'Two years, too late' report by Women's Aid Federation England, which held that many victims and survivors raised concerns that their children were being traumatised and harmed as a result of

73 Ministry of Justice, (2020) Domestic abuse and private law children cases A lite rature review, Domestic abuse and private law children cases (publishing.service.gov.uk)
74 Ibid, 4
75 Sturge and Glaser (2000), Contact and Domestic Violence - The Experts' Court Report (thomsonreuters.com)
76 Section 3 of the Domestic Abuse Act 2021.
77 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 49.
78 Ibid, 66
79 Ibid, 53.
80 Ibid, 49
81 Channel 4 Dispatches (2021), survey conducted for: Torn Apart: Family Courts Uncovered: Dispatches. See n.65 above for the limitations of this survey.

being forced to have contact with an abusive parent as a result of the presumption of parental contact.[82]

Additionally, the consequences of a court ordering unsafe contact with a perpetrator of domestic abuse in order to uphold parental 'contact' and the 'decision making rights', are considerable. There is repeated reference to a child's best interests requiring contact with both parents. However, given the high percentage of domestic abuse allegations in private law children proceedings, this approach fails to appropriately consider the impact of prioritising an alleged domestic abuser's parental rights over the welfare of both adult and child victims and survivors and overlooking, in particular the safety and voice of children.

The most severe consequences are set out in the two Child Homicides Reports by Women's Aid Federation England, cited[83], where perpetrators of domestic abuse killed their children during formal or informal child contact time. But where the Family Court has failed to screen domestic abuse effectively in private law children proceedings, there will be children also suffering emotional, physical and developmental harm from unsafe contact orders.

Adult victims and survivors are also harmed by unsafe orders as perpetrators can use contact arrangements as a further form of post-separation coercive control and abuse. Following the Domestic Abuse Act, this is now fully included within the criminal offence of controlling and coercive behaviour. The Harm Panel reported that many submissions detailed the long-term impact of court orders on adult and child victims and survivors: the orders facilitated continued abuse, resulting in "physical, emotional, psychological, financial and educational harm and harm to children's current and future relationships."[84] Indeed, many felt that "the level of abuse they and their children experienced worsened following proceedings in the Family Court."[85]

The Commissioner is particularly concerned about the significant increase in the utilisation of so-called 'parental' alienation which has led to unsafe contact. It was frequently raised in Harm Panel submissions as a concern. The Harm Panel report found that the most commonly cited reason for children's voices to go unheard was the pro-contact principle where contact is prioritised at all costs, regardless of the wishes of child, or the existence of domestic abuse. So-called 'parental' alienation is a term with no generally accepted scientific or legal foundation; however we use the term in this report, as it was frequently raised in Harm Panel submissions as a concern, and is also frequently raised with the Commissioner as a key concern of victims and survivors going through the Family Court. The Harm Panel explains so-called 'parental' alienation is based on an idea that children's wishes and feelings have been influenced by the 'alienating' parent, and therefore should be discounted.[86]

We know that turning family (including children) against a victim or survivor is a tool used by some perpetrators, as part of a pattern of abuse, whether during the relationship or as part of post-separation abuse, and this is clearly harmful. The Duluth Model Post-separation power and control wheel shows how these behaviours can form part of a pattern of post-separation power and control, usually in the context of prior domestic abuse during the relationship. This has

82 Birchall, J (2022), Two years, too long: Mapping action on the Harm Panel's findings (Two Years, Too Long: Mapping Action on the Harm Panel's Findings), 8.
83 Women's Aid (2004), Twenty-Nine Child Homicides: Lessons still to be learnt on Domestic Violence and Child Protection; Women's Aid (2016), Nineteen Child Homicides.
84 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 8.
85 Ibid.
86 Ibid, 78.

long been acknowledged and nothing in this report seeks to deny this. Rather, this report aims to highlight the damaging use of the term or concept of so-called 'parental' alienation (and its synonym 'alienating behaviours', amongst other terms utilised to encompass the same concept) as counter-allegations in the Family Court, and the chilling effect it is having on victims and survivor's ability to raise domestic abuse.

The evidence submitted to the Harm Panel showed that accusations of so-called 'parental' alienation or 'alienating behaviours' are being used in the Family Court as a counter-allegation to domestic abuse with the effect of drawing the court's focus away from the abuser and undermining a child's expressed wishes and feelings. The Harm Panel found that "fears of false allegations of parental alienation are clearly a barrier to victims of abuse telling the courts about their experiences."[87]

87 Ibid, 62

behaviours' a concern for the voice of the child?'

The term 'parental alienation' derives from the 'parental alienation syndrome' coined by discredited US psychiatrist Richard Gardner in the 1980s, who said that children could be brainwashed by a vindictive parent (usually their mother) into suffering the mental disorder of 'parental alienation syndrome' and rejecting the other parent.[88] The England and Wales courts initially declined to recognise 'parental alienation syndrome', with Butler-Sloss LJ noting in Re, L, V, M and H (children) 2000, that the term was not recognised in either the American or international classifications of disorders, nor generally recognised in psychiatric or allied child mental health specialities.[89] However, 'parental alienation syndrome' was subsequently reframed as 'parental alienation' by its proponents, and began to feature in England and Wales case law, with a recent uptick from 2017 onwards,[90] yet there is little scientific and evidential basis of so-called 'parental' alienation.

The Harm Panel found that "fears of false allegations of parental alienation are clearly a barrier to victims of abuse telling the courts about their experiences."[91] This aligns fully with accounts that the Commissioner hears repeatedly from victims and survivors.

The impact on both adult and child victims and survivors of successful so-called 'parental' alienation claims made by perpetrators can be devastating, with children being intentionally being removed from their primary carers to facilitate the establishment a relationship with the non-resident perpetrator parent. Given perpetrators of domestic abuse often seek to portray themselves as victims of abuse, thereby distorting the reality of abuse and further traumatising their victim, the Commissioner is of the view that the Family Court must be extremely robust in its ability to identify and engage with abusive tactics used within the Family Court.

Turning family (including children) against a victim or survivor can be a tool used by some perpetrators, as part of a pattern of abuse either during the relationship or as part of post-separation abuse,[92] and this is clearly harmful to children, victims and survivors. Where a child experiences the direct or indirect effects of domestic abuse, a self-protective measure may manifest in the child exhibiting reluctance, resistance or refusal of contact with the abusive parent.

It goes without saying that, in general, children benefit from a having a relationship with both parents, and the United Nations Convention on the Rights of the Child 1979 (CRC 1979) acknowledges a child's right to a relationship with both their parents, unless contrary to the child's best interests[93] The Commissioner is of the view that in the context of domestic abuse, a child exhibiting reluctance,

88 Mercer, Drew (2021), Challenging Parental Alienation: New Directions for Professionals and Parents (Routledge, London; New York), 26.
89 Ibid, 47.
90 Adrienne Barnett (2020), A genealogy of hostility: parental alienationin England and Wales, Journal of Social Welfare and Family Law, 42:1, 18-29.
91 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 62.
92 Duluth Model (2013), Post-separation power and control wheel.
93 United Nations Convention on the Rights of the Child, Article 9.3.

resistance or refusal towards contact is a reasonable and self-protective response to domestic abuse. Therefore, it is not appropriate to term a child's reluctance, resistance or refusal as so-called 'parental' alienation. Furthermore, the use of so-called 'parental' alienation as a 'counter-allegation' to domestic abuse is presently having a chilling effect on the ability of domestic abuse victims and survivors to have their concerns heard in the Family Court and their justified efforts to inform the Family Court of domestic abuse in order to ensure appropriate and safe child contact arrangements are put in place. The Harm Panel made findings that "fears of false allegations of parental alienation are clearly a barrier to victims of abuse telling the courts about their experiences".[94] This is something that the Domestic Abuse Commissioner also hears repeatedly from victims and survivors of domestic abuse. There is a feeling among victims and survivors of domestic abuse who have been in contact with the Office of the Domestic Abuse Commissioner that counter-allegations of so-called 'parental' alienation are taken more seriously than allegations of domestic abuse.

Even though there is no legal framework, provision or foundation in law, allegations of so-called 'parental' alienation have been used as a method to distract from the perpetration of domestic abuse and used to shift focus of proceedings towards a perpetrator's parental rights. The lack of evidence around the use of term is made clear by the approaches that countries have taken towards the term so-called 'parental' alienation, with a number of countries, such as Spain, specifically preventing its use due to the dearth of evidence.

The Commissioner understands that some separated parents may behave in an emotionally abusive manner by pathologically manipulating a child's response to contact with the other parent, such that the child becomes reluctant, resistant or refuses to have contact. This fully underscores the need to ascertain the facts of each case in a thorough, investigative and abuse-informed manner. The Commissioner hopes to obtain a better understanding of the Family Court and its approach to such allegations within the FCMRM.

Allegations of so-called 'parental' alienation are an issue of international concern. The United Nations Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) has

94 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 62.

discouraged states and parties from using the term,[95] and the European Parliament has adopted a resolution condemning the term and calling on members to prohibit use of the term in court proceedings.[96] The United Nations Special Rapporteur on Violence Against Women has recommended a prohibition on the use of so-called 'parental' alienation to the United Nations Human Rights Council. In her April 2023 report on account of: a lack of empirical basis (para 11); its deeply concerning ability to remove children and place them in 'dangerous home environments' (para 18); its capacity to 'side-line' domestic abuse concerns (para 20); minimising the voice of the child (para 22); and its use to perpetuate post-separation abuse and ongoing traumatisation of children (para 23). The report ultimately rejects the use of the term so-called 'parental' alienation on a human rights basis (para 73).[97] The damaging effect of the term so-called 'parental' alienation has also been raised as a concern by the CEDAW Committee.[98]

Cafcass and so-called 'parental' alienation

Cafcass does not use the term 'parental alienation. Instead, its Child Impact Assessment Framework adopts the term 'alienating behaviours' to describe circumstances where there is an ongoing pattern of negative attitudes, beliefs and behaviours of one parent (or carer) that have the potential or expressed intent to undermine or obstruct the child's relationship with the other parent without a justified reason. Cafcass view this as one of a number of reasons why a child may not want to see a parent post-separation. The guidance expects Family Court Advisers to consider the risk that claims of alienation may be used by perpetrators of domestic abuse within proceedings as a form of coercive control or to deflect the court's attention from their own behaviour.

Cafcass' position is that alienating behaviours are observable and present on a spectrum, often as part of a wider set of family dynamics which require a nuanced and holistic assessment of each child's unique experiences. When Cafcass' Family Court Advisers assess a child's case where the child is resistant, or refuses, to see a parent, they must first consider whether the child has experienced domestic abuse or other forms of harmful parenting are contributory factors. They are required, by Cafcass' Child Impact Assessment Framework's child resistance and refusal to spending time with a parent guidance to ensure they have clearly distinguished between harmful conflict, domestic abuse and bond breaking or alienating behaviours which lead to resistance to contact that is hard to explain, when there was a previously beneficial relationship.[99]

In Wales, a research review commissioned by Cafcass Cymru noted that "there is no commonly accepted definition of parental alienation and insufficient scientific substantiation regarding the identification, treatment and long-term effects.... Without such evidence, the label parental alienation syndrome has been likened to a 'nuclear weapon' that can be exploited within the adversarial legal system in the battle for child residence".[100]

95 CEDAW, Concluding Observations on the combined 7th and 8th periodic reports of Spain (39(b), U.N. Doc. CEDAW/C/ESP/CO/7-8 (2015); Concluding Observations on the combined 8th and 9th periodic reports of Canada (para 52, U.N. Doc. CEDAW/C/CAN/CO/8-9 (2016).
96 European Parliament (2021) The impact of intimate partner violence and custody rights on women and children, Texts adopted - The impact of intimate partner violence and custody rights on women and children - Wednesday, 6 October 2021 (europa.eu)
97 United Nations General Assembly Human Rights Council (2023), Custody, violence against women and violence against children Report of the Special Rapporteur on violence against women and girls, its causes and consequences, Reem Alsalem, 1680ab4067 (coe.int)
98 See, eg, Concluding Observations on the combined 7th and 8th periodic reports of Spain (39(b), U.N. Doc. CEDAW/C/ESP/CO/7-8 (2015); Concluding Observations on the combined 8th and 9th periodic reports of Canada (para 52, U.N. Doc. CEDAW/C/CAN/CO/8-9 (2016).
99 Cafcass, Resources for assessing child refusal/resistance (cafcass.gov.uk)
100 Ibid.

So-called 'parental' alienation is frequently raised by victims and survivors going through the Family Court in correspondence received by the Commissioner.

Between May 2020 and May 2022, 12 percent (13 of 108) correspondence received by the Commissioner about private law children proceedings references concerns about allegations of so-called 'parental' alienation. Victims and survivors who mentioned this issue explained that when they had raised allegations of domestic abuse, either counter-allegations of so-called 'parental' alienation had been raised by the perpetrator, or the victim or survivor's legal team had advised them not to put forward their allegations of abuse, due to fear counter-allegations of so-called 'parental' alienation would be raised in response and the risk of the victim or survivor losing contact with their children." These particular victims and survivors felt frustrated over how easy they felt it was for perpetrators to manipulate the court system through accusations of so-called 'parental' alienation.

"My solicitor told me that I shouldn't mention that I had been a victim of domestic abuse otherwise I would be accused of parental alienation."

Victim/survivor of domestic abuse who attended the Domestic Abuse Commissioner's roundtable discussion on the Family Court (September 2021)" not in our shoes.

