

Women's Aid and Rights of Women's Response to the Interim Report of the Family Justice Review

June 2011

This consultation response has been developed jointly by Women's Aid Federation of England (Women's Aid) and Rights of Women. It focuses on how the proposals will affect women who are at risk of domestic violence and other forms of violence against women and girls such as forced marriage, because that is our area of expertise and an issue which we are particularly concerned about. Please note that this response does not address the proposals related to public law as this is not our area of work or expertise.

About Rights of Women

Rights of Women has been working for more than 35 years to secure justice, equality and respect for all women. Our mission is to advise, educate and empower women by:

- Providing women with free, confidential legal advice by specialist women solicitors and barristers.
- Enabling women to understand and benefit from their legal rights through accessible and timely publications and training.
- Campaigning to ensure that women's voices are heard and law and policy meets all women's needs.

We received the Mayor of London's Award for Distinction for outstanding and innovative work in relation to domestic violence (November 2007) and the Lilith Project's Best Voluntary Sector Violence against Women Campaign (November 2005).

Rights of Women is an Industrial and Provident Society and an exempt charity. Our Rules set out our charitable purposes. Pursuant to the Charity Act 2006 we are in the process of registering as a charity.

Rights of Women specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support other disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

Our response documented here reflects the concerns we have about the potential impact that the proposed reforms, if implemented, will have on the women that we work with.

Between April 2009 and March 2010, we spoke to over 1200 women on our family law advice line. Our expertise and the recommendations we make about the proposed reform of the family justice system is informed by the conversations we have with these women.

About Women's Aid

Women's Aid Federation of England is the national domestic violence charity that coordinates and supports an England-wide network of over 370 local domestic and sexual violence organisations running over 900 refuge, advocacy and outreach services. Keeping the voices of survivors at the heart of its work, Women's Aid campaigns for effective legal **protection** and services, works to **prevent** abuse through public awareness, education and training and **provides** vital 24 hour lifeline services through the 24 Hour National Domestic Violence Helpline (in partnership with Refuge), and through Women's Aid's online information and support services for adults www.womensaid.org.uk, and for children and young people, www.thehideout.org.uk.

Women's Aid welcomes the opportunity to provide a written response to the Review Panel on behalf of our national and local services, which themselves provided local refuge and outreach support to over 109,000 women, nearly 40,000 children and over 1,000 men seeking safety from domestic violence in 2009.

Summary

We know from our experience working with women involved in the family justice system that domestic violence and other forms of violence against women and girls seriously inhibit women's access to justice and safety in the family justice system. We know of far too many cases where women have been deterred from accessing the civil remedies available to them and/or placed at further risk because of the insensitivity of the family justice system to their specific needs, which arise from the violence they have experienced.

The Family Justice Review presents an ideal opportunity to take strategic action and reform the family justice system in a way that strengthens the protection offered to children and adults affected by domestic violence. The Interim Report contains many welcome recommendations related to ensuring a more efficient, effective and specialised family justice system. These include proposals for a single family court, judicial continuity and specialisation in family law matters, and strengthened monitoring of practice guidelines. All of these proposals, if properly financed, are likely to have a positive impact on all cases, including those where domestic violence is an issue.

However, we are concerned that the Review currently risks missing this opportunity to propose a strategic and system-wide approach to addressing domestic violence, and that a number of the proposals will place women and children at greater risk of harm, as well as placing further barriers in the way of women's equal access to justice.

Given that domestic violence is such a significant feature of family law cases, we urge the Review Panel to take on board the recommendations we make in this response, and to meet with a range of specialist violence against women and girls organisations to discuss them.

Towards a Family Justice Service

Consultation questions 1-8

Q1: Do you agree with the proposed role that the Family Justice Service should perform?

The Interim Report recommends the establishment of a new Family Justice Service, led by a National Family Justice Board, bringing all the agencies dealing with children and families in the justice system together.¹ It is proposed that in England, court social work services should form part of the Family Justice Service, subsuming the role currently performed by CAFCASS.²

We agree in principle with the proposed role of the Family Justice Service but do wish to comment on proposals concerning the:

- guiding principles for the new Family Justice Service;
- consolidation of the court estate; and,
- localisation of budgetary decision-making.

We also comment on the need for the new Family Justice Service to:

- introduce a clear policy framework for the provision of special facilities/measures to ensure equal access to justice and safety for women who have experienced gender-based violence.

Guiding principles for the new Family Justice Service

We welcome that one of the key aims set out for the new Family Justice Service is to ensure that “proper safeguards are provided to protect vulnerable children and families”. In its list of recommendations, the Review Panel recommends that “safeguards should be built in to ensure the interests of the child are given priority in guiding the work of the Family Justice Service”.

Given the prevalence of domestic violence in private family law cases, we urge the Review Panel to also recommend that safeguards should be built in to protect vulnerable or intimidated adults within the family justice system – including those affected by domestic violence.

