



Response to The Family Justice Review Call for Evidence September 2010

This response by Rights of Women draws upon our experience and expertise providing legal advice, via our telephone legal advice line, to individual women who are going through the family justice system. Much of our work concerns supporting women who have experienced or are at risk of gender-based violence.¹ Owing to our experience and particular expertise in this area, this response focuses on the law, policy and practice in the family justice system as it relates to women who have experienced or are at risk of gender-based violence or are intimidated during family court proceedings.

Q2: What should the role of the state be when dealing with family-related disputes that do not concern the protection of children or vulnerable adults? To what extent should the state fund this?

The State has an essential role to play when dealing with family-related disputes regardless of whether they concern the protection of children or vulnerable adults. It is commonplace for parties dealing with family law related disputes to fail to reach agreement on important decisions. From our experience providing legal information and advice to women going through the family justice system, we consider that the State plays an essential role in guiding fair decision making in family law matters. It is important that the State responds to the unequal gender relations within the families and society generally, which place women at a disadvantage both in respect of decision-making and their socio-economic status. These are all factors that can inhibit the fair resolution of family law related disputes and contribute to what is often referred to as “power and control” dynamics within interpersonal relationships that inhibit women’s equal participation in decision making.

Although this question specifically requests responses on the role of the State when dealing with family-related disputes that do not concern the protection of children or vulnerable adults, we are concerned that the call for evidence does not contain any reference to vulnerability and specific needs arising from gender-based violence. This is striking considering the fact that domestic

¹ This response will use the terms gender-based violence and violence against women interchangeably, following the practice of the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee). See UN CEDAW Committee, *General Recommendation No. 19*, 11th Session, 1992.

violence features significantly in public and private family law cases within the family justice system.²

The call for evidence does identify a need to secure "a system that protects children and vulnerable adults from risk of harm." However, it defines a vulnerable adult as:

"a person aged 18 years of age who may be unable to take care of themselves, or protect themselves from harm or being exploited. This may be because they have a mental health problem, a disability, a sensory impairment, are old and frail, or have some form of illness."³

It is not clear to us where this definition comes from, and whether the definition was crafted with the intention to encompass vulnerability arising from domestic violence.⁴ There is plentiful information and evidence that domestic violence gives rise to particular needs and vulnerability which must be addressed in the family justice system. In 2005, HMICA published a **thematic review of the handling of domestic violence issues by the Children and Family Court Advisory and Support Service (CAFCASS) and the administration of family courts in Her Majesty's Courts Service (HMCS)** (HMICA 2005).⁵ That report presented a picture described in its foreword as being "far from satisfactory" and found that, "from a user perspective, those experiencing domestic violence are at a disadvantage in accessing the family justice system. This is because the needs of this vulnerable group have not been recognised and given priority. There has been insufficient strategic thinking or relevant management information to develop policies, drive change and improve service standards"⁶ We are concerned that this continues to be the case, and is reflected in the failure to refer to the specific needs of domestic violence survivors in the present call for evidence.

² For example, in a recent study conducted by the Ministry of Justice into applications for child contact orders, in 54% of cases sampled, the resident parent raised concerns over serious welfare issues, 34% of which were related to domestic violence. See Hunt and Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce, Briefing Note*, Ministry of Justice, Family Law and Justice Division, September 2008.

³ Ministry of Justice, *Call for Evidence – Family Justice Review*, June 2010, p3.

⁴ This is different to the definition adopted by the Department of Health and Home Office in the joint report, *No Secrets* published in 2000, which applied the definition adopted by the Lord Chancellors Department in the consultation paper, *Who Decides?* published in 1997. Both reports stated that a vulnerable adult "is a person who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation". See Home Office and Department of Health, *No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse*, 2000.

⁵ HMICA, *Domestic Violence, Safety and Family Proceedings, Thematic review of the handling of domestic violence issues by the Children and Family Court Advisory and Support Service (CAFCASS) and the administration of family courts in Her Majesty's Courts Service (HMCS)*, October 2005 [Hereinafter, HMICA 2005].

⁶ HMICA 2005, p9.

Under international law, the State has positive obligations to ensure that the rights of all individuals are respected, protected and fulfilled. These positive obligations include an obligation to prevent and respond to all forms of violence against women. The definition of vulnerability for the purposes of intervention and enhanced support in family law matters must encompass the definition of violence against women adopted by the United Nations (UN) as enshrined in the 1993 UN Declaration on the Elimination of Violence against Women⁷ and reaffirmed in the 1995 Beijing Declaration and Platform for Action⁸ to which the UK is a signatory. This definition includes physical, sexual and psychological violence occurring in the family. Rights of Women considers that these obligations require the State to identify and respond proactively to ensure equal access to justice for women who have experienced gender-based violence or are intimidated.

To what extent should the state fund this?