Concerns about the use of allegations of so-called 'parental' alienation were repeatedly raised in the Commissioner's roundtables, and in the small group sessions we held with victims and survivors. Almost every single survivor who participated in the sessions had faced allegations of so-called 'parental' alienation or had been warned by legal advisers about raising domestic abuse for fear of being accused of so-called 'parental' alienation. Likewise, the Channel 4 Dispatches survey, which analysed responses from over 3,000 family court users, found that so-called 'parental' alienation allegations were 5 times more likely to be made against parents who said they were victims of domestic abuse.[101] Perpetrators of domestic abuse may make allegations of so-called 'parental' alienation in response to allegations of domestic abuse to further control and abuse a victim. Perpetrators of domestic abuse may also make allegations of so-called 'parental' alienation to continue abuse post-separation. At this point, a victim of domestic abuse may feel compelled to inform the Family Court that the allegation: a) is a form of post-separation abuse intended to deflect from their own behaviour; and b) seek to demonstrate other abusive behaviours – whether during or post-separation – in order to demonstrate a wider pattern of behaviour.

When perpetrators of domestic abuse make allegations of so-called 'parental' alienation in response to allegations of domestic abuse to further control and abuse a victim, the Family Court must ascertain both allegations inquisitorially in order to ensure a fair hearing process to all, given domestic abuse may be present.

The Commissioner opposes the apparent parity attributed to allegations of so-called 'parental' alienation and domestic abuse where the Family Court investigates these allegations in parallel.

In Chapter 6 of this report, the Commissioner outlines a practical approach to addressing these concerns, which is informed by her statutory duty to encourage good practice in the identification of: people who carry out domestic abuse; victims and survivors of domestic abuse; and children affected by domestic abuse.[102]

101 Channel 4 Dispatches (2021), survey conducted for: Torn Apart: Family Courts Uncovered: Dispatches.
102 Section 7(1)(c)(i-iii).

The voice of the child

Within England and Wales, private law children proceedings encompass other aspects of a child's upbringing, as well as formalising contact arrangements. Such proceedings also determine the day-to-day of a child's upbringing, which can also have a direct impact on the day-to-day life of the primary carer. For example, applications to prohibit moving cities/London boroughs may be filed, as well as applications to ensure a child attends a certain school. The outcomes of these proceedings therefore hold the capacity to govern future decision making in relation to a range of life choices which would otherwise be left to the discretion of the family unit.

The Family Court is required by section 1(3) of the Children Act 1989 to consider "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)" in children cases. This reflects the rights enshrined by Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) 1989 for children to have the opportunity to be heard in legal proceedings that affect them. Given the mandate of the Commissioner, this report focuses on private family law proceedings which relate to domestic abuse. It should, however, be noted that the voice of the child should be meaningfully engaged with in all private law applications, including those which do not allege domestic abuse. Illustratively, other forms of harm may be raised, in addition to private family law proceedings where no harm is alleged. The voice of the child must be central to all private law applications. This is heightened in cases where domestic abuse is raised.

Yet the Harm Panel found that "[a] very strong theme from multiple submissions was that children's views are frequently disregarded, primarily in cases where children are stating that they do not want to spend time with an abusive parent"[103] with a key consequence that the "quality of the court's decision-making" may be undermined and "result in orders that do not promote, or undermine, the child's welfare."[104]

This was echoed in research published by the Nuffield Family Justice Observatory, which looked at research across a number of countries, including the UK, and found that "[c]hildren overwhelmingly feel unheard in court proceedings" and that "[t]his causes them significant distress."[105] The Nuffield study found that children's views about contact in cases of domestic abuse were complex but that where children expressed a wish not to have contact, but were still made to do so, it caused significant distress.[106] Similarly, during the Commissioner's session with members of the Family Justice Young People's Board (FJYPB), several mentioned that they did not feel that they had been listened to during proceedings, despite having a clear idea of what they wanted.[107]

Participants in the Commissioner's roundtables emphasised the importance of children's voices being heard and felt strongly that children's experiences should be central

103 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 72.
104 Ibid.
105 Nuffield Family Justice Observatory (2021), Children's experience of private law proceedings: Six key messages from research, Children's experience of private law proceedings: six key messages from research (nuffieldfjo.org.uk) 3.
106 Ibid, 9.
107 See also: Family Justice Young People's Board, In Our Shoes.

"Listen and genuinely hear us, because it has real life impact. Trust that we know what we want, even if we're young. Represent what we are saying no matter what your interpretation. Also, think about what a child is not saying to you, do they feel afraid to talk to you?"

'In Our Shoes', Family Justice Young People's Board (2021)

during court proceedings. Participants in the children's organisations and FJYPB roundtables emphasised that children should be considered separately from their parents, not just as an 'add-on' and recommended that courts should be asking how children's experiences of the perpetrator had changed a child's life. This is of particular relevance when considering the scope of Section 3 of the Domestic Abuse Act which establishes a child who 'sees or hears, or experiences the effects of, the abuse' is a victim of domestic abuse in their own right. Participants said that family justice professionals should be able to present evidence in a way which shows what it must have been like for the children to live with domestic abuse and the impact it had on their wellbeing (rather than just presenting a schedule of events.)

Many victims and survivors that the Commissioner spoke to in roundtables also felt that their children had not been listened to and supported the need to enhance the voice of children in proceedings. This is further reinforced by a presumption of contact and, in particular, younger children are encouraged to have contact with both parents regardless of what they may communicate.

The Harm Panel report found that the most commonly cited reason for children's voices going unheard was the pro-contact principle (where contact is prioritised at all costs, regardless of the wishes of child, or the existence of domestic abuse). The panel also found that allegations of so-called 'parental' alienation were a key factor in this, because the child's wishes, and feeling have been influenced by alienation so therefore should be discounted.[108]

The overarching effect of allegations of so-called 'parental' alienation, is therefore seen in the voice of the child being minimised or silenced entirely. This has a consequential effect that little weight is given to the child's wishes and feelings as set out in the welfare checklist contained in section 1(3) of the Children Act 1989. Given the significance of this, the deviation from listening and believing the child must be carefully approached. This is particularly worrying given the Family Court does not currently have a mechanism to check a court order is working well for a child. In order to return to court, an application to vary an order must be filed, which is often cost prohibitive and unattractive to parties who have already experienced stressful proceedings. The Pathfinder courts have identified this as area on which to improve and follow up will be an element of their approach to children in domestic abuse cases. Whilst it is too early to comment on this, the Commissioner considers it highly likely that it will be of value to the child and family.

Within the context of children, victims and survivors holding heightened protection in law, despite this, the successful use of this so-called 'parental' alienation strategy sees the following hierarchy of rights established by the Family Court:

108 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 62, 7-78.

Achieving Cultural Change

"I want my story to be someone else's survival guide. I can talk about my experience, but not everyone is in the same place. I would have really liked to give feedback throughout the proceedings and at different stages of the journey"

Victim/survivor of domestic abuse

who attended the Domestic Abuse Commissioner's roundtable discussion on the Family Court (September 2021)

It is clear that to address such consistent failings, serious systems learning and wholesale cultural change is needed – and yet such change is well known to be difficult to achieve.[109] This is especially the case in a family justice system made up of multiple institutions and agencies, which is under considerable pressure from increases in private law proceedings, the impact of the pandemic, and serious under-resourcing.[110] One judicial respondent to the Harm Panel described the system as "crumbling… we just can't cope with it."[111] The Harm Panel further made clear that the failings it identified systemic and were part of a culture which permeated the Family Court.

Cultural change requires a whole-systems approach. It is worth considering the principles developed by Ellen Pence in the USA and then adapted for use in the UK by the charity Standing Together Against Domestic Abuse in implementing the Coordinated Community Response model.[112] This model has been instrumental in improving the community response to domestic abuse and is important to consider when establishing how to change a complex system's response to domestic abuse. The Commissioner suggests that there are core requirements for successful systems change that can be read across from the Coordinated Community Response model to the Family Court. These include:

- **Shared vision and objectives**. This has been provided by the Harm Panel report which explained how the current system is failing to keep victims, survivors and children safe, and set out a vision for a reformed, sufficiently resourced system with a culture of safety and protection from harm, and a coordinated approach between different parts of the system;[113]

109 CIPD (October 2020), Organisational culture and culture change; Parmelle et al (2011), The effectiveness of strategies to change organisational culture to improve healthcare performance: a systematic review.
110 The number of private law applications made in 2019/20 was 46,500, compared to 35,000 in 2007/08: see Nuffield Family Justice Observatory (February 2021), Uncovering private family law: Who's coming to court in England? Summary.
111 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 41 (publishing.service.gov.uk)
112 Standing Together Against Domestic Abuse (2020), In search of Excellence: a refreshed guide to effective domestic abuse partnership work: The Coordinated Community Response. This document sets out the components that make up the Coordinated Community Response, that enable a whole system response to domestic abuse. This section of the report draws from these components.
113 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 9 (publishing.service.gov.uk)

- **Strategy and leadership at a local level**. We know that both government and the senior judiciary are committed to improving the Family Court response to domestic abuse. In addition to this top-down leadership, it is crucial that there is local leadership to embed and sustain systemic change, which are critical components of the Pathfinder Courts (discussed on page 45 of this report), which includes specialist domestic abuse experts and all actors in the family court system. This includes Family Justice Boards which provide a forum for input and problem solving by all leaders in the Family Court including survivors of domestic abuse and those who support them;
- **Resources**. This includes funding, but also people, passion and drive. For example the Pathfinder Courts bring in new resources to enable child assessment early in proceedings;
- **Coordination**. In transforming the response to domestic abuse, all agencies within a system should be working together, with the same vision and understanding. The role of a coordinator is crucial – but, as is made clear in the Coordinated Community Response model, all agencies within the system must play their part. For example, in the Pathfinder Courts, the working groups developing the pilots will coordinate the transformation. In addition the role of a Case Progression Officer, who is an information resource for families, keeps them informed about the progress of their case and signposting them to additional resources where appropriate;
- **Training**. Training is integral to ensuring that agencies within the system are working towards the same vision and share an understanding of the dynamics of domestic abuse. This is particularly true when considering the implications of definitions and, therefore, understanding of issues. Illustratively, a robust and uniformly understood definition of coercive control has been vital in making a 'hidden' form of abuse more visible;
- **Feedback on survivor experience**. Ensuring that survivor voices are heard is an essential component of the Coordinated Community Response – and, we suggest, there must also be a route for feedback from users of the Family Court to be heard at a local level;
- **Intersectionality**.[114] An intersectional approach is needed to recognise how historic and ongoing experiences of discrimination impact on victims' and survivors' experiences of the family justice system, and how different barriers to justice exist for victims and survivors sharing protected characteristics and/or migrant status; and
- **Monitoring, data and transparency.** Monitoring, data collection and analysis are crucial when changing a system, and the Monitoring and Reporting Mechanism will play its role in achieving this. The Commissioner will underpin efforts to obtain data through the Monitoring Mechanism, however, IT reforms, which are ongoing and led by the Ministry of Justice, are crucial to the ongoing effective capture and analysis of Family Court data.

114 Kimberlé Crenshaw coined the term 'intersectionality' in Crenshaw (1989), 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' as a lens through which the impact of multiple forms of discrimination and oppression on individuals can be understood.

There has been progress made since the Harm Panel report as noted on page 2. The Pathfinder Courts are also an emerging model as to how to achieve a coordinated response using these core requirements as discussed on page 45.

The learnings from these will be vital in ushering a sea change in how the Family Court responds to domestic abuse. That is why the Commissioner has provided a set of recommendations in this report to build on existing progress and which speak to a variety of the principles laid out above. Therefore, the recommendations must be taken in the round to bring about change.

Chapter 5:

Detailed plan for the Family Court Monitoring and Reporting Mechanism Pilot[115]

"Over the last five years I have supported scores of survivors through the Family Courts [sic] who have totally frozen, been utterly overwhelmed or had anxiety attacks before the proceedings have even started. I have supported several women who have been so frightened by the whole experience, and being in close proximity to their abuser that they have been physically sick whilst at court."

Family Court IDVA recounts her experiences of assisting victims and survivors of domestic abuse through Family Court proceedings for a blog for the Domestic Abuse Commissioner (July 2021)

As set out above, one of the recommendations of the Harm Panel report was to establish a national monitoring mechanism within the Office of the Domestic Abuse Commissioner and in partnership with the Victims' Commissioner, to maintain oversight of and report regularly on the Family Courts' performance in protecting children and adult victims from domestic abuse and other risks of harm in private law children's proceedings. In November 2021, the Domestic Abuse Commissioner and the Victims' Commissioner published a joint paper, *Improving the Family Court response to domestic abuse*, which set out the broad objectives as well as detailed questions and specifications for the national monitoring mechanism.

The objectives of the monitoring mechanism are to increase the transparency and accountability of Family Courts in responding to allegations of domestic abuse in private law children's cases, to identify and disseminate best practices in doing so, and to ensure consistency in delivering safer processes and outcomes for child and adult victims of abuse. It is envisaged that the mechanism will produce an annual report on the state of play in the Family Court, based on both areas of national or nationally representative data and 'deep dives' into particular issues or areas of concern. This will allow us to understand what is going well, to identify and disseminate best practice, and to understand where improvements are needed. Before the full mechanism is established, a pilot phase is necessary, and this section sets out the how the pilot phase will operate.