¹ The Family Justice Service would subsume the work currently performed by the Family Justice Council, Local Family Justice Councils, Family Court Business Committees, the National Performance Partnership, Local Performance Improvement Groups and the President’s Combined Development Board.

² Under the proposals, court social work services in Wales would continue to be delivered by Cafcass Cymru.

The Interim Report cites with approval legislation from Australia which sets out 5 clear principles for the conduct of family court proceedings.³ One of the principles establishes that:

“the proceedings are to be conducted in a way that will safeguard:

- a. the child concerned against family violence, child abuse and child neglect; and
- b. the parties to the proceedings against family violence”.

We consider that a similar statement in legislation would improve equal access to justice and safety in proceedings in England and Wales (see also our response to question 6, below).

Such a principle should also be integrated into the guiding principles of the proposed new Family Justice Service.

Review and consolidation of the court estate

The Interim Report highlights that “the establishment of the Family Justice Service offers the opportunity to review the appropriate use of the current estate.”⁴ It stresses that:

“[c]ourts are seen as daunting, intimidating places, especially by children and young people. This is, to some extent, inevitable and can be desirable. But in family law it is often not.”⁵

We agree, but stress that special consideration must also be given to the needs of intimidated adult parties to proceedings, in particular those at risk of domestic violence (see comments below in this section on the need for special facilities/measures for vulnerable or intimidated parties in the family justice system).

The Interim Report recommends that a single family court should be created, with a single point of entry, in place of the current three tiers of court. It further recommends that all levels of family judiciary (including magistrates) should sit in the family court and would be allocated depending on case complexity,⁶ and that the estate for family courts should be reviewed to reduce the number of buildings in which cases are heard, to promote efficiency, judicial continuity and specialisation.⁷

We agree that the general proposal for a single family court could promote greater efficiency, as well as support other welcome proposals related to judicial continuity and specialisation. However, we have serious concerns about the impact that a reduction in court buildings will have on travel distances to courts, which will affect court users in rural areas as well as those who are based in a town or city where there is no local family court. There is a strong need to assess the impact that this will have on court users, particularly single parents with caring responsibilities (who in

³ Ministry of Justice, Family Justice Review: Interim Report [hereinafter, Interim Report], March 2001, page 64, online: <http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-interim-rep.pdf>.

⁴ Interim Report, para 3.157, page 82

⁵ Interim Report, para 3.158, page 82.

⁶ Interim Report, page 28 (recommendations).

⁷ *Ibid.*

the majority of cases will be women)⁸ and those on low incomes. An increase in distances to court raises concern about increased costs and time required to engage in court proceedings.

We welcome the recognition in the Interim Report that this proposal will need to be tailored to local circumstance, and that there must be exceptions in rural areas. However, we further recommend that the Review Panel consider the introduction of travel expenses for low-income court-users and re-imbursments for employers for the leave required for court users who travel long distances to attend hearings.

We know from experience working with domestic violence survivors that perpetrators may institute court proceedings as a vehicle to continue the violence (see discussion on special facilities/special measures below). We are concerned that increased travel and costs associated with court use could increase the potential for proceedings to be used in this manner, as the perpetrator will be aware that the other party may find it difficult to attend court. We urge the Review Panel to be alert to this possibility.

We recommend that consolidating the court estate should be seized as an opportunity to design dedicated buildings that ensure to the greatest extent possible safety and equal access to justice in cases where domestic violence or other forms of violence against women is an issue.

We urge the Review Panel to consider the potential barriers to accessing justice that a reduction in the court estate could present, as well as the potential impact on court users of increased costs and travel time to court.

Consolidation of budgets and localisation of budgetary decision-making

The Interim Report recommends that budgets, including family legal aid, should, over time, be consolidated into the new Family Justice Service. Whilst we do not have comments on the transfer of responsibility for budgets to the proposed Family Justice Service, we are concerned about the proposal that “decisions on spending should be taken at the most local level possible” and that this, in time, may include “pooling as part of Community Budgets”.⁹

The proportion of the population in need of (and eligible for) legal aid is likely to vary across local areas, reflecting variations in demographics. We are concerned that the localisation of decision-making about spending on legal aid will result in variations, and inconsistency, in the availability of legal aid across local areas, according to these changes in demographics. “Poorer” areas with a higher proportion of the population eligible for legal aid will have to make decisions about whether or not to allocate a higher proportion of their budgets to legal aid, to the detriment of spending on other areas; this could also have knock-on effects on the quality of service delivery and facilities in other areas in the family justice system for which the budget is pooled.

⁸ For example, women make up 95% of parents with care (PWCs) within the current statutory child maintenance service caseload, with a similar proportion of non-resident parents (although research has suggested that for the overall eligible population, the proportion of PWCs who are female is closer to 97%). See, Department for Work and Pensions, *Equality Impact Assessment, Strengthening families, promoting parental responsibility: the future of child maintenance*, January 2011, p9, online: <http://www.dwp.gov.uk/docs/eia-strengthening-families.pdf>.