Access to free legal advice and representation is vital to ensuring equality, non-discrimination, access to justice and the rule of law. A system in which all court users do not have quality legal advice and representation is inefficient and unfair. Failure to provide adequate, accessible civil legal aid in family law matters will have a disproportionate and discriminatory impact on women, who are more likely to seek recourse to civil law remedies and at the same time are less likely to have recourse to the funds required to secure private legal advice and representation. As has been stressed so clearly by a leading lawyer in this field, “the pressure on family courts is already considerable but it would become even greater if we found more cases being dealt with by the parties themselves... [it is important to acknowledge] the simple fact that professional assistance aids the efficient administration of justice”.⁹

The need for State funding to ensure equal access to justice is perhaps most pressing in cases where there has been gender-based violence. Our experience speaking to women on our advice lines confirms that legal aid is vital to women’s ability to access the law and legal remedies and their ability to protect themselves from violence. The UK government committed to the provision of free or low cost legal aid to enable women to access justice when

⁷ UN Declaration on the Elimination of Violence against Women, UN Doc. A/RES/48/104, 20 December 1993, Article 2: “Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.” The UN CEDAW Committee has offered a definition of gender based violence which is instructive. It defines gender-based violence as “violence that is directed against a woman because she is a woman or that affects women disproportionately”. See UN CEDAW Committee, *General Recommendation No. 19*, 11th Session, 1992.

⁸ Beijing Declaration and Beijing Platform for Action, Beijing, China, September 1995.

⁹ The Hon Mr Justice Moylan, “What have human rights done for family justice?” in *Family Law*, August 2010.

they are at risk of or have experienced gender based violence when it signed the Beijing Declaration in 1995.¹⁰

Q5: How far are users able to understand the processes and navigate the family justice system themselves?

Rights of Women runs a legal advice line dedicated to providing information and advice to women who are going through the family justice system. Over recent years, we have experienced an increase in callers requiring legal advice in order to represent themselves in family law proceedings. The HMICA in 2008 also highlighted that “family courts are seeing increasing numbers of service users representing themselves because they are unable to afford legal fees or gain financial assistance to obtain legal help.”¹¹ We are concerned that despite this trend, there has been very little research conducted into the impact that this has on individuals and the outcome of cases. A literature review published in May 2010 underscored the gap - and need - for research and information on the experiences of parents who represent themselves in family court proceedings.¹²

Between April and November 2007, Rights of Women conducted a survey of 327 BMER women calling our advice line.¹³ The research focussed on women’s access to civil legal aid in family law matters. Of the women surveyed who had applied for legal aid¹⁴, 58.3% were found to be ineligible. When asked about the consequences of not receiving legal aid, a significant proportion (45.2%) reported that they had been deterred from taking legal proceedings or were considering not taking legal action (14.3%). It is clear from our experience that the daunting prospect of navigating complex legal procedures without representation can deter women from accessing their rights and remedies.

Despite the welcomed upper income waivers for domestic violence injunctions introduced by the LSC in 2007, legal aid is beyond the reach of many women who have experienced domestic violence owing to the continued requirement to make contribution payments. The payments can be considerable and from our experience speaking to women on our telephone advice lines, appear to represent a clear barrier to women’s ability to obtain legal representation. We

¹⁰ The Beijing Platform for Action requires states to provide “free or low cost legal aid” to women who have experienced violence, see Beijing Platform for Action, Strategic Objective D.1, Para 125 (a).

¹¹ HMICA, *The Family Courts – The experience of service users*, Chief Inspector’s foreword, July 2008, online: http://www.hmica.gov.uk/files/The_Family_Courts_-_Experience_of_service_users_Report_31_July_08_.pdf [Hereinafter, HMICA 2008].

¹² Hunt, Joan., *Parental Perspectives on the Family Justice System in England and Wales: a review of research*, Undertaken by the Family Justice Council and funded by the Nuffield Foundation, May 2010.

¹³ The results of this survey were published in: Rights of Women, *Measuring up? UK compliance with international commitments on violence against women in England and Wales*, June 2010.

¹⁴ Only 22.8% of the BMER women who took part in the survey had either applied, or been assessed for legal aid. This may reflect the fact that women contacting us for advice often do so before they seek legal advice from a solicitor, but it could also highlight a barrier that BMER women face in accessing information about the availability of legal aid.

are concerned that cuts to the civil legal aid budget have, and will continue to have, a disproportionate impact upon women's equal access to justice in the family courts. A literature review commissioned by the Legal Services Commission (LSC) in 2008 and carried out by Dr Mandy Burton underscored that one of the key factors influencing the accessibility of civil remedies in respect of domestic violence is the quality of advice received from family law solicitors.¹⁵ As was highlighted by the LSC in response to this literature review, the findings from Dr Burton's review "reinforce the importance of ensuring that women who are suffering from violence have access to the appropriate information at the appropriate time".¹⁶

Availability of timely information and advice

A lack of availability of accurate and timely information and advice compounds our concerns about the diminishing availability of civil legal aid.