The Pilot Phase of the Monitoring Mechanism

The pilot phase is scheduled to commence in late 2023 and to run for 12 months. The goals

115 Domestic Abuse Commissioner, (2021) Improving the family court response to domestic abuse Proposal for a mechanism to monitor and report on domestic abuse in private law children proceedings Improving-the-Family-Court-Response-to-Domestic-Abuse-final.pdf (domesticabusecommissioner.uk)

of the pilot phase are to scope a range of potential data sources and methods of data collection and to provide baseline data on how domestic abuse is being dealt with in private law children cases. Based on this information and recommendations for the final design of the ongoing national monitoring mechanism will be made.

The pilot phase for the Family Courts monitoring mechanism has two strands:

(a) – a scoping exercise: to determine the scope of available data sources and data access processes

(b) – an intensive court study: to gather and analyse data from three court sites to test alternative methods of data gathering and provide a systematic account of how those courts handle domestic abuse cases.

Scoping existing administrative data sets and data sources

The following agencies will be consulted to determine the extent to which the administrative data they currently gather can contribute to the monitoring mechanism:

- Her Majesty's Courts and Tribunals Service (HMCTS);
- The Children and Family Courts Advisory and Support Service in England (Cafcass);
- The Children and Family Courts Advisory and Support Service in Wales (Cafcass Cymru);
- The Legal Aid Agency (LAA); and
- The Ministry of Justice (MoJ).

This will include gathering information on proposed new data systems and proposed new court processes.

In addition, the correspondence received by the Domestic Abuse Commissioner's Office and the Victims' Commissioner's Office will be analysed, and relevant national organisations will be consulted on the feedback they receive from victims and survivors of abuse and from children on their experience of Family Court proceedings.

The intensive court study

The intensive court study will involve the following components:

- a contextual overview of the three selected court sites (which are yet to be selected and will require approval from the relevant District Family Judge and consultation with the President of the Family Division);
- a review of a sample of closed case files;
- observations of hearings;
- focus groups/interviews with domestic abuse victims and survivors, perpetrators and children with experience of private law proceedings in the three court areas.

The contextual overview will provide insights into the nature of the court, its personnel and facilities, the local area which it serves and professional perspectives on the implementation of practice directions and guidance, in order to help to understand potential reasons for lack of consistency between courts.

The closed case file study will review a stratified random sample of private law children's cases from each court. The aim will be to gather systematic data from 100 cases from each court, 50 dealt with at Tier 1 (Magistrates) and 50 at Tier two or three (District or Circuit judges).

Outcomes

The pilot phase will result in a report which makes recommendations for the design of the national monitoring mechanism. It will:

- suggest what national or nationally representative data should be gathered on an annual basis and which areas or issues should be the subject of periodic 'deep dives', in order to meet the objectives of the mechanism;
- report on the capacity of existing and forthcoming administrative data sets to provide the national data required;
- make recommendations for revision to any of those data sets to render them more suitable for the purposes of the monitoring mechanism;
- suggest which other data sources and data gathering methods should be used to provide the required nationally representative data and to contribute to 'deep dives' into particular issues;
- report on the statistical and qualitative findings of the intensive court study;
- place those findings in the context of previous research and current developments in relation to private law children's cases involving allegations of domestic abuse; and analyse those findings in terms of how they provide a baseline for the purposes of the national monitoring mechanism.

RECOMMENDATION 1

The monitoring mechanism recommended by the Harm Panel that is being established within the Office of the Domestic Abuse Commissioner and in partnership with the Victims' Commissioner must be allocated sufficient funding both for its pilot phase and, subsequently, for its national roll out. In this way it will be able to operate on an annual basis. A pilot phase of the monitoring mechanism is scheduled to commence in late 2023 and to run for 12 months, the funding for which is confirmed. Funding following the pilot phase should be considered at the earliest opportunity.

The Ministry of Justice should provide the Domestic Abuse Commissioner with a proposal on how learning from the Monitoring and Reporting Mechanism will feed into existing governance and policy development for the Family Court.

Best Practice in the Family Court

System learning must take place to achieve cultural change and ensure that adult and child victims and survivors are truly safe and that their rights are protected and promoted within the Family Court. Victims and survivors continue to feel that their experiences of abuse are minimised, and that the impact on children is not adequately understood. This highlights the importance of maintaining the momentum of the reforms brought on by the Harm Panel. The Family Monitoring and Reporting Mechanism will help us identify inconsistencies in practice, but we can only achieve cultural change if we know the extent to which the guidance is being followed, where legally binding Practice Directions are being complied with, and where there are repeated problems and inconsistencies.

Section 1: Family Court Domestic Abuse Best Practice Leads

The Commissioner is proposing the creation of a new role of Domestic Abuse Best Practice Lead in every court area, in order to help bring about and sustain change to improve consistency nationally. As set out above, domestic abuse is the central issue in private law children proceedings today. Proposed reforms which plan to divert more non-domestic abuse cases out of court,[116] means that this will become a high percentage of cases in front of the Family Court.

What would the role consist of?

Domestic Abuse Best Practice Leads would:

a. Be a valuable additional resource for Designated Family Judges in helping to bring about the improvements needed to achieve the vision for the family justice system set out in the Harm Panel report, as well as implementing improvements relating to potential findings of the new monitoring mechanism that is being established within the Office of the Domestic Abuse Commissioner and in partnership with the Victims' Commissioner;

b. Feed into the current court system, including the *Domestic Abuse and Positive Outcomes for Children Working Group* under the Family Justice Board, from the learning of the private law reform pilots as well as in any future national rollout of private law reforms;

c. Play a role in the implementation of the new overarching Statement of Practice for private law children proceedings, which is being developed by government and partners in fulfilment of Harm Panel recommendations, and will build on "the foundational wording provided by the Panel [and] link into existing cross-system governance groups to ensure that this is effectively implemented and drives cultural change across the system as a whole.";[117]

d. Develop links with local domestic abuse support services, as well as with the new family hubs being developed by the government;[118]

116 Private Law Advisory Group (December 2020), Final report, 3; Private Law Working Group (March 2020), Second Report to the President of the Family Division, 4.

117 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Implementation Plan, 4. Ministry of Justice (May 2023), Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update, 9.

118 Family hubs will be "a way of joining up locally and bringing existing family help services together to improve access to services, connections between families, professionals, services, and providers, and putting relationships at the heart of family help." See: Department of Education (November 2021), Family Hubs: Local Transformation Fund Application guide.

e. Provide guidance to judges about what is available in each court and to set up systems which ensure that where judges give directions for special measures, these are provided. They might also advocate for the improvement of the special measures available in their local court/s;

f. Facilitate the use of special measures in cases involving domestic abuse and ensure that litigants are aware of the guidance and the Procedure Rules and Practice Directions which they can rely on during the proceedings;

g. Where domestic abuse allegations have been made and judges have applied Practice Directions in the proceedings, such as 12J and 3AA, or other relevant Practice Directions, they will record the implementation of such measures;

h. Be a central point of contact and information for parties and professionals within the family justice system, local specialist domestic abuse support services, and the new family hubs,[119] as well as liaising with other agencies such as the police to reduce silo working;

i. Facilitate informal feedback from court users and local domestic abuse services;

j. Act as a champion for identifying and disseminating best practice (including around the specific issues facing victims and survivors with protected characteristics and/or migrant status);

k. Enhance understanding of domestic abuse locally and liaise with other Domestic Abuse Best Practice Leads, suggesting training and improvements for court staff and helping to ensure a trauma-informed family justice system; and

l. We suggest that that this role is accountable to HMCTS.

What would the role not involve?

It is important to be clear about what would not be within their remit. Domestic Abuse Best Practice leads would:

- Not be advocates for parties to proceedings or replace the IDVA role. Rather, they would be champions for fairness. They would advise on the availability of special measures in the relevant court centre and record whether these were applied in proceedings, as well as recording whether the relevant rules and guidance were followed in the proceedings;
- Not impinge on judicial independence;
- Not provide legal advice to parties, nor act as McKenzie Friend;
- Not act as an alternative complaints mechanism.

Facilitation, monitoring and improving consistency

The Domestic Abuse Best Practice Lead would facilitate and note-take on elements pertinent to domestic abuse allegations in order to improve their holistic understanding of best practice, and to use this knowledge to improve consistency within and between court areas.

The Lead would provide advice to court users and HMCTS staff on, and monitor the application of:

Practice Direction 12J (the guidance governing the Family Court's handling of domestic abuse allegations in child arrangements proceedings);

- Practice Direction 3AA (special measures), including the new presumption for special measures in section 63 of the Domestic Abuse Act 2021. This could include regular physical safety audits of court buildings, to ensure special measures can be effectively

119 Department of Education (November 2021), Family Hubs: Local Transformation Fund Application guide.

put in place when awarded and press for their availability in the courts for which they are responsible; and

- Practice Direction 3AB (new prohibition of cross-examination in person under section 65 of the Domestic Abuse Act 2021).

It would be helpful for data to be collected on compliance with relevant practice directions, which could feed into the Domestic Abuse Commissioner's monitoring mechanism, developed in partnership with the Victims' Commissioner's Office. However, it may be best for this data to be collected by a more junior staff member for cost effectiveness, and so Domestic Abuse Best Practice Leads are able to focus in a more targeted way on the key duties set out above.

In addition to the objectives of the Domestic Abuse Practice Lead, the Commissioner would urge the Ministry of Justice to provide resource for the following work streams which would assist with case facilitation:

- Monitoring the progression of cases involving allegations of domestic abuse, identifying in advance potential issues that might arise in a hearing, and helping address these to avoid unnecessary adjournments. An example would be identifying where relevant evidence has not been provided by the police and following up with police to secure this;
- Identifying any overlapping proceedings (applications for injunctive relief, Children Act and financial arrangements proceedings – and if possible overlapping criminal proceedings) and bring these to the attention of the relevant judges, using an abuse-informed approach to demonstrate the relevance of matters identified to domestic abuse. The Ministry of Justice may wish to consider establishing a consistent means of this process.[120]

We note that the above two elements (facilitation of cases) are being carried out in the private law reform pilots by Case Progression Officers, but that these roles do not exist in the current system beyond the Pathfinder Courts, and it is not yet clear if they will be introduced nationally, if and when the Pathfinder Courts are rolled out;

The above elements of the role would mean that Domestic Abuse Best Practice Leads would be well placed to help improve consistency both within their designated court area, through informing court staff and judges of trends observed locally, and nationally, through liaison with other Domestic Abuse Best Practice Leads.

Central point of contact, liaison, and feedback

The Domestic Abuse Best Practice Lead would act as a central point of contact and information for parties to proceedings and local domestic abuse services. They would liaise with other agencies such as the police or MARACs (multi-agency risk assessment conferences) and would facilitate feedback from court users and local domestic abuse services.[121]

Specifically, the Lead would:

- Ensure parties are aware of entitlements to special measures and prohibition of cross-examination in person, and that they are aware when these measures have been granted;
- Develop relationships with local specialist domestic abuse support services and help to spread information and understanding about Family Court processes within local domestic abuse support services so that victims and survivors have a better understanding about what to expect. This could include outreach and familiarisation visits to courts for local services. It would be particularly important to ensure that relationships are developed

120 Financial Arrangement Proceedings are legal proceedings to decide how assets held by spouses are to be divided upon separation and to arrange the sum of any maintenance payments by one party to the other.
121 A MARAC is meeting where information is shared on the highest risk domestic abuse cases. It is attended by representatives from policing, child protection, health, housing, probation and IDVAs.

with local specialist 'by and for' services (serving victims and survivors who are the most minoritized in society, such as LGBT+, Deaf and disabled, and Black and Minoritised), and that understanding about the contexts in which these victims and survivors face abuse is embedded into local learning and best practice;[122]

- Signpost parties to local specialist support services, including to specialist organisations run by and for Black and minoritized, LGBT+ and Deaf and disabled victims and survivors;
- Organise regular opportunities for court users and local domestic abuse support services, including specialist Family Court IDVAs (where they exist), to provide feedback.[123] It would be made clear that such feedback opportunities were not a complaints mechanism, or any form of appeal about individual cases, but rather a way for victims and survivors, and the services supporting them, to provide general feedback on issues they had experienced; and
- Liaise with other relevant agencies, including the police and local and national multi-agency partnerships such as MARACs or local family justice boards, to improve processes and reduce the risks of silo working.

Driving forward best practice towards a trauma-informed system

Domestic Abuse Best Practice Leads would identify and disseminate best practice to all relevant stakeholders in the process to improve understanding of domestic abuse, acting as an additional resource for Designated Family Judges and helping to ensure a trauma-informed family justice system. Specifically, the Lead would:

- Identify and disseminate new information, guidance and best practice with the Domestic Abuse and Positive Outcomes for Children (DA-POC), a subgroup of the Family Justice Board, including around the experiences of victims and survivors with protected characteristics and/or migrant status, leading to improvements in the understanding of domestic abuse within their local court area;
- Liaise with other Domestic Abuse Best Practice leads locally and nationally;
- Suggest, and seek buy-in from relevant family justice system stakeholders for improvements where observations or feedback indicate local trends that need addressing (for example, police evidence not being shared in a timely manner);
- Champion local and national initiatives that promote a trauma-informed approach to family justice;
- Raise awareness with, and feed into training of, HMCTS court staff and security, judges and magistrates where appropriate; and
- Helping Designated Family Judges implement improvements based on the findings of the Domestic Abuse Commissioner's monitoring mechanism developed in partnership with the Victims' Commissioner, once this is established.