⁹ See, *inter alia*, Interim Report, para 34, page 10; page 27 (recommendations); para 3.76-8, page 67.

We recommend that the Review Panel consider the potential impact that pooling and local-decision making concerning the legal aid budget could have on the availability of legal aid in areas where the need for it is high.

The need for special facilities/measures for vulnerable or intimidated parties in the family justice system

The Interim Report recommends that “[h]earings should be organised in the most appropriate location, determined by the Family Justice Service in consultation with the judiciary. Specifically, it recommends that “routine hearings (directions hearings for example) should use telephone or video technology wherever possible”; and that “some hearings do not need to take place within the formal court setting and where they do rooms should as far as possible be family friendly”.

Whilst we welcome the attention that the Review Panel has paid to ensuring that proceedings are as family-friendly as possible, we consider that there is a significant need to also consider the needs of intimidated and vulnerable adult parties to proceedings.

We are very concerned by the current lack of availability of special facilities and measures for vulnerable and intimidated court users and would 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.

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.

Many callers to Rights of Women’s advice lines often express fear at the potential for a perpetrator to locate where they live by instituting civil proceedings and/or that a perpetrator is issuing court proceedings as a means by which to continue violence. This very real concern was acknowledged by the court in the leading case of *Re L*.¹⁰

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.”¹¹ A survey conducted by Women’s Aid in 2001 found 60 refuge projects in England (47% of the sample) said they knew of cases in their area where a perpetrator had been able to use contact proceedings to track down his former partner since 19 June 2000, the previous year.¹²

Another issue frequently raised by women is the fear of having to come into close contact with a perpetrator in court. Callers to Rights of Women’s advice lines often state that the prospect of facing the perpetrator of violence in court and in the open waiting room outside of court is very daunting. Some women find it so daunting that they cannot go through with a hearing and agree to potentially unsafe contact arrangements. In addition to the potential harm to women and children in such situations, these fears seriously detriment the quality of a litigant’s evidence.

¹⁰ *Re L; Re V; Re M; Re H (Contact: Domestic Violence)*, [2000] 2 FLR 334.

¹¹ 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.

¹² Women’s Aid, *Making Contact Worse*, Bristol: Women’s Aid, 2001. The survey was sent to all refuge projects in England and 127 refuge projects took part.

As one respondent to a Rights of Women survey put it:

“Many women find the fear of an attacker crippling”.¹³

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.

In a Rights of Women survey published in February 2011 concerning the Ministry of Justice proposals for the reform of legal aid in England and Wales, one individual woman had this to say about facing her abuser in court:

“I was absolutely terrified in court - my soon to be ex husband was present and I would have found it very difficult if not impossible to speak. I imagine this must be the case for many women.”

Another woman said that:

“[e]ven with my barrister and his assistant present, he was intimidating.”¹⁴

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.”¹⁵

In 2005 and 2008, HM Inspectorate of Court Administration (HMICA, a body recently closed down under the review of non-departmental public bodies) identified and criticised what it perceived as a reactive approach of courts’, waiting for litigants to identify safety issues in family disputes rather than proactively identifying court user needs.¹⁶

The current policy framework for special facilities/measures

¹³ Online survey conducted in July 2009 concerning Government strategy, and implementation of policy related to violence against women. See Rights of Women, *Measuring Up? UK Compliance with International Commitments on Violence against Women in England and Wales*, June 2010, page 69, online: http://www.rightsofwomen.org.uk/pdfs/Measuring_up_A_report_by_Rights_of_Women.pdf.

¹⁴ Rights of Women, *Women’s Access to Justice: a research report*, February 2011, online: http://www.rightsofwomen.org.uk/pdfs/Policy/Womens_access_to_Justice-a_research_report.pdf.

¹⁵ 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, para 34, online:

http://www.family-justice-council.org.uk/docs/Relevant_Third_Party-Guidance_for_Local_Authorities%281%29.pdf.

¹⁶ 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.

The policy framework for the provision of special facilities/measures in civil courts is unclear.¹⁷ The **Family Courts Charter**¹⁸ (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 a HMICA 2008 inspection report into the experience of court users in Sheffield.

That report detailed 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.”¹⁹ It is therefore unsurprising that the inspectors found that unrepresented service users were also unaware of any special facilities.²⁰

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 our service users is that the availability of special facilities is not widely known or used.

In response to a 2005 HMICA report into Domestic Violence, Safety and Family Proceedings, HM Courts Service (HMCS) committed to publicise the availability of facilities and “[I]mplement 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.”²¹

According to the Ministry of Justice, a special facilities poster was distributed to all county court managers in December 2004.²² In January 2007, the posters were redistributed to all county/combined and magistrates courts in England and Wales. However, to our knowledge, there is not yet a 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

¹⁷ In the family court system, the term “Special Facilities” rather than “special measures” is used.

¹⁸ HM Courts Service, *Courts Charter – Family Courts*, Document AJ25.

¹⁹ 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], p13.