Rights of Women provides free legal advice on our family law telephone advice line to many women who have not been able to obtain legal aid or representation and are considering representing themselves in family law proceedings. Our experience speaking to women on our advice line is that users find it very difficult to understand the processes and navigate the family justice system themselves. This is compounded by negative experiences of the court process. Research studies have shown that court experiences in family law proceedings can be very traumatic, particularly in cases where there has been domestic violence.¹⁷

The increasing number of calls we receive to our advice line on family law indicates that quality legal information is in increasing demand – and is a scarce resource. Callers to our advice line often tell us that they do not know where they can access accurate and timely information and advice. We know that the demand for our service is not met: Rights of Women register approximately 90,000 attempted calls to our telephone advice lines each year, with the capacity to handle just 1,500.

The HMICA 2005 report into Domestic Violence, Safety and Family Proceedings highlighted how "survivors of domestic violence do not receive sufficient appropriate help, including information, to enable them to engage fully in the legal process within the family courts."¹⁸ We are very concerned that little has changed in this regard in the five years since the review.

Follow up of HMICA 2005 recommendation on provision of information prior to a hearing

¹⁵ Burton, Dr. Mandy., *Domestic Abuse Literature Review*, School of Law, University of Leicester, (Legal Services Commission), 2009.

¹⁶ Legal Services Commission, response to the Home Office consultation: 'Together we can end violence against women and girls', 2009, online: http://www.legalservices.gov.uk/docs/consultations/15_HO_End_Violence_Against_Women.pdf.

¹⁷ Hunt, Joan., *Parental Perspectives on the Family Justice System in England and Wales: a review of research*, Undertaken by the Family Justice Council and funded by the Nuffield Foundation, May 2010, p9.

¹⁸ HMICA 2005, p9.

The HMCIA has in two inspection reports (2005¹⁹ and 2008²⁰) stressed the need for survivors of domestic violence to be made aware in advance of the facilities available at court to ensure their safety. The HMICA 2005 report found that court users commonly reported that they were not made aware in advance of their arrival at court of what facilities may be available. It also found that the needs of those suffering domestic violence were only met by HMCS family administration on a largely reactive basis, driven by local initiative. In response, the HMCS in 2005 set an overall improvement target, aiming for “all court users (legal representatives and parties in person) [to] know what ‘Special Facilities’ are available at the court they are attending and how to access them, or seek an alternative venue” by June 2006.²¹ Unfortunately, we are not aware of any improvement in this situation since 2005.

In 2008, the HMICA pilot inspection carried out in Sheffield²² found that Sheffield family courts “did not always provide adequate information to service users to help them through their process and that standards of service set by HMCS centrally were not always made known to them”; that “[t]he impact of this on survivors of domestic violence was particularly unacceptable” and that the provision of relevant information and guidance, and the recording of complaints for service users were inadequate.²³

Women who contact our advice lines are often feel anxious about what might happen in court. This is exacerbated by a lack of knowledge and understanding of the process. We would urge the HM Courts Service to implement its commitment to proactively provide information to court users, for example on court procedures, pre-hearing visits and special facilities prior to a hearing.

Our concerns about the availability and adequacy of Special Facilities for vulnerable and intimidated court users in the family justice system are explored in depth in response to questions 22 and 23.

Q6: How can we provide greater contact rights to non-resident parents and grandparents?

Rights of Women asserts that it is not necessary to provide greater contact rights to non-resident parents. Most contact arrangements are successfully arranged on an informal basis (approximately 85%).²⁴ If a non-resident parent is unhappy with the level of contact they are having with their child they have the right to apply to court for a contact order and the court has the power to make emergency and interim contact orders, in favour of non-resident parents

¹⁹ HMICA 2005.

²⁰ HMICA 2008.

²¹ HM Courts Service, *HMICA, Inspection of domestic violence, safety and family proceedings, HM Courts Service Overall Response*, October 2005, online: http://www.hmcourts-service.gov.uk/cms/files/hmica_action_plan_overall_response_1005.pdf.

²² HMICA 2008.

²³ HMICA 2008, p1.

²⁴ Presdee, Vater, Judd & Baker, *Contact: The New Deal*, 2006, p14.

to avoid delay. The Children Act 1989 introduced the concept of parental responsibility as a deliberate shift away from the idea that parents have rights over children towards the idea that parents have responsibilities towards their children.

Rights of Women would like to stress that increasing the rights of non-residence parents to contact and / or the introduction of a right to contact or a presumption in favour of contact would undermine the fundamental principles of the Children Act 1989. In particular, Section 1 of the Act states that the child's welfare shall be the court's paramount consideration. The law of England and Wales places the child's best interest at the centre of every contact dispute and the welfare of the child is of overriding importance; the interests of the parents are relevant, but only in as much as they have an impact on the child's welfare. The law is child centred and the rights of the child should always take precedence over the rights of the parent or non-resident parents when considering contact arrangements. That consideration of the best interests of the child should be paramount in all decisions affecting children is consistent with the UK's obligations under the International Convention on the Rights of the Child, to which the UK is a State Party. Article 3(1) reads:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."²⁵

Specifically in relation to child contact, Article 18(1) of the CRC provides:

"States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. *The best interests of the child will be their basic concern.*" (emphasis added).