Governance and accountability

The role would need to be specially recruited, and terms of reference and duties of the role would need to be carefully defined and would have parameters which are respectful of judicial independence and complimentary to the role and functions of a District Family Judge. This is to ensure the seniority and independence required to effect change through engaging directly with local family justice leadership, namely the

122 Local protocols may need to be established about how these roles interface with local specialist support services – good relationships here will be important to the success of the role.

123 It will be important that this includes feedback specifically on the experiences of Black and minoritized survivors, those with migrant status, deaf and disabled survivors and LGBTQ+ survivors.

Designated Family Judge, as well as the Local Family Justice Board, whilst ensuring the need for judicial independence. We envisage that this is mostly likely to be achieved by appointing Domestic Abuse Best Practice Leads as mid to senior level HMCTS staff (with a distinct management structure to ensure independence; for example, they could be answerable to regional Domestic Abuse Best Practice Managers). Domestic Abuse Best Practice Leads would need to work closely with the Designated Family Judge. A legal qualification would not be required but the role would be suitable for someone with a legal background. Additionally, a crucial qualification would be a strong evidence-based track record of understanding the Family Court and legal issues associated with domestic abuse.

Post-holders would, therefore, either need to demonstrate significant practical frontline domestic abuse experience and/or take in-depth, in-person training on domestic abuse by a provider approved by an independent board consisting of specialists in domestic abuse and chaired by the Domestic Abuse Commissioner.

Impact of this role

A key aim of the current President of the Family Division is to restore public confidence in the family justice system,[124] and this has been a long-standing aim of previous holders of this role.[125] Much of the focus in this respect has, understandably, been on improving transparency – something the Commissioner considers crucial, and to which our monitoring mechanism will significantly contribute. A further important element in improving public confidence is to improve procedural justice. By procedural justice, we mean the perceived fairness of court proceedings, and how people feel they have been treated (regardless of whether or not a case is decided in their favour). This applies to all those involved in proceedings, in accordance with relevant human rights provisions in the right to a fair trial (Article 6). Natalie Byrom summarises the four key elements of procedural justice as: "whether there are opportunities to participate (voice); whether the authorities are neutral; the degree to which people trust the motives of the authorities; and whether people are treated with dignity and respect during the process."[126]

The Domestic Abuse Best Practice Lead role, if properly funded and embraced by court staff and judiciary, would significantly improve procedural justice for adult and child victims and survivors of domestic abuse. The role would facilitate, enhance and embed the changes to which the government has committed in their implementation plan following the Harm Panel Report, namely: implementation of a new overarching statement of practice "to drive cultural change across the system as a whole"; fundamental reform to private law children proceedings; enhancing the voice of child; safety, support and security at court; communication, coordination, continuity and consistency; resourcing; monitoring and oversight.[127] In doing so, Domestic Abuse Best Practice Leads would help address some of the issues that are raised repeatedly by victims and survivors with the Commissioner, including the lack of understanding of domestic abuse within the family justice system and the retraumatising nature of proceedings.

Importantly, the role would help ensure that the annual findings of the Domestic Abuse Commissioner's monitoring mechanism, developed in partnership with the Victims' Commissioner, leads to real changes on the ground in each court area. To optimise knowledge sharing,

124 Sir Andrew McFarlane (October 2021), Confidence and Confidentiality: Transparency in the Family Courts (judiciary.uk)
125 See eg. Sir James Munby (May 2021), Submission to the President's Transparency Review.
126 Natalie Byrom (2019), Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice, 19.
127 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Implementation Plan.

the Best Practice Leads would ideally meet regularly to improve operational consistency nationally.

Funding required

England and Wales are divided into Designated Family Judge (DFJ) areas, and DFJs lead the Family Court and manage its workload in each area. Each DFJ area has a Designated Family Court which is the principal family court location for that DFJ area. This is the location where all family applications from that DFJ area are sent for initial consideration before being allocated for hearings. Currently there are 43 Designated Family Courts which receive private family law applications; however some Designated Family Courts have multiple entry points for applications owing to geographical factors or workload. (For example, for the Portsmouth Designated Family Court area there are three points of entry: Portsmouth, Southampton and Basingstoke; for the Bristol Designated Family Centre area the points of entry are Bristol and Gloucester.) In total, there are 52 entry points for private law family proceedings in England and Wales.[128]

There is a high variation in different Designated Family Courts' caseloads: in the first quarter of 2022 (April to June) Family Court, caseloads of new cases received during that quarter by Designated Family Courts ranged from 101 to 716, with urban centres having particularly high volumes of cases (including London where there are only three Designated Family Courts (Central, East and West) receiving all London applications.)[129]

We therefore suggest that there should be at least one Domestic Abuse Best Practice Lead for each of the 52 entry points for private family law proceedings in England and Wales, and at least two Leads for entry points with higher volumes such as London.

If each Domestic Abuse Best Practice Lead were to cost £60,323 (the average total staffing cost for a Band B (SEO equivalent) role including both salary costs and other pay costs)[130] and we estimate the need for 1.5 Leads for each of the 52 entry points, the funds needed would be £4,705,194.

RECOMMENDATION 2

The government should establish, and provide appropriate funding for, a new HMCTS role of Domestic Abuse Best Practice Lead in every Family Court area. This role should drive forward the cultural change recommended by the Harm Panel, through:

- **improving compliance with key rules and guidance;**
- **improving communication with parties and local domestic abuse support services;**
- **facilitating feedback;**
- **improving understanding of domestic abuse within the court, including the particular issues and barriers faced by victims and survivors sharing protected characteristics and/or migrant status;**
- **driving best practice to ensure a trauma-informed family justice system; and**
- **driving a more consistent national approach operationally, which must allow for parameters within which inconsistencies can be captured in order to propel appropriate training and accountability.**

128 Internal HMCTS figures provided to the Domestic Abuse Commissioner's office.
129 Ibid.
130 Ibid.

Section 2: Pathfinder Courts

Pilot Pathfinder Courts in North Wales and Dorset have been established to improve information sharing between agencies such as the police, local authorities and the courts; provide better support and safer outcomes for child and adult victims and survivors; and introduce a problem-solving approach that places the child at the centre.[131] They have been handling private family law cases since early 2022. Whilst formal evaluations are pending, each site has been a source of extremely positive feedback. The Commissioner has been provided with excellent and consistent feedback in the form of praise from parties to proceedings, court staff and members of the judiciary.

The praise of the specialised courts has largely been due to:

- New practice directions which allow for earlier child impact assessment in comparison to national courts;
- The availability of a child-centric impact report at an earlier stage of the court process;
- New domestic abuse assessments as part of an initial report utilised to ascertain the extent of domestic abuse in cases;
- The presence and support of case progression officers who allow for ongoing support and assist with effective management of complex proceedings; and
- Strong links with specialist domestic abuse organisations who provided practical, emotional and signposting assistance.

The Commissioner is aware that much of the praise generated by Pathfinder Courts is due to the reduced adversarial approach to private family law cases, with an emphasis on the child and an abuse-informed approach to cases. In addition to this, the provision of holistic support for parties throughout proceedings has also been extremely beneficial in reducing the stress of the Family Court for families. The emphasis on a more investigative approach to private family law children cases was a recommendation of the Harm Report and has proven to be effective in reducing stress levels within proceedings and supporting all parties.

RECOMMENDATION 3

The Pathfinder Courts have had extremely positive feedback and have shown to be effective at engaging with domestic abuse and realising the ambitions of the Domestic Abuse Act 2021. As such, the Commissioner recommends the Ministry of Justice develop and deliver an ambitious plan to consolidate the best learning from the Pathfinder Courts, as well as from strong local practice elsewhere in England, Wales, and internationally to inform future practice, delivery, and policy development.

The Commissioner also recommends Pathfinder Courts should be resourced appropriately as part of wider efforts to roll out nationally. This is reflective of their capacity to effectively engage with domestic abuse owing to expertise, abuse-informed methods and a child-centric approach to cases.

131 Welsh government (3 March 2022), North Wales Family Court pilots new approach for supporting separated families who come to court | GOV.WALES (gov.wales)
Ministry of Justice (8 March 2022), Pioneering approach in family courts to support domestic abuse victims better - GOV.UK (www.gov.uk)

Centring the voice of the child

From the Commissioner's engagement with victims and survivors, practitioners, and the specialist domestic abuse sector, it is clear that child centricity and ensuring the voice of the child is meaningfully heard is priority across the board.

The Harm Panel Delivery Update provides a welcome illustration of a range of activity which has taken place to improve the voice of the child in private law children proceedings.[132]

This includes, but is not limited to:

- Ensuring children's wishes and views are central in the Investigative Approach pilot;
- Cafcass Cymru have created a two-year secondment for a Harm Panel Change Manager. They have also reviewed and are further developing their suite of practice tools and means of engaging, to ensure even better engagement with children and young people;
- Cafcass established a Learning and Improvement Board to consider the implications of the expert Panel's report, and published their Domestic Abuse Learning and Improvement Plan in June 2021, with a 12-month review of progress published in June 2022. Progress on actions includes launching a new Domestic Abuse Practice Pathway and guidance to support Family Court Advisers in working with children and families affected by domestic abuse; and
- The Private Law Advisory Group has scoped work to understand and consider what more needs to happen to better enhance children's participation in private law proceedings, including what might be possible to test in the Investigative Approach Pathfinder pilots in Dorset and North Wales.

However, through her engagement with victims and survivors, it is clear that we must go further in enhancing the voice of the child due to the range of concerns raised in Chapter 2. The Commissioner has drawn together relevant positive duties to safeguard the child by designing a child-centric framework to apply to private family law proceedings where domestic abuse is alleged. This has been developed from best practice in the UK and the USA to capitalise on existing progress made by the Family Court.

The following three principles therefore establish the positive framework of duty. Following setting out the Commissioner's three principles, two types of so-called 'parental' alienation allegations are considered within this framework given it is both a high priority area to address and the focus of this concerning issue, as indicated by survivor correspondence.

Principle 1: Considering duties to safeguard the child

The Commissioner acknowledges the range of welfare principles, legal commitments and relevant laws which should be read and applied in a way which maximises the provision of protection the Family Court offers to child victims of domestic abuse as highlighted in the Harm Panel Report.[133] The Family Court is bound by section 1 of the Children Act 1989, specifically the welfare checklist. National laws are further

132 Ministry of Justice (May 2023), Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update, 12-13.
133 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 25-26 (publishing.service.gov.uk)

supported by the international human rights law framework,[134] namely the Convention on the Rights of the Child 1989 which protects and promotes the right of the child who is separated from one or both parents to maintain personal relationships and direct contact with both parents on a regular basis, except if it contrary to the child's best interests (Article 9).

However, an overarching aspect of the Commissioner's framework is the need to assess the effect of abusive, hostile or controlling behaviours experienced by the survivor as a result of the perpetrator's conduct. The subsequent impact on the child, given the abuse directed to the adult victim or survivor, is considered by the Commissioner to satisfy the threshold of Section 3 of the Domestic Abuse Act 2021, which requires the child to be considered a victim in their own right of the abuse because they indirectly experienced the effects of domestic abuse. The harms and risk for children who are victims of domestic abuse are listed in Chapter 2 and demonstrate that this landmark provision is not currently being realised.

The Commissioner encourages more explicit acknowledgement of Section 3 of the Domestic Abuse Act 2021 alongside the welfare principles, legal commitments and relevant laws when considering private family law proceedings where domestic abuse is alleged. The further principles laid out in this Chapter work to support the Family Court in responding to domestic abuse allegations more effectively and therefore achieving the welfare principle and the ambitions of the will of Parliament in upholding the Domestic Abuse Act 2021.

Principle 2: Child-centric examination of a domestic abuse allegation

When an allegation of domestic abuse is raised, the Family Court should pause and then take the appropriate time required to investigate the allegation. At present, the law would require this if ascertaining domestic abuse is relevant to the welfare issues before the court, as per PD 12J. **The Commissioner contends that domestic abuse will always be a relevant issue in relation to the welfare of the child.** Given the passage of the Domestic Abuse 2021, the Commissioner expects section 3 to be a fundamental safeguarding provision in relation to vulnerable children.

