



## **Pre-Legislative Scrutiny of the Children and Families Bill**

### **Rights of Women**

Established in 1975 to promote the legal rights of women throughout England and Wales, Rights of Women aims to increase women's understanding of their legal rights and improve their access to justice so that they can live free from violence, oppression and discrimination and are able to make their own safe choices about the lives they and their families lead. Working from a rights-based approach to increase women's legal literacy, we offer a range of services including legal advice telephone helplines, legal guides and handbooks and training courses and other events, equipping individuals and organisations with the knowledge and skills to assert women's legal and human rights.

Since 1975 Rights of Women has been providing a critical analysis of the law and its impact on women, identifying gaps and omissions in the protection available to women and highlighting areas of discrimination in legislation and the application of the law. Rights of Women has lobbied and campaigned to improve women's equality in the law and their ability to attain safety and justice.

As a grassroots organisation providing a range of legal advice and information services to women throughout England and Wales,<sup>1</sup> we hear women's experience of the law and legal systems on a daily basis. Through our training courses, conferences and other events we have regular contact with other professionals from the statutory, community and voluntary sectors providing services to women. This also gives us a broad picture of women's access to justice and equality. It is this experience, alongside our experience as lawyers which we use in our policy work.

### **Mediation**

**a) The safeguards in place to ensure that domestic violence or other welfare issue cases are filtered out from the mediation information and assessment meeting ("MIAM") system, and whether they will be effective.**

The proposed amended legislation will make it compulsory, with limited exceptions, for all parties seeking to resolve a family law matter to attend a mediation information and assessment meeting (MIAM).

The domestic violence exception to attending MIAMs, as set out in the Family Procedure Rules 2011 provides that:

Any party has, to the applicant's knowledge, made an allegation of domestic Violence against another party and this has resulted in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months.

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<sup>1</sup> For more information about Rights of Women's services visit: [www.rightsofwomen.org.uk](http://www.rightsofwomen.org.uk).

We propose that the exception should be broadened, to include a full range of statutory and non-statutory evidence.

According to the British Crime Survey just 16 percent of victims of domestic violence report to the police and most women will experience an average of 35 incidents of violence before making a report.

Research published by Rights of Women and Welsh Women's Aid indicated that just 29.9% of the sample of 324 women who were receiving specialist support as victims of domestic violence had obtained a non-molestation order, occupation order, forced marriage protection order or other protective injunction.<sup>2</sup>

The limited nature of the exceptions mean that many victim/survivors of domestic violence whose allegations are not being investigated by the police or who do not have a domestic violence injunction, or have one or both of these, but do not meet the strict 12 month time limit, will be in a vulnerable position. For example, a woman may have fled to a refuge but there is no criminal investigation and she does not have a domestic violence injunction, will not be fast tracked through the MIAM stage.

It is important to point out that the domestic violence exception for MIAMs does not match up with the gateways for legal aid<sup>3</sup> and the concessions made by the Government<sup>4</sup> in extending the time limit to 24 months and widening the range of evidence to include medical evidence and admission to a refuge.

If a woman does not fulfill the strict criteria for avoiding a MIAM, then it will fall on mediators to act as gatekeepers and assess whether there are risks of domestic violence, imbalance between the parties or child protection issues that require immediate diversion to the court process. Mediators are not specifically trained to deal with this and we are advised that many mediators are uncomfortable with this role.

We agree that mediation can be effective in family law. However, we stress that any case involving domestic violence poses serious welfare concerns both to the adult parties to the proceedings and the children, owing to the strong links between domestic violence and child abuse.<sup>5</sup> Because of these concerns, which are set out in more detail below, we firmly believe that in cases where domestic violence is an issue a MIAM is not appropriate. We propose that the exceptions to the requirement to attend a MIAM are extended and broadened, and that a self-declaration process as adopted by the DWP in the "Supporting separated families; securing children's futures" - Consultation on Child Maintenance<sup>6</sup> is used. This would involve parties to family law proceedings being asked if they had experienced domestic violence and being able to avoid attendance at the MIAM if they have previously reported domestic violence to a list of agencies including the police, social services, medical practitioners and court.

***We recommend that any case where there is a real risk to a child or to an adult party to the proceedings should be immediately routed to court. It is potentially***

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<sup>2</sup> Rights of Women and Welsh Women's Aid, *Evidencing domestic violence: the facts*, January 2012, online: [http://www.rightsofwomen.org.uk/pdfs/Policy/Evidencing\\_dv\\_the\\_facts.pdf](http://www.rightsofwomen.org.uk/pdfs/Policy/Evidencing_dv_the_facts.pdf).

<sup>3</sup> For the Act see <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>

<sup>4</sup> The Government agreed to extend the 12 month time limit to 24 months and also extended the range of evidence to include medical evidence and admission to a refuge.

<sup>5</sup> For a discussion of the links between domestic violence and child abuse, please see Dwyer, F. (ed.) *Safe and Sound*, Bristol: Women's Aid.