We therefore consider that current law concerning child contact is correct and that the best interests of the child should remain paramount.

Furthermore, we contend that increased contact rights for non-resident parents are not necessary: the law already recognises the importance of contact. The starting point for courts when considering whether to order contact is that contact with a non-resident parent is presumed to be in a child's best interest. There is no evidence that non-resident parents are at a disadvantage, in fact a recent Ministry of Justice report on the outcomes of applications to court for contact orders after parental separation or divorce

²⁵ UN Convention on the Rights of the Child, Article 3(1).

concluded that “overall, non-resident parents stood an even chance of getting everything they had initially sought” when making an application for contact.²⁶

The Ministry of Justice report also identified that only 21% of non-resident parents did not achieve the contact which they sought. Moreover the research indicated that the key reason for this was not that the system favoured non-resident parents, rather the research showed that most of the non-resident parents either formally withdrew their application, did not turn up to the final hearing or, while not consenting to the outcome, did not actively oppose it. The survey also noted that resident parents were much less likely to achieve their initial objectives. The report concluded that: “The fact that they (non-resident parents) are not always successful should not tempt us into accusing the system of favouring resident parents.”

As summarised in **P (Contact: Supervision) 1996 2 FLR 314**, applying **Re O (A minor) Contact imposition of conditions [1995]**, although contact is almost always in the child’s best interests, where there are welfare concerns, for example as a result of a child being exposed to domestic violence, immediate direct contact may not be appropriate and should not be ordered. If there were minimum rights to contact or a presumption this could lead to unsafe contact arrangements being ordered. Indeed, although there is no legal presumption of contact, in practice even where there has been serious domestic violence and/or welfare issues raised, the court will usually award contact to the non-resident parent. The Ministry of Justice research indicated that 60% of cases where welfare concerns have been raised, ended with staying or unsupervised contact being awarded to the non-resident parent.²⁷

In summary, there is no need to increase the rights of contact for non-resident parents, as evidence suggests that the current system ensures that in the majority of cases non-resident parents either agree contact arrangements or achieve everything they originally set out for when making an application for contact. Moreover, increased rights of contact will weaken the rights of the child and could place children and vulnerable adults at risk of harm by encouraging unsafe contact arrangements.

Grandparents

Grandparents must get the court’s permission in order to make an application for contact unless the child has lived with the grandparent for 3 out of the past 5 years. This ensures that only legitimate applications are dealt with in court and is an important filtering process. In terms of streamlining the family court system, taking away this step for grandparents, would serve to increase applications for contact and put further pressure on a family justice system which is already inundated and struggling to cope with the backlog of cases. This in turn is likely to increase litigation within families, increase delays and

²⁶ Ministry of Justice, *Outcomes of Applications to court for contact orders after parental separation and divorce*, September 2008, p5.

²⁷ Ministry of Justice, *Outcomes of Applications to court for contact orders after parental separation and divorce*, September 2008.

encourage further strain on CAF/CASS to the detriment of the children involved.

Q7: How effective is alternative dispute resolution (ADR), such as mediation, collaborative law and family group conferencing? What types / models of ADR are more effective and for which circumstances? Does this differ according to cases? How could we improve it and incentivise its use what safeguards need to be put in place?

Mediation and conciliation are forms of ADR which are commonly used in family proceedings. The aim of mediation is to reach an agreement between the people involved. Mediation can be effective in family law disputes; however, mediation is never appropriate where there has been domestic violence, or when one person is aggressive or bullying.

In order to ensure that mediation is safe and effective it needs to be voluntary and parties need to be informed that they do not have to reach an agreement at mediation. From the experience of the women who contact our advice line, there is often a lot of pressure to attend mediation and to conciliate in order to avoid hearings in contact disputes, even when mediation is not appropriate, for example where there has been domestic violence. As a result of this pressure, many women agree contact arrangements which are unsafe or potentially unsafe. The evidence from the women we support on our advice line, who are going through child contact disputes at court, is that pressure to mediate and reach agreements comes from legal professionals including their own barristers and solicitors, the non-resident parents, CAF/CASS and judges.

ADR is usually encouraged in family disputes or, as in the case of ancillary relief, is required as part of the family justice process. Many of the women we support who have been through the family justice process, for which mediation may be appropriate, have indicated that they would have liked to resolve things by way of mediation but their partner was unwilling to attend mediation or the chance of reaching an agreement was so unlikely that they deemed mediation pointless and a waste of time and money.