Such investigation should be undertaken to establish if domestic abuse is present and contextualising the child's behaviour within that understanding. Positive investigative practice, which is child-centred, can be seen in the Pathfinder Courts which are working closely with specialist domestic abuse agencies and ensure strong collaboration across agencies. The elements of investigative practice are suggested as follows:

a. The Family Court must work to establish if there is a context and historical presence of domestic abuse to contextualise the child's behaviour, which may help identify the perpetrator and the adult victim or survivor;

b. Allegations of a child resisting contact must first be ascertained to clarify if a child is (i) in fact resisting contact or (ii) if the child's response is a consequence of such abuse. The absence of identification of domestic abuse through (1) should not rule out the presence of domestic abuse;

c. In order to ensure any duty towards the child as a victim of domestic abuse is identified and met, the vulnerability of the child must be considered. Abuse-informed training should cover the spectrum of ways in which children exhibit signs of having experienced the direct or indirect effects of domestic abuse. In applying this approach, the child is afforded the maximum level of protection, and strategies to undermine the ascertainable wishes and feelings of a child expressing

134 Ibid, 27.

reluctance, resistance and refusal are appropriately safeguarded;

d. Investigation into the weaponization of children in private family law proceedings must be given the highest level of scrutiny and care, given the vulnerabilities of the child and the prevalence of domestic abuse in private family law cases; [135]

e. In the context of domestic abuse, efforts by the domestic abuse survivor to take an approach to child contact which minimises upset or distress experienced by the child should be acknowledged as protective parenting and must not be conflated with so-called 'parental' alienation in instances of domestic abuse;

f. 'Self-protective measures' (efforts by the domestic abuse survivor to protect their own physical or psychological well-being) must not be conflated with an unwillingness to facilitate contact between the child and the abusive parent;

g. Self-protective measures taken by a child, exhibited in the form of reluctance, resistance and refusal at contact or increased contact, must not be approached as the effect of a parent encouraging, engineering or inducing such behaviour;

h. Self-protective measures in (f) and (g) above must be considered thorough an abuse-informed lens which is inquisitorial. This is in line with the Pathfinder Courts who integrate awareness of domestic abuse training at all levels in order to adequately safeguard children and adult victims;

i. The impact of domestic abuse on a child must be considered in direct terms. This extends to and includes the effect of domestic abuse from one parent to another, with regard to parenting behaviours;

j. A child's reluctance, resistance, or refusal at contact (see principle 3), or increased contact, must be determined within the framework of response to abuse if domestic abuse is established. Domestic abuse does not need to be the whole reason for a child's response and can be understood to be part of it;

k. A spectrum of reasons exists for child reluctance, resistance and refusal such as: child attachment to a primary carer; apprehension at a new setting; or a stark increase in contact with a previously absent parent. Such behaviour must be understood in child-centric terms and the starting position cannot be an assumption of pathological manipulation of the child, nor alienating behaviours; and

l. Evidence to assist the Family Court in understanding the above must be accepted given domestic abuse requires identifying patterns of behaviour. Forms of evidence may, therefore, present in a number of different ways. Evidence relevant to domestic abuse and the well-being of the child should be accepted and considered by the Family Court.

Principle 3: Understanding the presentation of the Child (Resistance, Reluctance, Refusal)

To successfully practice principle 2, there must be a comprehensive understanding of the presentation of the child. There is a spectrum of responses which are to be reasonably expected from a child when their parents separate. This depends on a number of factors, including how old the child is, the relationship they have and enjoy with each parent, and their established pattern of care and schedule.

There are many sources which encourage separating parents to communicate and approach their child sensitively, reflecting the

135 CAFCASS, Women's Aid (2016), Allegations of domestic abuse in child contact cases (cafcass.gov.uk)

need to handle children in a manner which is tailored to their developing cognitive state and also a recognition that within a course of any divorce/relationship change, including dynamics which are not abusive, there is a degree of difficulty and stress by nature of the event. Children can still be reasonably expected to exhibit negative emotions, such as upset, anger and frustration when learning their parents are separating in non-abusive circumstances. Such reactions can be considered natural and expected responses to a change in situation, and a child upset, proportionate to the circumstances should not provide a basis for an allegation of so-called 'parental alienation'.

The Commissioner believes the linguistic framework used in relation to children in the Family Court requires careful consideration. The following terms have been adopted in practice in the United States of America by the National Council of Juvenile and Family Court Judges,[136] and the Commissioner has found it productive in encompassing the range of behaviours which are exhibited by children:

Reluctance – Resistance – Refusal (RRR Model):

Term	Definition	Example in context
Reluctance	*Unwillingness or disinclination to do something.*	A child may require reassurance from the primary carer, or reassurance that their feelings (including those of reticence) are acknowledged.
Resistance	*To disagree with something. To be changed by something.*	A child may run away at handover, be insistent that they are unhappy with proposals and seek to appeal to their primary carer, adults in school settings or others.
Refusal	*To say that you will not do or accept something.*	A child stating that they will not: stay overnight, have contact, accept being collected by a non-resident parent, participate in phone/video calls.

The above responses can manifest in a number of ways dependent on the age, maturity and ability to understand the implications of making choices (amongst other factors) of the child. Similar linguistics are already being utilised by Cafcass and Cafcass Cymru.[137]

It is helpful to note the Commissioner considers linguistics to be crucial in the appropriate consideration of the voice the child. The representation of the child through language can be used to distort the understanding of a child, for example the consistent referral to a child as 'hostile', which has been used to describe a child in the Family Court. The term 'hostile' is overly broad, lacks precision and does not consider the spectrum of child response. The proposed RRR model shifts the focus from child-behaviour and distorts child responses which are better understood utilising language that more accurately depicts the actuality of child's behaviour.

136 National Council of Juvenile and Family Court Judges (2022), Revised Chapter Four: Families and Children, Revised-MC-Chapter-Four-Dec.-2022-FINAL.pdf.pdf (ncjfcj.org) , 19.
137 Cafcass - Children and Family Court Advisory and Support Service, Resources for assessing child refusal/resistance (cafcass.gov.uk) Children's resistance or refusal to spend time with a parent: Cafcass Cymru practice guidance | GOV.WALES (gov.wales)

The Commissioner considers the most diligent approach to child welfare and safeguarding is for the Family Court to consider a child who is averse to contact with a parent post-separation through a lens which is child-centric and abuse-informed, in order to maximise safeguarding in relation to domestic abuse. In doing so, the following non-exhaustive list should be taken into account:

1. The relationship between each parent and child prior to the separation;
2. The age and development of the child (including if neurodivergent);
3. Risk factors;
4. The parent's behaviour and attitude towards the primary carer;
5. Domestic abuse;
6. Child attachment theory;
7. Cognitive development of children;
8. Pedagogy of children and how children present at different points in time;
9. Child trauma;
10. Neurodiversity;
11. The centrality of routine, schedules and consistency; and
12. The indirect impact of seeing, hearing of experiencing the effects of domestic abuse (including the impact of a primary carer being a victim of domestic abuse;

An intersectional approach to give consideration to the wider implications of socio-economic standing, culture, religion and immigration status have on the nuances of domestic abuse, and therefore the impact on the child.

In keeping with a child-centric approach, child development and behaviours must be considered and understood in the round. Adverse responses to contact with a parent may manifest with the child showing hesitation, anxiety and/or distress during contact or at the prospect of increased contact: all of which must be understood in relation to the child and the relationship with the parent. These behaviours may take different forms, for different children, and children may exhibit different responses over time.

It is also necessary to note that children have to be understood as children. In order for the Family Court to integrate the voice of the child, that voice must be understood relative to the individual child and their thought processes. Respecting the views expressed by a child underpin the acknowledgements of their own independent personhood and developing autonomy. Further, the voice of a child may not necessarily be literal, this is true of babies, toddlers and non-verbal children, but may also be expressed by sensitive exploration and appropriate engagement with the child.

Supporting context: Identifying the type of allegation

Post-separation abuse can take multiple forms, including methods which weaponize children and instrumentalise the Family Court. There will be a range of typologies which the Family Court will be presented with when allegations of domestic abuse are raised. Broadly speaking, the Commissioner hears of two predominate accounts:

> ***Type I allegations: abusers attempting to deflect from domestic abuse***
>
> ***Type II allegations: the perpetrator is utilising the child as a tool of coercion and control.***

Type I allegations: abusers attempting to deflect from domestic abuse

In Type I cases, the perpetrator is making the allegation towards the victim or survivor.

Applications within private family law proceedings usually centre around achieving increased contact for the non-resident parent.[138] In a proportion of these cases, the child involved exhibits signs of reluctance, resistance and/or refusal at the prospect of:

a. contact with the non-resident parent;

b. increased contact with the non-resident parent; and/or

c. leaving their primary carer.

Type I allegations see a perpetrator of domestic abuse accusing the primary carer of being responsible for a child displaying resistance, refusal and/or reluctance at the prospect of contact, or increased contact, with them. As such, when an argument is presented, and irrespective of terminology utilised, the case must be assessed and screened for domestic abuse through more rigorous and effective fact finding. Where domestic abuse is present, either in the relationship prior to separation or during Family Court proceedings themselves, Type I allegations should be considered as potential mechanisms of coercively controlling abuse.

Type I allegations are made under the guise of parental concern and are afforded traction by advancing arguments which utilise exercising parental rights. These allegations may distort or distract from a proper exploration of domestic abuse where this is necessary. Currently, these present as so-called 'parental' alienation allegations which are underpinned by a motivation to further abuse and harass the other parent, whilst deflecting from their own abusive behaviour. Type I allegations have gained considerable traction due to the minimisation of domestic abuse within the Family Court, which is attributed to a 'pro-contact' principle, reflecting national and international laws to encourage relations between child and both parents. This practice runs the risk of silencing the voice of children.

Within this concerning dynamic, principle 3 is not adequately engaged with currently in the Family Court: the voice of the child is minimised; protective parenting (efforts by the survivor, who is often the primary carer, to take an approach to child contact which minimises upset or distress experienced by the child) is penalised; and the perpetrator's rights are centred and prioritised within children proceedings relating to domestic abuse.[139] Type I allegations have proven to be extremely effective at silencing the voices of children, victims and survivors of domestic abuse.[140] The subsequent impact is compromised protection for children, victims and survivors of domestic abuse, which is unacceptable and incompatible with the Domestic Abuse Act 2021.

The Commissioner, as part of her Office's day-to-day work[141] has been informed of cases where domestic abuse has been insufficiently understood in terms of lacking focus on the child's experience of domestic abuse, either directly or indirectly, as well as accounts of domestic abuse being ineffectively engaged with through Fact-Finding Hearings which have not a) found domestic abuse or b) considered domestic abuse ascertained to be relevant to the welfare of the child.

In such cases a Type I allegation may result in the perpetrator gaining or increasing contact;

138 Macdonald, G. S. (2016). Domestic violence and private family court proceedings: Promoting child welfare or promoting contact? *Violence Against Women*, *22*(7), 832-852. https://doi.org/10.1177/1077801215612600

139 Linda C. Neilson, 2018, Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights? (FREDA Centre for Research on Violence Against Women and Children)

140 The reference in the footnote then needs to be: Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 158-159

141 Within the parameters of her appointment, the Commissioner:
1. interacts with victims and survivors at events and visits;
2. published a mapping report A patchwork of provision which states 69 percent of respondents wanted supported for Family Court proceedings in the last three years (the report was based on the views of over 4,000 victims and survivors of domestic abuse);
3. receives feedback from and engagement with front line services who interact with thousands of survivors of domestic abuse day to day;
4. has a Practice and Partnerships team within her Office, containing Geographic Leads, who work within different regions of England and inform her of their areas.

contact orders which remove safety barriers; and most concerningly the removal of the child from a survivor and then placed in the care of a perpetrator parent. All of which can be both unsafe and unwanted by the child.[142] The Commissioner fears that a child-centric approach has not taken place and a full understanding of domestic abuse has not been demonstrated.

These court orders have been considered necessary by the Family Court on the basis of supporting attachment between child and perpetrator parent. This has a huge impact on the well-being and welfare of the children, who in some cases may be removed from their primary carer with no warning and placed in the care of a perpetrator. It is a means of post-separation abuse of both child and adult victim and therefore the Court may later see a Type II allegation.

Type II allegations: the perpetrator is utilising the child as a tool of coercion and control.

In Type II cases, the victim or survivor is making the allegation towards the perpetrator.

The Duluth Model Post-separation power and control wheel demonstrates how perpetrators' behaviours, including disrupting relationships with children, can form part of a pattern of post-separation power and control, usually in the context of prior domestic abuse during the relationship.[143] The Domestic Abuse Commissioner recognises this as a form of post-separation abuse.

The Family Court may see Type II (a) allegations in relation to pathologically manipulative conduct, resulting in the intentional undermining of a previously strong relationship between child and their (victim or survivor) parent. Illustratively, extending to and including, but not limited to: encouraging the child to emotionally and physically hurt the non-abusive parent; continuously moving contact dates to coincide with days when the children were due to visit extended family members; using information received from the child to disrupt and control the adult victim or survivor.[144] The Commissioner considers this form of post-separation abuse as coercively controlling behaviour and therefore domestic abuse of the child. The parameters of this typology should be very carefully developed and draw from robust, evidence-based and credible literature and research.

Summary

Both of the above allegation types are forms of domestic abuse. To fully understand the complexities of coercive control and post-separation abuse, which has been permitted to flourish by misuse of so-called 'parental' alienation allegations, a fuller picture must be formed. The complexities of such allegations must be considered and ascertained to ensure that children and adult victims of domestic abuse are appropriately safeguarded.

142 Against Violence and Abuse, (2022), Staying Mum Findings from peer research with mothers surviving domestic abuse & child removal, Staying-Mum-Final-1.pdf (avaproject.org.uk)
143 Domestic Abuse Interventions Programme (2013) Post Separation Power and Control Wheel, Using-Children-Wheel.pdf (theduluthmodel.org)
144 Callaghan J, Alexander J, Sixsmith J and Fellin L (2015) 'Beyond "witnessing": Children's experiences of coercive control in domestic violence and abuse'. Journal of Interpersonal Violence.

RECOMMENDATION 4

The Commissioner recommends for the Ministry of Justice and Family Justice Board to work with the Commissioner to capitalise on existing work, such as the Pathfinder Courts, to further strengthen the consideration and understanding of the voice of the child when domestic abuse is raised by drawing from the principles presented in this report.

It is crucial to state that these principles are intended to operate:

- **Within the wider recommendations made with respect to cultural reform of the Family Court; and**
- **As soon as allegations of domestic abuse are raised within private family law proceedings.**

Chapter 8:

Overview of the Commissioner's further recommendations for change

Coming face to face with an abusive partner is difficult and you have to make sure that both adults feel safe in the process. If you don't feel safe in that environment, it will affect how confidently you are able to put forward your evidence. Whilst the decision may not go in your favour, it is important that you're made to feel like what you have said has equal value."