²⁰ HMICA 2008.

²¹ HM Courts Service, *HMICA, Inspection of domestic violence, safety and family proceedings, HM Courts Service Overall Response*, October 2005.

²² 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-justicecouncil.org.uk/docs/AppendixB_HMCS_special_facilitiesposter%281%29.pdf.

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.

We consider that vulnerable and intimidated courts users must be offered special support and facilities/measures 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 call Rights of Women's advice lines feel vulnerable and intimidated by parties to proceedings, and in the absence of special facilities/measures, 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 them at risk of harm. In order to ensure sufficient protection is afforded to vulnerable and intimidated adults through the system.

We strongly recommend:

- ***The introduction, following a review, of specific legislative provisions and a clear policy framework, for the delivery of an enhanced service for vulnerable and intimidated service users in the family justice system, including the provision of special facilities/measures analogous to those available in the criminal justice system.***
- ***A review, with the view to the expansion and improved monitoring of the availability of special facilities/measures in family justice system, including:***
 - ***Separate entrances and exits***
 - ***Separate waiting areas***
 - ***Availability and use of screens and, where necessary, video links in proceedings***
 - ***Court familiarisation visits***

This exercise should include a survey of court users to identify further facilities/measures that would support their safe and equal participation in court proceedings.

- ***The introduction of an effective early identification system to identify cases where special facilities/measures might be needed, as proposed by the HMCS in 2005. We would very much welcome a shift in approach from reactive to proactive identification and response to vulnerability and intimidation.***

Q2: Ensuring that a child's voice, wishes and feelings are central to the Family Justice Service is crucial. What would you recommend as the crucial safeguards to enable this to happen?

Q3: Do you agree that children should be offered a choice as to how their voice can be heard in cases that involve them, including speaking directly to the court?

We have chosen to address these two questions together.

We believe that the voices of the child should be heard in **all** cases in the family courts. Article 12 of the UN Convention on the Rights of the Child states that:

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”²³

We support this unequivocally and believe that the wishes and feelings of children should be sought in every case, as firmly established by the Children Act 1989, especially where there are safety and welfare concerns. Both Women’s Aid’s member services and Rights of Women’s service users tell us that they believe there is not enough attention paid to the wishes of the child and that their views are not taken into account.

We welcome the assertion in the Interim Report that “[t]he family justice service will need to ensure that the interests of children and young people are at its heart.”²⁴

From the experience of our respective member services and service users, we are particularly concerned about an apparent lack of specialist knowledge of the dynamics of domestic violence amongst Cafcass officers and a minimisation of mothers’ concerns about risk and safety issues. Evidence gathered by Women’s Aid’s member services and concerns raised by Rights of Women’s service users indicates that Cafcass officers need to spend more time with the child(ren), getting to know them and understanding what they have experienced.

During an online consultation conducted in 2007,²⁵ children told Women’s Aid:

“i am very scared and frightened of my daddy. i am mad with my daddy for hurting my mummy and me and my sisters and brother. i want my daddy to stay out of my life but he is taking it to court to see us...i am very scared incase no one listens to me, i want to be heard what if they dont listen ?? i dont want to be made to see my dad please help me and my family.”
Tara, 8 yrs.

“My dad is taking us to court for contact, we don’t want to see him or have anything to do with him, I just hope the court will listen to me and my mummy I think we shouldn’t have to see him. we can think for ourselves, I think the court should let us have our say. I don’t know what I will do if they say I have to go.”
Suze, 14 yrs.

From our collective experience there is therefore a need for women and children to feel that the children’s views are thoroughly explored and heard by the court. Whilst

²³ United Nations Convention on the Rights of the Child, online:
<http://www2.ohchr.org/english/law/crc.htm>.

²⁴ Interim Report, para 3.4, page 53.

²⁵ The Kidspeak on-line consultation with children and young people was set up by Women’s Aid, in partnership with Margaret Moran MP, and with the help of funding from The Body Shop. It took place throughout the months of June and July 2007. For more information, please see: Barron, J., (2007), Kidspeak: Giving Children and Young People a Voice on Domestic Violence, Bristol: Women’s Aid.

we are concerned that the active participation of all children may cause unnecessary delay in proceedings, we agree that it may be appropriate to consider the views of older children and young people and that it would be useful to consider the use of a menu of options, similar to those suggested by children and young people consulted during the Family Justice Review, and set out in the Interim Report, including:

- “speaking directly to the judge in court;
- speaking to the judge outside court;
- writing a letter to the judge;
- appearing in court/before the judge by videolink/telephone/skype; and
- views being expressed through a trusted, neutral individual.”²⁶

We consider that giving children and young people options on how they can make representations to the courts will empower them to have an input into decisions made about them, provided that their voices are given adequate weight and attention. Children and young people should also be provided with special measures of protection, such as giving evidence by video link, to ensure that this is safe.

Q4: Do you agree that there should be a single family court?

Please see our comments above in response to Question 1.