Rights of Women underscores Lord Justice Wall's finding in his response to the Women's Aid publication, *Twenty-Nine Child Homicides: Lessons still to be learnt on Domestic Violence and Child Protection*,²⁸ that there needs to be a move away from the idea that "contact is always the appropriate way forward" towards an understanding that "contact that is safe and positive for the child is always the appropriate way forward."²⁹ 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

²⁸ Women's Aid Federation of England, *29 Child Homicides: Lessons still to be learnt on Domestic Violence and Child Protection*, 2004, online: http://www.familieslink.co.uk/download/jan07/twenty_nine_child_homicides.pdf.

²⁹ 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.

been heard and findings of fact made. At Rights of Women we support this proposal as a necessary safeguard and call on the Government to make this a statutory requirement. We consider that there needs to be a change of attitude as well as a move toward putting safeguards in place so that women do not feel pressured into reaching agreements on contact that may be harmful to them and their children.

The HMICA 2005 report which reviewed the handling of domestic violence by the family courts and CAFCASS noted the high degree of pressure on parents in the family justice system to make decisions quickly and that there were problems with a focus on a conciliatory approach to child contact, particularly where domestic violence had been alleged. The report identified that often potentially dangerous arrangements on contact were agreed further to rushed mediation sessions where the mediator did not have the full facts and that there should be clear protocols about access to information to identify which cases were suitable for conciliation, as resources in the family justice system are wasted and people are placed at potential risk.³⁰

Rights of Women believes that ADR has its place in the family justice system but in order for it to work and in order to protect women and children from unsafe contact arrangements there need to be safeguards put in place such as:

- Full information provided to parties entering the process that mediation is voluntary;
- Clear guidelines stipulating that mediation is never appropriate where there has been domestic violence;
- Introduction of a statutory requirement that judges should decline to approve contact orders until allegations of domestic violence have been fully investigated.

Q8: To what extent do issues around enforceability of court orders motivate decisions to go to court? To what extent does it affect decisions and outcomes of cases?

Defined contact and residence orders are legally binding and the court has certain enforcement powers when they are breached. The court might for example impose an unpaid work requirement, sentence to imprisonment or transfer residence.

It is important that contact and residence orders are legally binding as it ensures that if one party breaches the order there is recourse for the other party to have it enforced, and that parties' are aware of the consequences of breaching the order and thus are more likely to comply. Most parents can agree arrangements between themselves, but for those who cannot the enforceability of a court order is very important, and ensures a sense of finality and certainty, which is in both the parents' and moreover the children's best interests.

³⁰ HMICA 2005.

From our experience working with women on our advice line contact orders are more likely to be enforced against resident parents (who are more likely to be mothers), rather than non-resident parents. The new contact enforcement procedures for unpaid work requirements and financial compensation introduced by the Adoption and Children Act 2006 can be used against non-resident parents. However, in practise we have not heard of any situations where this has been used. We consider that this is currently an imbalance that needs to be addressed.

Rights of Women is further concerned that we often receive calls from women who have breached a contact order because they have experienced violence and/or the child has made an allegation of physical, sexual or emotional harm and as a result the resident parent feels she cannot let contact happen. Such circumstances can be very distressing for the resident parent. Women often report that they feel perceived to be difficult, or vindictive, when they breach a contact order. There should not be an automatic assumption that withholding contact is a hostile step and we consider that there needs to be much greater awareness and sensitivity in court to the reasons behind breach of a contact order where there has been physical or psychological violence.

Q9: Are there elements of cases which could be considered outside of a court setting and if so by whom? For what type of cases would this be appropriate and what sort of settings might be suitable alternatives? What are the benefits and disadvantages? How can we provide greater contact rights to non-resident parents and grandparents?

There are currently cases which are dealt with outside the court system, by way of ADR as discussed above. Rights of Women would oppose the idea of elements of the family justice system being dealt with outside the courts except when dealt with by agreement between parties or through approved methods of ADR. The importance of courts making decisions is that they have experience and understanding of the legal principals which govern children and family law. There is a danger of uncertainty and increased potential for bias if bodies other than the courts make decisions on family law matters as they may not apply the legal principals properly. Furthermore, if the decisions of bodies outside of the court setting are not legally binding, then parties may go through the process and resort to court in any event. This will increase the cost for parties and cause further delay in resolving disputes.

Q22: How could the system be improved to ensure it meets the needs of its users and secures positive outcomes for children?

Rights of Women considers that much more needs to be done to ensure that the availability of timely and quality advice is provided to women going through the system. This is particularly critical in cases where a woman is intimidated or feels threatened, whether or not there has been domestic violence. We consider that there must be an improvement in the availability of

information on family court procedures, for all court users, prior and during the hearing of a case. This will require a more proactive approach on the part of the Courts Service.

We are concerned about the patchy implementation of the practice direction, **Practice Direction: Residence and contact Orders: Domestic Violence and Harm**³¹ is patchy. In order to ensure that safe and workable contact arrangements are reached and that allegations of domestic violence are properly investigated, Rights of Women propose that the Practice Direction: Residence and contact Orders: Domestic Violence and Harm is placed on a statutory footing. Indeed, for the practice direction to be effective courts, we consider that judges and magistrates' should be given compulsory and standardised training, delivered by experts, on domestic violence and the impact it has on children, as well as on the correct procedure to follow when domestic violence is raised as an issue in contact proceedings.