Victim/survivor of domestic abuse who attended the Domestic Abuse Commissioner's roundtable discussion on the Family Court (August 2021)

Section 1: Training

The Harm Panel findings and the Commissioner's engagement with victims and survivors as well as with family justice professionals is consistent with the findings of a survey of Family Court legal professionals conducted by Channel 4's Dispatches. This found that four out of five lawyers who responded to the survey said magistrates have a poor or very poor understanding of domestic abuse and coercive control, while one in three said District Judges also have a poor or very poor understanding of these issues.[145]

The need for a better understanding of domestic abuse within the family justice system also came out repeatedly in the Domestic Abuse Commissioner's roundtables. It was felt to be key that judges and Cafcass officers should better understand:

- the nature of coercive control;
- the gendered dynamics of domestic abuse;[146]
- the tactics a perpetrator will use to gain control and dominance over a survivor; and
- how the Family Court applications can be used to perpetrate post-separation abuse, including through false allegations of so-called 'parental' alienation.

Many of the participants in the Commissioner's roundtables highlighted the need for courts to better understand the particular experiences of victims and survivors sharing protected characteristics and/or migrant status, as well as the additional barriers they face in seeking help and accessing justice. The barriers discussed included:

- lack of understanding of the distinct ways that victims and survivors in different communities may experience domestic abuse;
- prejudice within family justice agencies

145 Channel 4 Dispatches (2021), survey conducted for: Torn Apart: Family Courts Uncovered: Dispatches. See n.19 above for details of the limitations of the Dispatches survey.

146 Gendered dynamics include both the gendered nature of domestic abuse (i.e. the predominate victims and survivors of domestic abuse are women and perpetrators are men), but also how the victim or survivor's gender can influence the response they receive (i.e victims and survivors who are men are often not considered victims or are overlooked).

(for example questioning about someone's immigration status);

- lack of appropriate specialist domestic abuse support;
- with respect to Deaf and disabled victims and survivors, false perceptions of victims' and survivors' parenting capabilities; and
- with respect to male victims and survivors, stereotypical views of what a 'victim' should look like.

We understand that most individuals working across the family justice system will have undergone mandatory domestic abuse training as part of their role. The judiciary, Cafcass and Cafcass Cymru have further developed and improved their training provision since the publication of the Harm Panel report. The Commissioner has welcomed the opportunity to sit on Cafcass' Learning and Improvement Board, engagement with Cafcass Cymru, as well as opportunities to meet with the Judicial College to discuss their training plans for judges on domestic abuse.

At present, the extent of this training still varies, with there being no consistency between the types of training that are delivered to the different agencies and individuals working within the family justice system, and the frequency with which such training is undertaken. In order to achieve long-term cultural change, it is crucial that lawyers, judiciary, magistrates, magistrates' legal advisors, Cafcass officials and social workers regularly undertake trauma-informed training to ensure that they have an up-to-date understanding of the nuances of domestic abuse and how it may present. There is particular need to ensure that magistrates and legal advisors undertake adequate, robust and thorough training, given they constitute the judiciary in many domestic abuse cases when litigants-in-person are self-representing. In the absence of barristers and solicitors, their ability to engage with domestic abuse appropriately and correctly is heightened.

The Lord Chief Justice, Senior President of the Tribunals and Chief Coroner have statutory responsibility for the training of judicial office holders. These responsibilities are exercised through the Judicial College. Since April last year, the President of the Family Division and Chair of the Judicial College have led a review of judicial training on domestic abuse, and in light of recent caselaw, the Harm Report and the Domestic Abuse Act. This has been warmly welcomed by the Domestic Abuse Commissioner.

Refreshed and updated specialist digital training on domestic abuse was launched in October 2021 for all family judges, including Recorders and Deputy District Judges. New digital essential domestic abuse training to meet the needs of magistrates and legal advisers was also launched in October. New training which addresses the recent caselaw, the Harm Report and the Domestic Abuse Act has been rolled out since April 2022.[147]

This is a good step forward, and the Commissioner welcomes the commitment of the President and the Judicial College on this matter. However, all training needs to be ongoing and the Judicial College, as well as other key stakeholders, must be transparent on what the training includes and how it is delivered to build trust into the family justice system. The Commissioner would encourage further public details about the nature of the training; how attendance at the course will be monitored; and what follow up training will be provided. She would also encourage details of the planned training of family magistrates.

Further progress is being made with training

147 Ministry of Justice (May 2023), Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan: delivery update, 16.

for family lawyers. SafeLives is developing and delivering a cultural-change training programme to create systemic transformation within the family justice system and strengthen practitioner capacity to respond well to domestic abuse, which is being funded by the Legal Education Foundation. It will upskill family lawyers to identify and evidence domestic abuse and coercive control, as well as identity the impacts of abuse and practice appropriate multi-agency working.[148] However, we must see more consistent provision for and investment in the training of practitioners.

Additionally, specialist domestic abuse services should be supported to develop their skills and knowledge to support victims and survivors of domestic abuse. Victims and survivors have expressed to the Commissioner the importance of the support from specialist domestic abuse services, however, such services are not consistently provided with funds or engagement to upskill their staff to provide the most effective response.

Alongside this there is a role for multi-agency training to foster collaboration and shared understanding at the local level. The Family Justice Board should promote excellent training and ongoing learning to improve standards across the board.

It is crucial for training to take place to inform the Family Court and to achieve cultural change, and the domestic abuse sector has played a key role over the years in providing expert training. For example, the SafeLives Cultural Change programmes have led to measurable improvements; with the Domestic Abuse Matters training for police forces being found to lead to a 41 percent increase in arrests for coercive and controlling behaviour.[149] Meanwhile, an evaluation of the SafeLives pilot for children's social care professionals found that participants experienced the programme as a "challenging and thought-provoking experience that would lead to changes in how they think, behave and act," including changes to how they would spot the signs of domestic abuse and understanding the stages of abuse.[150] The Safe and Together culture change training model (mainly used in training social workers, but recently brought in to train judiciary in Australia) has also had success in improving the understanding of domestic abuse within systems and organisations.[151]

Careful consideration should also be given to developing the skills and knowledge needed in the Pathfinder sites. Learning from the Pathfinders, as well as examples from local family justice agencies, and internationally, such as Safe and Together Training in Australia should inform future training packages for all family justice agencies.

148 Domestic abuse training for family lawyers | SafeLives
149 Brennan, Myhill, Tagliaferri, and Tapley (2021) 'Policing a new domestic abuse crime: Effects of force-wide training on arrests for coercive control', Policing and Society, pp 1–16. The Commissioner notes that Domestic Abuse Matters training is provided to police by both SafeLives and Women's Aid.
150 SafeLives (July 2020), Domestic Abuse: The Whole Picture, Culture Change Programme for Children's Social Care Professionals.
151 Iriss (2019), Evidence on the Safe and Together Approach

RECOMMENDATION 5

The Commissioner recommends greater transparency and consistency across the whole family justice system, so that a full culture-change programme of training on domestic abuse is provided. This includes to judiciary, magistrates, magistrates' legal advisors, Cafcass officials, and local authority social workers, and specialist domestic abuse services. Training oversight of the family justice system should sit under the Positive Outcomes for Children of the Family Justice Board. The Commissioner should attend the Family Justice Board to discuss and engage on training for all agencies and services in the family justice system.

RECOMMENDATION 6

Funding should be made available by the Ministry of Justice for specialist domestic abuse training. This training should include the impact of domestic abuse on adult and child victims and survivors; in this respect it should include at a minimum the following elements identified as crucial in our roundtables:

- **the nature of coercive control;**
- **the gendered dynamics of domestic abuse;**
- **the tactics a perpetrator will use to gain control and dominance over a survivor; and**
- **how Family Court applications can be used to perpetrate post-separation abuse 6).**

The training should include input from the domestic abuse specialist sector. Furthermore, it could be linked into the new Statement of Practice that is being developed in fulfilment of the Harm Panel recommendations to cover all key agencies and professionals in the family justice system.[152] The Commissioner would welcome continued engagement from all relevant family justice agencies, in particular the Judicial College, and Cafcass on training.

152 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 73 (publishing.service.gov.uk)

Section 2: Court support

For fair and just proceedings to take place, victims and survivors must be enabled to participate effectively through critical support which is currently absent.

"There is a disconnect between what a survivor expects, what the court directs and what really happens within the process... My daughter was removed from me almost overnight and I had no advocacy support or anyone to guide me through it."

Victim/survivor of domestic abuse who attended the Domestic Abuse Commissioner's roundtable discussion on the Family Court (September 2021)

Part 1: Independent Domestic Violence Advocates

Prior to April 2023, the issues with victims and survivors' access to court support were twofold: (1) victims and survivors' limited ability to obtain a specialist Family Court IDVA or community-based domestic abuse specialists, and (2) such support being refused entry to court.

On 6 April 2023 IDVAs were permitted access to the Family Court to provide crucial support for victims and survivors of domestic abuse during proceedings, as set out in PD 27C of the Family Procedure Rules.[153] This is huge progress and vital support for vulnerable victims and survivors will be assured as a result.

In October 2021, prior to the PD, the President of the Family Division, stated: "To my mind, there are unlikely to be many cases where it is appropriate to refuse a party's application to be supported by an IDVA at a hearing. In like manner to an application for special measures, a request for an IDVA should almost invariably be granted. The IDVA is simply in the room as a supporter to enable the party to participate effectively in the proceedings. In addition, specialist support can be essential where the party is a victim of abuse and where plans for their safety, both in and outside the courtroom, must be made."[154]

Research commissioned by the Commissioner, and conducted by SafeLives, found over 70 percent of domestic abuse victims did not receive specialist, formal, support through the Family Courts and of these victims and survivors almost 90 percent were not aware support was available.[155] This is despite specialist support in court being the most common answer given by victims and survivors when asked what improves their experiences of going through court.[156] There are very few specialist Family Court IDVAs or community-based domestic abuse specialists due to lack of specialist funding for these roles. Advocates providing general support to victims and survivors of domestic abuse will support clients through Family Court proceedings where their contract and time allows, but they are usually only funded to work with clients for short periods of time.

Whilst PD27C establishes an excellent foundation upon which IDVAs may support both the victim and the wider Family Court system with their expertise, adequate funding is vital to the success of the PD.

As shown in the SafeLives research, the average length of support provided by general IDVAs to clients was 14 weeks (an increase from 12 weeks in 2019),[157] compared to Family Court proceedings that can go on for years. As IDVAs usually focus on high-risk cases, by the time a case reaches the Family Court the IDVA providing general support may no longer be working with that survivor. However, we know

153 Practice Direction 27C of the Family Procedure Rules
154 Sir Andrew McFarlane (October 2021), Supporting Families in Conflict: There is a better way.
155 Domestic Abuse Commissioner, SafeLives (June 2021), Understanding Court Support for Victims of Domestic Abuse, 1
156 Ibid, 7.
157 Ibid 11.

that conflict over child contact can be a flash-point for risk,[158] and so even cases that had been satisfactorily managed at 'standard' risk may suddenly escalate in and around Family Court proceedings. As pointed out in the Women's Aid Federation England 'Nineteen Child Homicides' report, this is something that is not always understood by agencies.[159] Further, typical IDVAs in community-based settings may not always be best placed to advocate within the family court, and a more specialist role is warranted. Not only might a survivor have been moved on from their community-based IDVA onto longer-term support (even where Family Court could escalate risk once more), but a general community-based IDVA may have more limited contact with the Family Court system.

We know that building relationships with institutions and understanding the complexities of process and procedure are key requirements for effective advocacy, and a community based IDVA may not interact with the Family Court regularly. A dedicated, specialist Family Court IDVA will therefore better understand the complexities of proceedings, how the courts work in their area, and have a good understanding of how proceedings can escalate risk for victims and survivors.

What is the role of a Family Court IDVA or domestic abuse support worker?

Court IDVAs, or support workers provided by specialist 'by and for' services, are there to provide emotional and practical support to victims and survivors of domestic abuse going through the Family Courts and the criminal justice process where charges have been brought against the perpetrator. Specialist Family Court IDVAs understand the family court process, help explain this to victims and survivors, and build up relationships with court staff so that they can liaise with them, request special measures or interpreters where needed and feed into risk assessments being made by Cafcass and Children's Social Care professionals. More broadly, they can provide wrap-around support to victims and survivors, through making referrals to agencies and therapeutic support services. Recent PD27C has ensured their access to the Family Court.

The Pathfinder sites will help further define the two aspects of the role of specialist domestic abuse services: the assessment as part of the initial report; and the support which is provided.

Their job is to help victims and survivors feel safe and confident at court, so that they can give their best evidence and feel better able to navigate proceedings. The role is also to help keep victims and survivors physically safe: for example, to ensure that victims and survivors can get to court without bumping into the perpetrator.

It is particularly important for victims and survivors with protected characteristics and/or migrant status to have access to a specialist support worker who understands their needs (ideally provided by a specialist 'by and for' organisation), to help mitigate the trauma caused by the Family Court process.[160]

The role of an IDVA or support worker is particularly important because many victims and survivors do not have access to a lawyer due to high legal aid thresholds, and, even when they do, many lawyers do not yet have a good understanding of domestic abuse. IDVAs do not replace legal advice but can help victims and survivors feel supported.

158 The SafeLives DASH (Domestic abuse, stalking and 'honour'-based violence) risk checklist, includes a question as to whether there is conflict over child contact, noting a study of separated women that found that that child contact is a particular point of vulnerability for survivors and their children (Humphreys and Thiara 2003), and noting that "this has also been reiterated through research with IDVA projects confirming that harassment and stalking often continue post separation. Child contact is used by perpetrators to legitimise contact with ex-partners…". See SafeLives (2014), Dash risk checklist for the identification of high risk cases of domestic abuse, stalking and 'honour'-based violence.