Q5: Do you agree that the changes we have proposed to the judiciary – including greater continuity, specialisation and management – will lead to improvements in the operation of the family justice system?

The Interim Report recommends that Judges and Magistrates should be enabled and encouraged to specialise in family matters. It also recommends that a requirement for appointment to the family judiciary should, in future, include a willingness to specialise.²⁷

We strongly support this recommendation, which should support quality decision-making, including in cases where domestic violence is an issue.

The Interim Report further recommends that “there should be judicial continuity in all family cases. The High Court will be an exception but this should be limited as far as possible. This recommendation applies also to legal advisers and benches of magistrates.”²⁸

Again, we firmly endorse this recommendation; we consider that judicial continuity should, as the Review Panel sets out, not only increase speed and efficiency, but also improve effective case management and hence the experience and outcomes for court users, particularly children and vulnerable adults.

In our experience, a lack of judicial continuity compounds the problems that are often present in cases where domestic violence is an issue. In particular, it exacerbates the risk of re-victimisation during proceedings and undermines the capacity of judges to effectively take into account the violence.

²⁶ Interim Report, para 3.9, page 54.

²⁷ Interim Report, para 41, page 10; page 27 (recommendations).

²⁸ Interim Report, page 27 (recommendations)

Q6: Do you agree that case management principles, in respect of the conduct of both private and public law proceedings, should be introduced in legislation?

The Interim Report cites with approval the principles set out in Australian legislation, aimed at ensuring there is a strong focus on case management by the court and at ensuring a less adversarial approach to the conduct of family court proceedings.²⁹ The five principles are:

- “(i) the court is to consider the needs of the child concerned, and the impact that the conduct of the proceedings may have on the child, in determining the conduct of the proceedings;
- (ii) the court is to actively direct, control and manage the conduct of the proceedings;
- (iii) the proceedings are to be conducted in a way that will safeguard:
 - a. the child concerned against family violence, child abuse and child neglect; and
 - b. the parties to the proceedings against family violence;
- iv) the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties;
- (v) the proceedings are to be conducted without undue delay and with as little formality as possible.”³⁰

We firmly support the proposal that there must be improved case management in private family law proceedings and consider that better case management will improve the process and outcomes for parties to proceedings. We further agree that the Australian legislation cited above concerning case management principles presents a sound basis upon which to develop similar principles into legislation in England and Wales.

In particular, as we have set out above in response to question 1 concerning the role and guiding principles of the proposed new Family Justice Service, we strongly support the inclusion in legislation and policy of clear reference to the need to conduct proceedings in a way that will safeguard both children and adult parties to proceedings from family violence (paras iii (a) and (b) in the Australian legislation cited above).

However, we are concerned to stress that any attempts to improve efficiency and drive down the costs and time spent on proceedings must not undermine the quality of decision-making or the safety and well-being of all parties to proceedings. We would therefore be concerned to see the principle contained in paragraph (v) of the Australian legislation (cited above) incorporated into legislation in England and Wales as it stands and consider that this would need further thought and consultation.

In particular, we are concerned that such a principle risks undermining the potential for safe outcomes where domestic violence is an issue, owing to its emphasis on speed and informality. We raise similar concerns throughout this response in respect of proposals to introduce a two-track system for case management, increase the use of alternative dispute resolution (see response to questions 19-23 below), and reduce the use of expert reports in family law proceedings (see response to question 24).

²⁹ Interim Report, paras 3.64-5, pages 64-5.

³⁰ *Ibid*, citing Family Court of Australia, Less Adversarial Trial Handbook, June 2009, as set out in Family Law Act Amendment (Shared Parental Responsibility) Act 2006, Division 12, section 69ZN.

Q7: What changes are needed to the culture and skills of people working in family justice and how best can they be achieved?

Training and skills

The Interim Report recommends that the new Family Justice Service should ensure that there is a focus on continuing learning amongst professionals involved in family justice.³¹ We strongly support this recommendation.

In 2005, HMICA found that ensuring both the safety of children and adults received 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.³² It recommended, amongst other things, training on the handling cases of domestic violence for all court staff.

We believe that there is still a widespread lack of understanding of domestic violence amongst professionals within the system including a misunderstanding of the dynamics of power and control that exist within abusive relationships. Awareness must be raised within the family justice system of the dynamics of domestic violence.

We recommend that:

- ***All staff (legal and non-legal) working in the family justice system should receive compulsory, standardised and ongoing training on the dynamics of domestic violence and its impact on adults and children, delivered by specialists from the violence against women and girls sector.***
- ***All staff should receive training and information on the availability of special facilities/measures and the correct procedure to follow when domestic violence is raised as an issue in family proceedings.***

Below, we further recommend that Judges and Magistrates receive standardised training on the application of the **Practice Direction: Residence and contact Orders: Domestic Violence and Harm** and that mediators and other gateway professionals within the family justice system receive comprehensive and ongoing training on the complexities and dynamics of domestic violence, including an understanding of power and control from specialised violence against women and girls trainers (for further details, please see our response to questions 19-23 on mediation and alternative dispute resolution).