<sup>6</sup> For full details of the consultation. The self declaration scheme for domestic violence is outlined at page 34 <http://www.dwp.gov.uk/consultations/2012/childrens-futures.shtml>

***fatal to attempt to distinguish between 'priority' and 'non-priority' domestic violence and all cases of domestic violence should be treated as a strong concern.***

***We propose that the Family Procedure Rules are amended to include a self declaration process for victims of domestic violence, which provides that survivors will not have to attend a MIAM if they have previously reported the incident to a statutory or voluntary agency including - the police, a court, a medical professional, social services, a MARAC, an employer, a school, a domestic violence service/refuge etc. Alternatively, we propose that the Family Procedure Rules mirror the gateway criteria to accessing legal aid in the LASPO Act 2012.***

***We would also recommend that women who have experienced domestic violence should not be required to attend any mediation or conciliation through the court process including First Hearing Dispute Resolution Appointments and Conciliation hearings.***

### **Mediation and Domestic Violence**

It is important that the real and potentially fatal dangers present in bringing the victim and perpetrator together are recognised. A relationship defined by violence, control, threats and an imbalance of power must not be subject to mediation. Domestic violence is not usually caused by a problem with anger, or a loss of control. It is most often chosen intentional behaviour designed to exert power and control over another.

Mediation or other dispute resolution interventions imply a position of equality and of equal bargaining power between two parties and supports the abuser's view that he is not entirely responsible for stopping his violence. It also creates the illusion of a safe space. Yet fear is a significant factor influencing the behaviour and decisions made by women experiencing domestic violence.

Domestic violence is characterised by an imbalance of power so any intervention that encourages mediation or seeks to deny the abuser's responsibility for their violence may result in further attempts to manipulate, dominate and threaten the woman experiencing domestic violence. Women will inevitably not be able to participate or speak freely and may be subject to very subtle signals (such as a particular look or gesture) that serve as a threat, which often go unnoticed by a third party. There is a very real danger that perpetrators might use these processes to maintain power and control over their victims, divert themselves from criminal justice sanctions and avoid taking responsibility for their own actions.

The conclusions made by Lord Justice Wall in his response to Women's Aid's publication, *Twenty-Nine Child Homicides*<sup>7</sup> are also relevant here. In his review, Lord Justice Wall emphasised that judges should decline to approve agreed orders where issues of domestic violence or harm have been raised until evidence has been heard and findings of fact made.<sup>8</sup> We strongly support this proposal as a necessary safeguard and urge the Review Panel to consider it.

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<sup>7</sup> Saunders, H., *29 Child Homicides: Lessons still to be learnt on Domestic Violence and Child Protection*, Women's Aid Federation of England, 2004, online: [http://www.familieslink.co.uk/download/jan07/twenty\\_nine\\_child\\_homicides.pdf](http://www.familieslink.co.uk/download/jan07/twenty_nine_child_homicides.pdf).

<sup>8</sup> Lord Justice Wall, *Report to the President of the Family Division on the publication 'Twenty-nine child homicides'*, March 2006, online: [http://www.judiciary.gov.uk/Resources/JCO/Documents/report\\_childhomicides.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/report_childhomicides.pdf).

***We propose that disclosure of domestic violence should automatically preclude the requirement to attend a mediation information and assessment meeting and any mediation or conciliation throughout the entire family court process. We believe that mediation, conciliation and other forms of ADR are not appropriate in any case involving domestic violence because:***

- ***It will place the victim at further risk of violence or abuse;***
- ***It gives the perpetrator the opportunity to continue to have contact with the victim;***
- ***It causes re-victimisation;***
- ***For mediation to work successfully, both parties should enjoy an equal balance of power, which is not present in a domestic violence situation.***
- ***Victims may feel unable to take part fully in mediation because they still fear the perpetrator; and,***
- ***Victims may be put under pressure by the perpetrator to agree to an arrangement or settlement that is not in their or their children's best interests; the likelihood of reaching an outcome that is safe and fair is very limited.***

### **Child arrangement orders**

**d) What is the effect of the amendments to section 11A to 11P, is it simply a “a shift in focus” to remove the perception of “winners and losers.”**

The amendments to 11A – 11P and the replacement of residence and contact orders with child arrangement orders will serve to increase the complexity of legislation that is already incredibly complicated.

The Family Justice Interim Report stated that “[t]his is intended to reduce both the likelihood of long and unfocused hearings, and to move from a sense of a ‘winner’ in terms of ‘awarding’ residence and contact”.<sup>9</sup>

Whilst we welcome the move away from an adversarial approach to proceedings, we do not feel that changing the terms will achieve this aim. In our experience, it is the process, rather than the terms used, that influence how the parties feel about proceedings.