159 Women's Aid (2016), Nineteen Child Homicides, 29 (womensaid.org.uk)

160 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases; Domestic Abuse Commissioner (June 2021), SafeLives, Understanding Court Support for Victims of Domestic Abuse,

RECOMMENDATION 7

Every survivor going through the Family Court should have access to a specialist domestic abuse support worker. The Ministry of Justice should explore options for investment into these roles for both the delivery of the role, but also for the professional development of the role.

This must not come at the expense of general community-based services funding. There should also be consideration on preventing additional burden to local authorities; rather, additional, long-term ringfenced specialist funding is needed to provide these specialist IDVA or other specialist support workers. The Ministry of Justice should absorb learning from the Pathfinder Courts in order to improve delivery.

Part 2: Qualified Legal Representative Scheme

The prohibition of cross-examination provisions contained within the Domestic Abuse Act 2021 came into force on 21 July 2022 and has barred cross-examination by a defendant within all family proceedings commencing from the same date.[161] The underlying objective was to address the victim's re-traumatisation in being cross-examined by their abuser.

To operationalise the prohibition of cross-examination, the Ministry of Justice established the Qualified Legal Representative (QLR) scheme. The scheme is a register of appropriate family law practitioners who may conduct cross-examination in family proceedings.[162] QLRs are appointed for both victim and perpetrator in circumstances where neither party is represented and a hearing with evidence is necessary.

We understand the QLR Scheme has had limited success likely owing to the low rates of pay, compounded by QLR advocates not being able to recover travel or other reasonable expenses. This effectively renders the Scheme as useless in more remote areas of England and Wales as travel costs may significantly offset, or even outweigh renumeration. This is demonstrated by both the national shortage of QLRs and those who signed up for the scheme leaving given the poor rate of renumeration.

Where no QLRs exist, judges are tasked with cross examination, increasing strain on the limited resources of the judiciary. The Commissioner urges the Ministry of Justice to provide adequate resources for an effective, efficient and proper QLR scheme.

RECOMMENDATION 8

The Qualified Legal Representative scheme should be fully and appropriately resourced in order to ensure effective implementation.

The QLR Scheme was a flagship measure in the Domestic Abuse Act 2021 and is both victim-centric and court-centric. However, despite its evident need, the Scheme has had limited success likely owing to the low rates of pay, which is exacerbated by QLR advocates not being able to recover travel or other reasonable expenses.

161 Section 65 of the Domestic Abuse Act 2021, as implemented by Practice Direction 3AB.
162 Sections 65 and 66 of the Domestic Abuse Act 2021.

Part 3: Legal aid

In the Commissioner's family law practitioner survey, when professionals were asked, which, if any, of the following they considered to be areas which require improvement in private family law proceedings (see methodology for list), access to legal aid was by far the most common answer with nearly eight out of ten practitioners agreeing with this statement.

Findings from our recent national survivor survey demonstrates just how important an issue the Family Court is to victims and survivors, with 69 percent indicating that they wanted legal support or advice for Family Court proceedings compared to 42 percent who wanted access to legal support or advice for criminal court proceedings.[163] Sadly, the desire for such support is not met with provision as there is a lack of court support such as IDVAs, Qualified Legal Representatives (QLRs) and other specialist support workers,[164] and lack of access to legal representation.[165]

Legal aid is access to public funds granted by the Legal Aid Agency to individuals to help pay for legal advice, family mediation and representation in court. Legal aid may cover some or all of a party's legal costs. Since 2010, annual spending on legal aid has drastically declined, with a 35 percent net reduction in spending between 2010 and 2020 from £2.6 billion to £1.7 billion.[166] The introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) changed the scope of family legal aid, meaning that participants cannot access legal aid for private family law proceedings barring some exceptions.[167] Whilst victims and survivors of domestic abuse are in theory eligible for legal aid under LASPO, the Act made this hard to access due to a restrictive means test.

"Repeated applications which induce considerable stress and can be life wrecking financially."

Family Law practitioner, the Domestic Abuse Commissioner's practitioner survey 2023

"Cases being pursued by litigants in person who are clearly perpetrators. They are often passive aggressive, refuse to compromise, are unreasonable etc. Rarely are they openly hostile on the whole, continuing abuse is much more subtle."

Family Law practitioner, the Domestic Abuse Commissioner's practitioner survey 2023

163 Domestic Abuse Commissioner (2022), A Patchwork of Provision Summary Report, DAC_Mapping-Abuse-Suvivors_Summary-Report_Feb-2023_Digital.pdf (domesticabusecommissioner.uk)
164 Domestic Abuse Commissioner (June 2021), SafeLives, Understanding Court Support for Victims of Domestic Abuse,
165 The LexisNexis Legal Aid Deserts report (2022), The LexisNexis Legal Aid Deserts report
166 Pyper, D., Sturge, G., Lipscombe, S., Holland, S. (2020) Spending of the Ministry of Justice on Legal Aid, House of Commons Library
167 Ibid.

"The bar for legal aid is set so low that pretty much any woman with a job has to fund their own legal costs... This creates the situation whereby women who have lived through abuse, are terrified of losing their children, are frightened of their partner and are traumatised, are having to navigate court alone, without advice, representation or guidance."

Correspondence from a victim/survivor of domestic abuse to the Domestic Abuse Commissioner

The application process for legal aid is complex, requiring victims and survivors to provide extensive evidence of their finances, including original copies of passports, payslips, bank statements and housing costs. The Lord Chancellor's Guidance on determining financial eligibility for Controlled Work and Family Mediation (April 2021) is 43 pages long and the guidance on determining financial eligibility for certificated work is 137 pages long. Many victims and survivors may struggle to comprehend the complexity of the guidance and be deterred from applying, or indeed, from understanding that they are eligible for legal aid, if their financial situation has any unusual element. It is also extremely challenging to provide additional and / or supplementary information and / or documents, particularly where their passports may have been confiscated by a perpetrator, or where access to their bank accounts or joint assets were restricted throughout the course of their relationship. The present process of applying for legal aid is therefore a barrier to justice for victims and survivors of domestic abuse and their children.

The means test for legal aid is split across three different facets: gross income; disposable income; and disposable capital.[168] If any of the tests are failed, legal aid funding is refused. The means test threshold is difficult to meet and, as demonstrated by a recent report by Surviving Economic Abuse,[169] it acts as a barrier to justice to individuals who cannot afford to pay for their own legal representation, for the following reasons:

- The income test threshold which victims and survivors of domestic abuse must meet has not been revisited for over ten years, with there being no adjustment made to account for changes to the national median salary during this time. Research by the Law Society has shown that people on incomes already 10 percent to 30 percent below the minimum income were being excluded from legal aid;[170]
- The disposable income assessment has not been adjusted to account for changes in housing and childcare costs, nor does it reflect other essential expenditure such as travel costs.[171] As most victims and survivors on these salaries have little disposable income, many are left with no choice other than to represent themselves and act as litigants in person in proceedings, or take out large litigation loans which leave them in extreme amounts of debt;[172]
- The capital test has caused issues for various victims and survivors who own part or all of their home but have little or no income, or who co-own their property with the perpetrator and are therefore unable to access the

168 The current thresholds are set out here: Civil legal aid: means testing - GOV.UK (www.gov.uk)
169 Surviving Economic Abuse (2021), Denied Justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives.
170 Professor David Hirsch (2018), Priced out of justice? Means testing legal aid and making ends meet, The Law Society.
171 Surviving Economic Abuse (2021) Denied Justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives.
172 Katie Tarrant (20 July 2021) Divorced from reality: How legal loans racked up half a million debt for a standard divorce, Byline Times; Surviving Economic Abuse (2021) Denied Justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives.

capital held in the property. In practice, the capital test operates on the assumption that individuals are able to sell their assets or borrow against them in order to fund litigation. A judicial review was brought against the Legal Aid Agency seeking to address the legality of this in R (On the Application of GR) v Director of Legal Aid Casework [2020] EWHC 3140 (Admin), which led to the legal aid regulations being amended to allow the Legal Aid Agency to exercise discretion as to whether it valued a capital asset like a property at zero.[173] Whilst the Legal Aid Agency's decision to amend the regulations was warmly welcomed, the application of the new rules remains inconsistent as it falls to individual assessors to decide whether or not to consider granting exemptions. Unfortunately, for many victims and survivors of domestic abuse, this exemption is still not being granted.

The changes in the scope of legal aid in private family law proceedings have led to a substantial decrease change in the pattern of legal representation. For 2022 as a whole, the proportion of disposals in private law cases where neither the applicant nor the respondent had legal representation was 39 percent, whilst the proportion where both had legal representation was 19 percent. This was up 2 and down 2 percentage points respectively compared to 2021.[174] Litigating in person is rarely appropriate in domestic abuse cases due to the complexity of these cases and the re-traumatisation which victims experience as a result of having to litigate against their perpetrators.

In the Commissioner's survey, family law professionals were asked about their work with litigants in person who were accused of domestic abuse. Over two thirds of respondents to the survey felt that litigants in person, who are alleged to have abused the other parent, were aggressive in their communication style, reinforcing the need for an effective QLR scheme (see pages 67-68 above). When asked about behaviour of litigants in person more generally, three quarters of legal practitioners confirmed that litigants in person use excessive communication in Family Court proceedings. Just over half of participants who answered the question around communication style felt that the communication style of litigants in person 'sometimes' was used to intentionally cause stress to the other parent.

Other issues include the introduction of fixed fees for legal aid work, combined with a lack of funding for legally aided cases, has led to a significant reduction in the number of providers completing legal aid work and has created advice deserts whereby there are areas where there is no legal aid provision at all, or where providers have limited or no capacity to accept new cases.[175] As such, even where individuals are eligible for legal aid, they may find themselves struggling to find providers who can take their cases forward. Currently, this issue disproportionately affects individuals from marginalised backgrounds and those who live in rural areas.[176]

In March 2022, the Government published the Legal Aid Means Test Review Consultation, in which it set out proposals for reforms to the legal aid system. [177] In response to the consultation, the Domestic Abuse Commissioner noted that whilst many of the proposals in the Means Test Review demonstrated an improvement from the current arrangements with regard to civil legal aid, the proposals put forward do not go far enough in cases involving domestic abuse – with some

173 Public Law Project (2021) Practice Note: Trapped Capital (publiclawproject.org.uk)
174 Family Court Statistics Quarterly: October to December 2022, Family Court Statistics Quarterly: October to December 2022 - GOV.UK (www.gov.uk)
175 The Westminster Commission on Legal Aid (October 2021) Inquiry into the Sustainability and Recovery of the Legal Aid Sector.
176 Ibid.
177 Ministry of Justice (March 2022) Legal Aid Means Test Review

measures set to disproportionately affect victims and survivors who are lone parents.[178] Further, the requirement to provide additional evidence to support a means test application would be unduly burdensome for victims and survivors, as well as to the public purse due to the additional layers of administration required to process the applications through the proposed gateways.[179]

RECOMMENDATION 9

The Government should remove the means test for legal aid for all victims and survivors of domestic abuse going through private family law proceedings. This would enable any party raising allegations of domestic abuse to receive legal representation throughout their proceedings and provided critical support for the victim or survivor to navigate the complex legal system.

In order to avoid legal advice deserts, the Commissioner supports the recommendation made by the Commission for Legal Aid (a cross-party initiative formed by the All-Party Parliamentary Group on Legal Aid) for the Government to carry out a review into legal aid fee schemes to help ensure that individuals who are eligible for legal aid are able to access the legal representation they need.[180] This extends to and includes all parties within proceedings.

178 Office of the Domestic Abuse Commissioner for England and Wales (June 2022) Domestic Abuse Commissioner's response to the Legal Aid Means Test Review Consultation
179 Ibid, page 2
180 The Westminster Commission on Legal Aid (October 2021) Inquiry into the Sustainability and Recovery of the Legal Aid Sector

Section 3: The use of experts

The use of experts in the Family Court is governed by Practice Direction 25B. There is currently no requirement for an expert to be regulated by an external regulatory or supervisory body; rather, a case-by-case approach is taken. PD25B states: "If the expert's area of professional practice is not subject to statutory registration (e.g. child psychotherapy, systemic family therapy, mediation, and experts in exclusively academic appointments) the expert should demonstrate appropriate qualifications and/or registration with a relevant professional body on a case by case basis.";[181]

Roundtable participants were particularly concerned about the use of experts (sometimes with recognised qualifications in psychology and psychotherapy and sometimes without) to draft reports for the court alleging that a child has been subjected to so-called 'parental' alienation, with these reports then being relied on by the judge. Some of these reports are extremely costly to obtain and mean that a parent who has more money, is able to obtain reports which may persuade the Family Court to make an order which is not in the best interests of the child. Several pieces of correspondence to the Commissioner also raised concerns about these kinds of experts. In these cases, many roundtable participants impressed how the allegation of so-called 'parental' alienation appeared to supersede any presence of domestic abuse. The use of unregulated experts to this effect, is chilling, and their increasing presence has caused both fear and a lack of faith in the Family Court to address domestic abuse.