We would also like to see the introduction of similar protection measures for vulnerable and intimidated court users in civil proceedings as there are for witnesses in criminal proceedings.

A research review published in May 2010 highlighted that "simply being involved in court proceedings makes those who have been subject to domestic violence anxious that their abuser may discover their whereabouts."³² The HMICA has in 2005 and 2008 identified and criticised the reactive approach of courts' waiting for the litigant to identify safety issues in family disputes.³³

Callers to our advice line often tell us that the prospect of facing the perpetrator of violence in court and in the open waiting room outside court is very daunting. Some women find it so daunting that they cannot go through with the hearing and agree to potentially unsafe contact arrangements. These fears can also seriously detriment the quality of the mother's evidence. Rights of Women spoke to one woman who had suffered a tirade of abuse that she described as torturous at the hands of her ex-partner. Her ex-partner then sought contact with their child at the county court. On the day of the fact finding hearing, she was so intimidated by her partner she ran out of the court and was unable to give clear evidence. As a result, the violent father was granted overnight staying contact with the child, contact arrangements which in this case had the potential to be extremely unsafe. Special measures would act to enhance both the quality of evidence and safety for women in contact proceedings. This is explored in more detail in response to question 23.

³¹ HM Courts Service, *Practice Direction: Residence and contact Orders: Domestic Violence and Harm*, 14 January 2009, online: http://www.hmcourts-service.gov.uk/cms/files/Revised_PD_Domestic_Violence140109.pdf.

³² Hunt, Joan., *Parental Perspectives on the Family Justice System in England and Wales: a review of research*, Undertaken by the Family Justice Council and funded by the Nuffield Foundation, May 2010, p14.

³³ Hunt, Joan., *Parental Perspectives on the Family Justice System in England and Wales: a review of research*, Undertaken by the Family Justice Council and funded by the Nuffield Foundation, May 2010, p15.

Question 23: How can we ensure sufficient protection is afforded to vulnerable adults through the system?

In our recent publication, **Measuring up? UK Compliance with international commitments on violence against women in England and Wales**, we analysed the law and policy on civil remedies related to violence against women. Our research highlighted the very important role that civil remedies play, because they can provide ongoing protection for those who are experiencing gender-based violence, in contrast to the criminal law which operates to punish perpetrators. However, our research found that the way that civil remedies have to be obtained can deter women from using them.

In addition to the concerns outlined above (in response to question 5) with regard to the availability of quality legal advice and representation, we are concerned by the lack of availability of special facilities for vulnerable and intimidated court users. The need for strategic action and introduction of special measures in the family courts to mitigate the potential harm to victims of gender-based violence has been acknowledged across statutory agencies. The Ministry of Justice, when it issued **Forced Marriage (Civil Protection Act) 2007 - Guidance for local authorities as relevant third party and information relevant to multi agency partnership working**, underscored protection issues in court, highlighting how “most waiting areas are communal and could provide an opportunity for respondents to intimidate and pressure the victim.”³⁴ However, perhaps most compelling are the findings and recommendations of the **HMICA Inspection of Domestic Violence, Safety and Family Proceedings** conducted in 2005 (HMICA 2005). That report found that ensuring both the safety of children and adults receives insufficient attention and that both HMCS and CAFCASS needed to significantly improve safety within their service delivery, requiring the implementation of robust strategies to guide staff in how to handle cases where domestic violence is alleged, or proven to be an issue.³⁵ It issued six recommendations to HMCS which we consider, if implemented, would improve significantly the experience of women at court:

1. making information about court facilities available to vulnerable parties before they attend court
2. developing and implementing policies that address the availability and use of facilities for vulnerable or intimidated parties
3. ensuring an appropriate balance is maintained between safety and service delivery, through the use of robust risk assessment procedures
4. identifying, collecting and using relevant management information
5. developing links with national and local community groups working with survivors of domestic violence
6. providing training for court staff.

³⁴ Ministry of Justice, *Forced Marriage (Civil Protection Act) 2007 - Guidance for local authorities as relevant third party and information relevant to multi agency partnership working*, October 2009, online: [http://www.family-justice-council.org.uk/docs/Relevant Third Party-Guidance for Local Authorities%281%29.pdf](http://www.family-justice-council.org.uk/docs/Relevant%20Third%20Party-Guidance%20for%20Local%20Authorities%281%29.pdf), para 34.

³⁵ HMICA 2005, Foreword.

To our knowledge, 5 years on, there has been no comprehensive review or follow up on the implementation of these recommendations by HMCS.

Below we focus on one of the six recommendations: **developing and implementing policies that address the availability and use of facilities for vulnerable or intimidated parties**. This is an issue of particular concern to Rights of Women.