Regular review of practice guidelines

We also strongly support the Interim Report's proposals to regularly review compliance with practice guidelines.³³

We have particular concerns about the patchy implementation of the Practice Direction: Residence and contact Orders: Domestic Violence and Harm³⁴ which

³¹ Interim Report, para 44, page 11.

³² 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, Foreword [hereinafter, HMICA 2005].

³³ Interim Report, page 27 (recommendations).

is evident from information we receive from our service users, and recommend:

- **The regular review and monitoring of the implementation of domestic violence policy and procedures. We recommend that this should be done, amongst other methods, through survivor feedback wherever possible.**
- **Given its current patchy implementation, the Practice Direction: Residence and contact Orders: Domestic Violence and Harm should be placed on a statutory footing.**
- **Thought is given to the introduction of a new practice direction, concerning the conduct of all private family law proceedings and the need to safeguard all parties to proceedings from domestic violence. Such a practice direction would complement the Practice Direction: Residence and contact Orders: Domestic Violence and Harm.**

Q8: Do you have any comments you wish to make on our proposals for system management and reform?

Yes, we are concerned that the Review risks missing the opportunity to propose a strategic and system-wide approach to addressing domestic violence.

Below, we set out our recommendations in this regard. Specifically, we address:

- The prevalence of domestic violence in private family law cases;
- The need to adopt a definition of domestic violence; and,
- The need for strategic thinking on domestic violence on a system-wide level.

We also set out the pressing need for the Review Panel to meet with a range of specialist violence against women and girls organisations to discuss the potential unintended and negative impact that the current proposals could have on women who have experienced violence and abuse.

Prevalence of domestic violence in private family law cases

Domestic violence is a significant feature of private family law cases.³⁵ Statistics concerning child contact cases cited within the Interim Report reflect this stark reality:

“One study found that parents raise serious welfare concerns in over half of all contact cases.³⁶ In a small-scale snapshot undertaken by the Review team, among the 75 applications studied where the C100 harm box had not been ticked, around a third of applicants and a sixth of respondents were

³⁴ HM Courts Service, *Practice Direction: Residence and contact Orders: Domestic Violence and Harm*, 14 January 2009, online: http://www.hmcourtsservice.gov.uk/cms/files/Revised_PD_Domestic_Violence140109.pdf.

³⁵ 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.

³⁶ Ministry of Justice, *Family Justice Review: Interim Report* [hereinafter, Interim Report], March 2001, online: <http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-interim-rep.pdf>, page 176, citing 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.

found to have convictions or cautions relevant to safeguarding. This is in line with Aris and Harrison's finding that in 29% of 140 cases where applicants answered no to the harm question examination of the court case files revealed evidence of a high level of violence.³⁷ The family was known to the local authority in almost one half of cases. Domestic violence was alleged in telephone interviews in around one third of the 100 cases.³⁸

We believe that the Review presents an ideal opportunity to reform the family justice system in a way that strengthens the protection offered to children and adults affected by domestic violence. It is crucial that domestic violence and the vulnerability that arises from it are appropriately addressed in order to ensure equal access to justice and outcomes that are safe and positive for families.

The Interim Report contains many welcome recommendations related to ensuring a more efficient, effective and specialised family justice system. These include proposals for a single family court, judicial continuity and specialisation in family law matters, and strengthened monitoring of practice guidelines. All of these proposals, if properly financed, are likely to have a positive impact on all cases, including those where domestic violence is an issue.

However, we are concerned that the Review risks missing the opportunity to propose a strategic and system-wide approach to addressing domestic violence. In 2005, HMICA issued the report of a comprehensive inspection into domestic violence, safety and family proceedings. That report presented a picture described in its foreword as being "far from satisfactory" and found that:

"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."³⁹

It also set out 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"⁴⁰

The HMICA set out concrete recommendations to improve safety and responses to domestic violence in family proceedings. We are very concerned that little has changed in the six years since the HMICA published its findings and there has been no comprehensive review or follow up on the implementation of the recommendations made.

We recommend that the Review Panel, as an integral part of the review of the family justice system, revisits and follows up on the findings and recommendations made by HMICA in 2005; they remain valid today and are referenced throughout this paper.

³⁷ Interim Report, p176, citing Aris and Harrison, University of Warwick, *Domestic Violence and the Supplemental Information Form C1A*, Ministry of Justice, 2007.

³⁸ Interim Report, para 5.143, P176.

³⁹ HMICA 2005, page 9.

⁴⁰ *Ibid.*

We urge the Review Panel to recommend the implementation of robust strategies to be followed by all staff in the family justice system and in all proceedings where domestic violence is an issue.

The need to adopt a definition of domestic violence

The Interim Report does not set out a definition of domestic violence employed for the purposes of the Review. We consider that it is essential to define domestic violence in order to ensure the effective formulation and implementation of policies to address it. In particular, a clear definition is needed to identify cases where domestic violence is an issue, and appropriately respond to the vulnerability that arises from it.