We are concerned that a change to the terms used to describe orders is likely to introduce further confusion into what is already a complicated area of law for both litigants and the statutory and non-statutory agencies that they and their children come into contact with. There is already some confusion around terms and what they mean. It is not uncommon to hear litigants and professionals using the terms “custody” and “access” in place of residence and contact. We anticipate that the same will happen with changing the terms once more. Rather than ceasing to use the terms residence and contact, litigants and the professionals they engage with in the statutory and voluntary sector are likely to continue to use those terms alongside the terms custody and access, and lack clarity on what a “child arrangement order” actually means. For example, we anticipate that there could be confusion within schools about a child arrangement order being used in place of a residence order. Currently, a woman who has experienced violence can inform the school that they should not release the children to an abusive parent and provide a copy of the residence order to the school in support of that request. School staff are familiar with what a residence order is, and are able to respond appropriately. Similarly, when a

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<sup>9</sup> Interim Report, para 112, page 22.

child has been abducted within the UK by a non-resident parent who has parental responsibility, the police will not return the child to the parent with care, unless she has a residence order in her favour. We are concerned that considerable work will need to be done to ensure that these professionals and others such as health-care professionals understand the content of a child arrangement order and their obligations with respect to children and non-resident parents.

It is important to remember that only 10% of disputes concerning contact go to court and that of those cases which are contested, most people do not dispute residence or contact in principal. So calling an order a contact order, when less than 1% of applications are refused, is likely to have a limited impact, as there are so few people who could be regarded as 'losers' if achieving a contact order makes you a 'winner'. It is more what the order actually states and the impact it will have rather than the name that it is given. In most cases residence is not disputed and the 'no order' principal of CA 1989 (Section 1 (5)) exists to ensure that contact and, particularly, residence orders are not made unless they are necessary, to avoid litigation between parents and a winner / loser culture.<sup>10</sup>

The amended Sections 11A – 11P are unclear, for example, the description of a residence order in subsection 6B as follows–

“this subsection applies to a child arrangements order if the arrangements regulated by the order relate only to either or both the following-

- a) with whom the child concerned is to live, and
- b) when the child is to live with any person”

The amendments and removal of the terms contact and residence result in the legislation becoming less accessible, more longwinded and less concise.

The new wording is confusing and unhelpful and is unlikely to reduce the highly stressful and adversarial nature of court contact and residence disputes. The impact of the complexity of the new wording will be compounded by the fact that many more people will be representing themselves in contact proceedings, come April 2013, when the Legal Aid Sentencing and Punishment of Offenders Act comes into force. Family legal aid will be removed from scope with limited exceptions. The change of terms will make the application process more difficult and there will be more people who will complete the C100 and other forms incorrectly, as they will be unsure exactly what they are applying for. Court staff will have to be re-trained, as well as judges and other professionals for example CAF/CASS, the police and schools.

***We recommend that no change to terms is needed and that this change will introduce confusion amongst litigants and the professionals that they and their children come into contact with. However, if the terms are to be changed, we recommend that considerable work will need to be done to raise awareness amongst litigants, as well as statutory and voluntary organisations, about the new terms and how to understand the content of the child arrangement order.***

## **Expert evidence**

### **e) Does the new test adequately protect against miscarriages of justice?**

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<sup>10</sup> Children Act 1989 Section 1(5) “Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than not making no order at all”. Thus the court will not make an order just to confirm the contact arrangements or that a child lives with one parent.

No.

Expert evidence plays a vital role in care proceedings and in private law children proceedings on a variety of different issues. Expert evidence can resolve factual disputes about what has happened to a child, or argument about the capacity of a mother or a father to provide adequate parenting. It may be necessary to obtain evidence from a variety of medical, psychiatric or other expert witnesses.

The expert's role in the court process is to conduct an assessment and express an opinion within their particular area of expertise. Experts are instructed to provide an independent and objective assessment and play a vital role in ensuring that the appropriate outcome is reached by the court.

We do not think the proposed changes are necessary as it is already the case that any party to the proceedings wishing to seek the opinion of an expert must receive permission of the court. There are already rules that provide that a child should not be examined by an expert for the purpose of preparing expert evidence without permission of the court.

Judges are experts in the law and not in any other areas such as mental health or abuse, similarly social workers are not experts on these issues. Only experts should make assertions that carry any weight about issues for which they are trained in. It is, therefore, essential to have expert evidence used when necessary in children matters in order to ensure that the child's welfare needs are met.

## **Care Plans**

### **h) Should the Judge's role be restricted to considering only the permanence provisions of care plans?**

We do not agree with this proposal as it removes an important safeguard for children. The Judges adjudicative role in care cases is vital. This will remove an important check on social services and the opportunity for the judge to scrutinise decisions made and ensure that the correct conclusion is reached in these very difficult cases. We do not think that there should be a change to the current provisions. We would suggest that this will increase the likelihood of bad decisions, appeals and reduce the motivation of social services to take care in writing the reports as they will not be subject to the same scrutiny.

### **j) Enforcement and Shared Parenting**

Please see the Women's Aid Federation of England's response to *Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* which Rights of Women contributed to and endorsed.

This response is supported and endorsed by Women's Aid

**women's aid**  
until women & children are safe  
[www.womensaid.org.uk](http://www.womensaid.org.uk)

19<sup>th</sup> October 2012