Facilities for vulnerable or intimidated parties in the Family Justice System

The gap in law and policy

Whilst special measures have been available in the criminal courts for some time, there are no specific legislative provisions related to special measures in family proceedings.³⁶ Special measures in criminal courts aim to provide women with protection from perpetrators during the court process and support the delivery of best evidence. There are striking differences between the facilities available to women who have experienced gender-based violence in the criminal and civil courts. For example, in the criminal courts a woman cannot be personally cross-examined by an alleged perpetrator of sexual violence. In the civil courts, a woman can be personally cross-examined by the person responsible for the violence she has experienced.³⁷ This has serious implications for the safety and wellbeing of women who have experienced domestic violence and other forms of gender-based violence. As one respondent to a Rights of Women survey put it: “Many women find the fear of an attacker crippling”. This situation raises serious questions about equality before the law and equal protection of the law.

There are a multitude of situations that can give rise to concerns about barriers to accessing justice for women who have experienced gender based violence and are going through the family justice system. For example, callers to our telephone advice lines often feel that a perpetrator is issuing court proceedings as a means by which to continue gender-based violence, through intimidation and harassment. This very real concern was acknowledged by the court in the leading case of *Re L*.³⁸ Another issue frequently raised by callers to our advice line is the fear of having to come into close contact with a perpetrator in court. Many women also fear the potential for a perpetrator to locate where she lives by instituting civil proceedings.

³⁶ Special Measures are available for vulnerable and intimidated witnesses in criminal proceedings under Part II of the **Youth Justice and Criminal Evidence Act 1999**. For further information and comparison between measures available in criminal and civil courts, see Hall, A. (ed), *Related Family and Criminal Proceedings: A Good Practice Guide*, published by the Law Society, 2007, online: <http://www.family-justice-council.org.uk/docs/RelatedFamCrimPro.pdf>.

³⁷ Our concerns about the lack of protection for women in civil courts have been published elsewhere, most recently in: Rights of Women, *Measuring up? UK compliance with international commitments on violence against women in England and Wales*, June 2010.

³⁸ *Re L; Re V; Re M; Re H (Contact: Domestic Violence)*, [2000] 2 FLR 334.

The policy framework for the provision of special facilities in civil courts is unclear.³⁹ The **Family Courts Charter**⁴⁰ (the Charter) makes reference to the potential for individuals who have any worries or concerns to speak to a member of the court staff who can advise on the availability of **Special Facilities**. The meaning of special facilities is not defined, and the Charter does not make reference to an obligation to provide special facilities, only a right to request them. The Charter specifically refers to the possibility for all court users to apply for the courts permission to use video conferencing facilities; and to request to view the type of room, or court where a case will be heard. Our experience resonates with the findings of the **HMICA 2008** inspection into the experience of court users in Sheffield. That report details how "[I]nspectors found that the knowledge of these available services was limited amongst professionals. As a result, some service users were not making use of these services because they were not told about them. Inspectors found that some local solicitors had never heard about court familiarisation visits or the use of video link."⁴¹ It is therefore unsurprising that the inspectors found that unrepresented service users were also unaware of any special facilities.⁴²

The Charter also explicitly states that the staff at the court will arrange for individuals to wait apart from the other side's witnesses if there is no separate area. Despite the inclusion of these measures in the Charter, our understanding from speaking to women on our family law advice line is that the availability of special facilities is not widely known or used.

Follow up on HMCS response to HMICA 2005 inspection

In the **HM Courts Service Overall Response to the HMICA Inspection of Domestic Violence, Safety and Family Proceedings** recommendation 6, concerning the provision of information to family court users, including details of facilities for vulnerable parties before they attend court, the HM Courts Service stated that it would:

- Publicise the availability of facilities
- ...
- Implement a system for early identification of cases where special facilities might be needed, prompting a 'trigger' system on application whereby all courts (county and FPCs) will automatically notify the vulnerable or intimidated party (applicant or respondent), or their legal representative, of special facilities available locally.⁴³

Current availability of facilities

³⁹ In the family court system, the term "Special Facilities" rather than "special measures" is used.

⁴⁰ HM Courts Service, *Courts Charter – Family Courts*, Document AJ25.

⁴¹ HMICA 2008, p13.

⁴² HMICA 2008.

⁴³ HM Courts Service, HMICA, Inspection of domestic violence, safety and family proceedings, HM Courts Service Overall Response, October 2005.

In respect of the first action (publicising the availability of facilities), according to the Ministry of Justice, a special facilities poster was distributed to all county court managers in December 2004.⁴⁴ In January 2007, the posters were re-distributed to all county/combined and magistrates courts in England and Wales. At the same time, each court was surveyed and “encouraged again to consider what provisions they have for vulnerable witnesses and victims attending their court and any additional provisions that could be put in place.”⁴⁵ The results of the survey were published in 2007 in a report published by Family Justice Council on the request of the HMICA.⁴⁶ That report addressed the availability of special facilities including provision of i) separate waiting rooms ii) separate exits and entrances iii) screens in the court and video links iv) separate toilets v) viewing the court in advance. These are all services which Rights of Women believes would greatly improve women’s experience and protection during family court proceedings.