We recommend that, for the purposes of the family justice system, the Review Panel adopt the current Home Office and Association of Chief Police Officers (ACPO) definition of domestic violence which, in line with international standards, defines domestic violence as:

“any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”

This definition is also used by the Crown Prosecution Service, the Ministry of Justice and the UK Border Agency.⁴¹ It reflects the definition of violence against women contained in the United Nations (UN) Declaration on the Elimination of Violence against Women (DVAW),⁴² a definition to which the Government has agreed to work across all departments in its “Call to End Violence Against Women and Girls.”⁴³

Article 1 of DVAW sets out that violence against women is “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” An important aspect of this definition is that it focuses on the effects of violence, which may take the form of physical, sexual or psychological violence.

This is significant because the Interim Report appears to suggest that not all forms of domestic violence are serious enough to warrant special or enhanced attention within the family justice system. In this regard, and in particular in relation to mediation, the Interim Report emphasises that “domestic violence varies greatly in its characteristics”⁴⁴ and refers to circumstances where “domestic violence is a strong concern.”⁴⁵ Whilst we agree that the term domestic violence covers a wide and non-exhaustive range of acts of violence, we assert – as the Government has done in its Call to End Violence Against Women and Girls (VAWG) - that no level of VAWG is

⁴¹ See the CPS’ *Policy for Prosecuting Cases of Domestic Violence* (2010), the Ministry of Justice’s *A Guide to Civil Remedies and Criminal Sanctions* (February 2003, updated March 2007); the UKBA’s *Victims of Domestic Violence: Requirements for Settlement Applications*; and the IDI Chapter 8, Section 4, *Victims of Domestic Violence*.

⁴² United Nations (UN) General Assembly, Resolution A/RES/48/104, 20 December 1993, online: <http://www.un.org/documents/ga/res/48/a48r104.htm>.

⁴³ HM Government, *Call to end Call to End Violence against Women and Girls*, March 2011, page 5, online:

<http://www.homeoffice.gov.uk/publications/crime/call-end-violence-women-girls/vawgpaper?view=Binary>.

⁴⁴ Interim Report, para 5.136, page 175.

⁴⁵ Interim Report, para 5.129, page 173.

acceptable and that all forms and incidents of domestic violence must be taken seriously and appropriately addressed within the family justice system.

We recommend that in line with cross-government commitments on VAWG, the Review Panel makes clear that the ACPO definition of domestic violence should be applied throughout the family justice system and that all forms of domestic violence must be taken seriously.

The need for strategic thinking on domestic violence on a system-wide level

In our previous submissions to the Family Justice Review, we have set out our concerns about the lack of safeguards for women who have experienced or are at risk of domestic violence, who are involved in a range of proceedings including those related to applications for domestic violence injunctions (non-molestation and occupation orders), forced marriage protection orders and financial relief, as well as child contact and other family proceedings.

It is striking that the Interim Report does not review in any detail problems within the family justice system related to proceedings other than those concerning child contact. We consider that the Review must address, with the view to implementing strategic policies, service standards and problems arising in all private family law proceedings where domestic violence is an issue.

One issue of concern is that the family justice system at present does not take a joined up approach to family law proceedings where domestic violence is an issue. For example, advisors on Rights of Women's advice lines often speak to women who are or have been involved in more than one set of proceedings where domestic violence is raised. This can be very traumatising for women who have to go through multiple contested hearings about the violence that they have experienced. We urge the Review Panel to consider how family law proceedings, such as those related to applications for non-molestation orders and occupation orders might be better joined up with child contact proceedings, in order to avoid this situation.

Another issue of great concern is the lack of special facilities/measures in the family justice system to support women who have experienced gender-based violence. In June 2010, Rights of Women published a research report analysing the law and policy on civil remedies related to violence against women.⁴⁶ The 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, the research found that the way that civil remedies have to be obtained and the potential for re-victimisation through court proceedings, can deter women from using them.

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.⁴⁷ Special measures in criminal courts aim to provide women with protection from perpetrators during the court process and support the delivery of best

⁴⁶ Rights of Women, *Measuring Up? UK Compliance with International Commitments on Violence against Women in England and Wales*, June 2010, online: http://www.rightsofwomen.org.uk/pdfs/Measuring_up_A_report_by_Rights_of_Women.pdf.

⁴⁷ 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>.

evidence. 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.⁴⁸ This has serious implications for the safety and wellbeing of women who have experienced domestic violence and other forms of gender-based violence, as well as raising questions about equal access to justice.