Submissions to the Harm Panel also raised the issue of the reliance by the Family Court on 'experts' in the contested concept of so-called 'parental' alienation. Concerns were raised with the Harm Panel that the credentials of such experts were not always examined or challenged by the court.[182] Women's Aid Federation England felt that there was a disparity in approach to expert testimony and found that courts allowed expert testimony on so-called 'parental' alienation but often would not allow expert testimony on domestic abuse.[183] An apparent rise in so-called 'parental' alienation experts in recent years has also been noted in academic literature, with Birchall & Choudhry summarising this as follows:

"Barnett notes that a significant feature of the most recent case law is the increasing number of parental alienation 'experts' instructed in cases. These child psychologists and psychiatrists referred to Gardner's now discredited theories and recommended transfers of residence from mothers to fathers, as well as therapy for 'alienated' children and 'alienating' parents (Barnett, 2020a). These concerns around the use of psychological witnesses in the Family Courts echo the findings of a study analysing 126 expert psychological reports from family law proceedings. The quality of the reports was extremely variable with two thirds rated 'poor' or 'very poor', and there was evidence of unqualified experts being instructed to provide 'expert' psychological opinion (Ireland, 2012)."[184]

Instruction of so-called 'parental' alienation 'experts' in cases in England and Wales is of concern, particularly as the most recent examination of research methods adopted by proponents of so-called 'parental' alienation has concluded that: "empirical work related to parental alienation is weak in design and implementation, and assertions about that

181 PD25 B, Annex, paragraph 6.
182 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 63 (publishing.service.gov.uk)
183 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases
184 Birchall, Choudhry (2021), 'I was punished for telling the truth': how allegations of parental alienation are used to silence, sideline and disempower survivors of domestic abuse in family law proceedings.

work are pseudo-scientific in nature."[185] Where such experts are unregulated by a professional body, concerns are only amplified and there is no recourse where such experts continue to make unsubstantiated claims in Family Court cases. This is a concern that is echoed by the Association of Clinical Psychologists (ACP-UK), which has stated, "'Psychological experts' without the necessary qualifications are sometimes being instructed to act as expert witnesses in the Family Court. This can result in harm to the public. ACP-UK are aware of several cases in which 'psychological experts' who are not Health Care Professions Council (HCPC) registered have suggested inappropriate diagnoses and made recommendations for children to be removed from their mothers based on these diagnoses."[186] ACP-UK emphasises the importance of using HCPC registered practitioner psychologists as experts in Family Courts.

The Commissioner welcomed the memorandum by the President of the Family Division which concluded that, "pseudo-science, which is not based on any established body of knowledge, will be inadmissible in the Family Court."[187] The Family Justice Council is currently carrying out a review into the use of expert witnesses in the Family Court full guidance due to be published in 2023.[188] In the interim, it published guidance which highlighted issues of conflicts of interest existing in expert assessments where allegations of alienating behaviours had been made. The guidance highlighted the importance of the court relying on robust psychological approaches to inform any therapeutic recommendations it made for intervention, as well as stating that it would not be appropriate for the court to order interventions which could only be deliverable by an expert witness or their associates.[189]

Further to the memorandum, the President of the Family Division reiterated this position in Re C [2023]. He focused on the role of expert psychologists in family law proceedings, particularly psychologists who are not registered with a relevant professional body. The President confirmed that instruction of experts should be on a case-by case basis but that the court must carefully examine the qualifications and expertise of any psychologist who is not registered with a professional body.[190]

As confusing as the position and title of psychologist is, the president was clear in Re C that it is not for the judiciary to 'prohibit the instruction of any unregulated psychologist' [98]. This will be a matter for Parliament to decide whether the term 'psychologist' needs to have a stricter definition and protection for those who are registered under specific regulations.

Given that many parties to Family Court proceedings are litigants in person, it is likely to be difficult for them to seek to object to an expert relying on pseudo-scientific arguments, when, for example, they may have little or no understanding of the relevant guidance in PD25B, or the procedure for objecting to the appointment of an expert (or even that they have the right object to an expert at all).

The Commissioner holds significant concerns about the use of such experts, particularly given her concerns about the legitimacy of so-called 'parental' alienation. Reflecting the scale of the issue is the marketisation of such expert reports. Unregulated experts are able to charge considerable fees for reports which 'confirm' so-

185 Mercer, Drew (2021), Challenging Parental Alienation: New Directions for Professionals and Parents, (Routledge, London; New York), 246.
186 Association of Clinical Psychologists (December 2021), The Protection of the Public in the Family Courts, The Protection of the Public in the Family Courts (acpuk.org.uk)
187 President of the Family Division (2021), President's Memorandum: Experts in the Family Court, Letterhead Template (judiciary.uk)
188 Family Justice Council (2022) Interim Guidance in relation to expert witnesses in cases where there are allegations of alienating behaviours – conflicts of interest, Experts in the Family Court
189 Ibid, page 2
190 Re C [2023] EWHC 345 (Fam).

called 'parental' alienation. The Commissioner urges Parliament to direct for stricter regulation of the term psychologist, as indicated by the President of the Family Division in Re C [2023] as the correct authority to do so. The Commissioner offers to assist Parliament with their approach to this and encourages engagement with the domestic abuse sector to ensure that abuse expertise is able to access the Family Court.

RECOMMENDATION 10

The Commissioner recommends the Ministry of Justice consult with her Office, the specialist domestic abuse sector, the relevant regulatory bodies, NHS England, NHS Wales, the specialist children's sector to develop a stricter definition of psychologist. The Ministry of Justice should identify an appropriate legislative opportunity to implement this definition.

“Today I have a life worth living. I am happy to live my life and I got married. I decided the kind of life I want for myself and for my future children.”

Our Shoes’ – Family Justice Young People’s Board (2021)

Conclusion

Whilst important reforms to private law children proceedings are underway, change must not stop there. Improving the Family Court response to domestic abuse must be a top priority for the government when considering its work to improve the national response to domestic abuse, and sufficient resource must be allocated accordingly.

Importantly the Family Court is failing in its ability to effectively engage with domestic abuse and is lacking a child-centric model in order to for it to do so. As the Commissioner recommends, the provided child-centric model would ensure more effective and safe examination of the claims made by parties in the court.

We are at a unique moment in Family Court reform, and benefit from continued commitment from the Ministry of Justice, the senior judiciary, Cafcass and Cafcass Cymru to achieve improvements for domestic abuse victims and survivors and children who face the Family Court. The Commissioner is particularly grateful for their input and commitment to the establishment of the monitoring mechanism.

Upon publication of the Harm Panel report and its accompanying Ministry of Justice Implementation Plan, then Justice Minister Alex Chalk stated: "we are committed to both immediate action and longer-term reform, to ensure the system fully supports those who are victims of domestic abuse or otherwise vulnerable, and delivers the right outcomes for them and their children."[191] We welcome the reconfirmation of this commitment by former Minister Lord Wolfson KC, who stated at an event held by the Domestic Abuse Commissioner in November 2021 that reforming the Family Court's approach to domestic abuse was a priority for the government.[192]

The Commissioner welcomes the Government's commitment to improve the experience of the Family Court for victims and survivors. Together, these practical, achievable proposals would lead to a significant shift in how cases involving domestic abuse are treated in the Family Court and bring about the improvements that adult and child victims and survivors deserve. They would achieve the ambitious aim of sustaining the long-term cultural change recommended by the Harm Panel report and ensure that the Domestic Abuse Act 2021 fulfils its objective to recognise children as victims in their own right as intended by Parliament. In order to achieve the solutions proposed in this report the following recommendations must be enacted in conjunction to one and other.

191 Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases Implementation Plan, 3.
192 Virtual event held by Domestic Abuse Commissioner on Improving the Family Court Response to Domestic Abuse.

Appendix A

Summary of recommendations

R1) The monitoring mechanism recommended by the Harm Panel that is being established within the Office of the Domestic Abuse Commissioner and in partnership with the Victims' Commissioner must be allocated sufficient funding both for its pilot phase and, subsequently, for its national roll out.

R2) The government should establish, and provide appropriate funding for, a new HMCTS role of Domestic Abuse Best Practice Lead in every Family Court area.

R3) The Commissioner recommends the Ministry of Justice develop and deliver an ambitious plan to consolidate the best learning from the Pathfinder Courts, as well as from strong local practice elsewhere in England, Wales, and internationally to inform future practice, delivery, and policy development. The Commissioner also recommends Pathfinder Courts should be resourced appropriately as part of wider efforts to roll out nationally.

R4) The Commissioner recommends for the Ministry of Justice and Family Justice Board to work with the Commissioner to capitalise on existing work, such as the Pathfinder Courts, to further strengthen the consideration and understanding of the voice of the child when domestic abuse is raised by drawing from the principles presented in this report.

R5) The Commissioner recommends greater transparency and consistency across the whole family justice system, so that a full culture-change programme of training on domestic abuse is provided.

R6) Funding should be made available by the Ministry of Justice for specialist domestic abuse training. This training should include the impact of domestic abuse on adult and child victims and survivors.

R7) Every survivor going through the Family Court should have access to a specialist domestic abuse support worker. The Ministry of Justice should explore options for investment into these roles for both the delivery of the role, but also for the professional development of the role.

R8) The Qualified Legal Representative scheme should be fully and appropriately resourced in order to ensure effective implementation.

R9) The Government should remove the means test for legal aid for all victims and survivors of domestic abuse going through private family law proceedings.

R10) The Commissioner recommends the Ministry of Justice consult with her Office, the specialist domestic abuse sector, the relevant regulatory bodies, NHS England, NHS Wales, the specialist children's sector to develop a stricter definition of psychologist. The Ministry of Justice should identify an appropriate legislative opportunity to implement this definition.

domestic abuse commissioner

Detailed Case Example

Case example

The reported case of GK v PR[193] helps to illustrates some of the issues faced by victims and survivors going through family court proceedings.

The case was an appeal to the High Court, brought by GK, the mother, following a fact-finding hearing in which the judge in the lower court dismissed allegations of domestic abuse made by GK against her former partner, PR. GK was diabetic, and her condition was exacerbated by stress.

GK met PR in October 2017 and they had a child in March 2019. The relationship ended in November 2019. PR applied for a Child Arrangements Order a month later in December 2019. The Family Court made Interim Orders in March 2020 and June 2020, allowing PR to see the child on an unsupervised basis. In November 2020, GK terminated the interim arrangements.

A fact-finding hearing took place over a year after PR initially filed for the order, taking place in January 2021. GK made 29 separate allegations of domestic abuse, including sexual abuse, verbal abuse and coercive and controlling behaviour. The hearing bundle consisted of over 1000 pages, with the judge having little time to read it before the hearing. The proceedings were conducted on a hybrid basis (i.e. with most of the people involved in the case in court, but with GK joining over video link because she was shielding). GK struggled with the stress of proceedings and was hospitalised after the first day of the hearing. She joined the hearing from the hospital the next day.

The judge in the lower court dismissed most of the allegations of domestic abuse which GK had made. He made an order reinstating contact between PR and the child, as well as allowing for overnight contact.

GK appealed. The appeal judge allowed the appeal and remitted the case back to the lower court for a rehearing. In doing so, he considered procedural failings and made a number of concerning findings that show the challenges that some victims and survivors face in the family courts.

Failures around special measures

The appeal judge found that despite GK being, at least potentially, a vulnerable party:

- No ground-rules hearing[194] took place before the fact-finding hearing;
- No thought was given to a different process of cross examination (perhaps written questions and/or questions directed via the judge, or a focus on particular topics);
- There were issues with the video link that meant that PR was able to see GK on screen, and GK was also able to see PR – and these issues should have been addressed at the outset;

193 [2021] EWFC 106.
194 A meeting between the parties and judges where it is agreed how the fact-finding hearing will be conducted and what special measures are necessary.

- The judge in the lower court did not consider the impact of GK's vulnerability on her ability to give evidence. He referred to her oral evidence appearing pre-prepared and "dissociated" but did not consider whether trauma-induced vulnerability may have caused her to present in this way; and
- GK was not given the opportunity to give evidence in the most appropriate form. This was particularly important in a case where the judge placed importance, when determining credibility, on how GK presented herself as a witness.

Failure to take the correct approach on allegations of domestic abuse and rape.

The appeal judge found that the judge in the lower court:

- did not properly consider and weigh in the balance the police and medical disclosure that GK presented regarding her allegation of rape;
- minimised the nature of some of the allegations of domestic abuse and their potential impact upon GK;
- did not consider the totality of the evidence in the round, nor fully address how the individual pieces of evidence played into a narrative of coercive and controlling behaviour; and
- relied heavily upon an assessment of each party as a witness, without factoring in the likely impact on GK of giving evidence of traumatic episodes as a vulnerable witness, in the context of a pressurised court setting.

The case was therefore referred back to the lower court to be re-heard.

We note that the appeal judge made clear that his judgment should not be taken as suggesting that GK's allegations are proved.

However, it is clear that the findings he did make illustrate some of the problems that can arise when the family court hears allegations of domestic abuse in private law children proceedings, and how survivors may be prevented from giving their best evidence, and from having their allegations of domestic abuse and sexual assault considered fairly. A letter from GK's GP was later provided to the court, confirming her hospital admission. The GP said:

"She was unwell and was in resus for a couple hours while her condition stabilised. Her symptoms started after the court hearing on 14th; she was extremely stressed and anxious. She was questioned about past trauma which included about when she was raped, smothered and choked by her ex-partner on several occasions… She reports her symptoms were highly likely the stress of this event…"

This illustrates the potential extreme impact that cases of this nature can have on victims and survivors and the importance of using court procedures designed to assist parties where such allegations have been made.

domestic abuse commissioner

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