Disappointingly, only 32% of the 264 county/combined courts and 220 magistrates’ courts surveyed responded to the 2007 survey. Of those, a surprisingly high number of courts reported having special facilities available. Whilst the survey report did find that “the extent to which county courts are able to assist vulnerable witnesses or victims is still largely dependent upon the court accommodation, staff resources and funding”,⁴⁷ only 11% of all courts reported that they were not able to provide separate waiting rooms, 29% that they could not provide separate exits and entrances, and 39% that they were not able to provide screens in the court and video links. We are concerned that these statistics do not reflect reality on the ground, nor the experience of court users. For example, in our experience, it is the norm rather than the exception that our service users are compelled to wait in the same room as an ex-partner, with no alternative facilities available. The HMICA 2008 inspection in Sheffield also found that special facilities in courts to ensure safety, such as ensuring that parties to a case have separate waiting areas if needed, were not found to be available.⁴⁸ It is possible that the data on facilities in court may have been skewed because of the low response rate from courts, with only those courts with special facilities available responding. We would recommend a more thorough review of the availability of special facilities in the family courts to obtain a more accurate picture.

⁴⁴ See Ministry of Justice, Domestic Violence and Forced Marriage Newsletter, 25 November 2009, online: <http://www3.hants.gov.uk/forced-marriage-newsletter-0911.pdf>. The text of the poster reads: “Special facilities are available at this court for people who feel unsafe or are intimidated by anyone connected with their work. If you or your client would like to make use of these facilities, please contact the relevant court staff”. A box is provided for each court to enter a staff contact for this purpose. The poster can be viewed online: http://www.family-justice-council.org.uk/docs/AppendixB_HMCS_special_facilities-poster%281%29.pdf.

⁴⁵ Family Justice Council, 2007 Report on the Availability of Special Facilities in County/Combined and Magistrates’ Courts, online: http://www.family-justice-council.org.uk/docs/Report_on_availabilityof_special_facilities_in_family_civil_courts_2007%281%29.pdf.

⁴⁶ Family Justice Council, 2007 Report on the Availability of Special Facilities in County/Combined and Magistrates’ Courts.

⁴⁷ Family Justice Council, 2007 Report on the Availability of Special Facilities in County/Combined and Magistrates’ Courts.

⁴⁸ HMICA 2008, p15.

Early identification of cases where special facilities might be needed

In respect of the second action (early identification of cases where special facilities might be needed), to our knowledge, there is no system for the early identification of cases where special facilities might be needed. Indeed, in our experience, women who have experienced or are at risk of gender-based violence must themselves inquire about special facilities in court, and are not guaranteed those facilities when they are requested. We are not aware of any pro-active identification of need by HMCS staff.

Summary and recommendations

Rights of Women considers that vulnerable and intimidated courts users must be offered special support and facilities to ensure that they are safe and able to participate freely in court proceedings. Whether or not domestic violence is alleged or has taken place, many women who we speak to on our advice lines feel vulnerable and intimidated by parties to proceedings, and in the absence of special facilities, are inhibited from participating freely in court proceedings. The implications of this scenario are manifold: it inhibits women's equal participation in court proceedings and places women at risk of harm. In order to ensure sufficient protection is afforded to vulnerable and intimidated adults through the system, we recommend:

- monitoring and implementation of the six recommendations made to HMCS in the HMICA 2005
- a follow up inspection to the HMICA 2005 inspection report
- introduction of an effective early identification system to identify cases where special facilities might be needed, as proposed by the HM Courts Service in 2005. We would very much welcome a shift in approach from reactive to proactive identification and response to vulnerability and intimidation
- expansion and improved monitoring of the availability of special facilities in family courts
- introduction of specific legislative provisions related to the provision of special facilities in the civil courts, in line with provisions at the criminal courts

Q24:

In what types of cases is it important to hear the voice of the children to assist with decision making? How should the child's voice be heard in the family justice system?

It is central to protecting the rights of the child and upholding the spirit of the Children Act 1989 that the voice of the child is heard in all Children Act cases, where it is deemed in the child's best interests. In most cases children's views are heard through a CAFCASS officer. In some cases, particularly those which involve older children and / or the child disagrees with CAFCASS's assessment, then the child can be made party to the proceedings and will be represented by their own solicitor. Where a child is old enough to express his

or her own view, it is for the court to decide how much weight to attach to it and whether it should be considered. One concern that is repeatedly raised on our advice line is that despite these procedures, women do not feel that the views of their children are adequately taken into account in decision making.

It is important that children's voices are heard where it is necessary to prove an important matter that is in dispute, and where the child's welfare requires it. Children should be able to give evidence directly in court and should be provided with special measures and protection, such as giving evidence by video link, to ensure this is safe.