We are concerned that this problem will get worse if the Ministry of Justice's proposals on legal aid are implemented as we anticipate that there would be a surge in the numbers of litigants in person.⁴⁹ The Ministry of Justice proposes to remove legal advice and representation for private family law (financial relief and private children matters) from the scope of legal aid (mediation will remain in scope). Although the proposals state that all advice and representation where domestic violence is present will remain in scope, we are very concerned about the proposed gateways, as we do not consider that they will capture all cases where domestic violence is present.⁵⁰ Furthermore, whilst it is proposed that legal aid will be retained in domestic violence and forced marriage cases (in relation to non-molestation orders, occupation orders, forced marriage protection orders and applications to High Court for a wardship order), it does not appear to be available for those against whom a protection order is sought (i.e. the alleged perpetrator). Removing legal aid from perpetrators in these cases will increase the number of women who are faced with questioning in court from the perpetrator of abuse (rather than their solicitor). This could involve a perpetrator cross-examining a woman in detail on her account of the physical or sexual violence she has experienced. We believe that legal aid should be available for those against whom a domestic violence injunction is sought, at least for court hearings, to ensure that women are not re-victimised in this way.

(This issue is explored further in response to question 1 concerning the need for special facilities/measures for vulnerable or intimidated parties in the family justice system).

Given that domestic violence is a significant feature in all private family law matters, we recommend:

⁴⁸ Rights of Women's 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.

⁴⁹ See Ministry of Justice, *Proposals for the reform of legal aid in England and Wales*, 15 November 2010, online: <http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf> and *Rights of Women's response to the consultation 'Proposals for the Reform of Legal Aid in England and Wales'*, February 2011, online: http://www.rightsofwomen.org.uk/pdfs/Policy/Rights_of_Womens_response_to_the_Ministry_of_Justice_s_legal_aid_proposals_2011.pdf.

⁵⁰ The consultation document proposes that legal aid to resolve family law matters (other than to obtain domestic violence injunctions) will only be available in domestic violence cases where the victim meets one of the following requirements: where the Legal Services Commission (LSC) is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant (e.g. an application for an injunction) or has funded such proceedings within the last 12 months and an order was made, arising from the same relationship; where there are ongoing privately-funded (or self-represented) domestic violence (or forced marriage) proceedings (e.g. an application for a protection order), or where there have been such proceedings in the last 12 months and an order was made, arising from the same relationship; where there is a non-molestation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or, in the case of forced marriage, against any other person); where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent).

- *The Review Panel conduct a review of the current policy framework concerning the conduct of proceedings in all cases where domestic violence is an issue;*
- *That such a review should be conducted with a view to developing a robust and system-wide strategy to ensure safety and effective access to justice and remedies for all adults and children in the family justice system at risk of domestic violence; and,*
- *That the Review Panel seek to meet with a wide range of specialist domestic violence organisations to obtain their views on how the family justice system can be reformed to ensure better outcomes in cases where domestic violence is an issue. This could be done in the format of a roundtable discussion.*

We further recommend that the Review Panel address, in conjunction with the Ministry of Justice, the impact that the current proposals (and any subsequent decisions) for the reform of legal aid will have on the family justice system. We anticipate that the new Family Justice Service will face an increasing number of litigants in person. The new service will need to address the increased support needs of these litigants, particularly vulnerable litigants in person.

Private Law: Consultation questions 17-24

Q17: Do you agree that there is a need for legislation to more formally recognise the importance of children having a meaningful relationship with both parents, post-separation?

The Interim Report raises the question of whether “more should be said in legislation to strengthen the rights of children to a continuing relationship with both parents (and others, for example grandparents) after separation”.⁵¹

We consider that, ***except where there is a risk to their safety or wellbeing or to the safety or wellbeing of their primary carers***, it is important for children to maintain contact with non-resident parents and others such as grandparents, or be looked after through shared parenting arrangements.

However, where there is domestic violence, there must be no presumption that contact is in the best interests of the child. In all such cases there must be rigorous risk management to ensure the safety and well-being of children and their parents.

As Lord Justice Wall, now President of the Family Division, has said:

“we should continue to promote the message that it is not possible at one and the same time to be guilty of serious violence to your partner and to hold yourself out as a good parent. The old approach that a man may have abused the mother of his children, but that he had not struck the children and that he was still a good father will no longer wash in the over-whelming majority of cases.”⁵²

⁵¹ Interim Report, Para 107, page 21.

⁵² Lord Justice Wall, Domestic Violence in Consent Orders, in a speech to the Hertfordshire Family Forum at the Law Faculty of the University of St Albans on 13 March 2007, online: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/263/263we49.htm>.

The Review Panel has recommended that:

“no legislation should be introduced that creates or risks creating the perception that there is an assumed *parental right to substantially shared or equal time* for both parents” (emphasis added).

However, we recommend that the Review Panel make clear that beyond this, there is no parental right to contact (or legal presumption of contact) of any form or duration. The paramount consideration in any proceedings involving children must be the welfare of the child. This principle is enshrined in domestic law through the Children Act 1989, and reflects the international law position set out in the Convention on the Rights of the Child.

In this regard, we are concerned that the Review Panel has recommended that:

“there should be a statement in legislation to reinforce the importance of the child continuing to have a meaningful relationship with both parents, *alongside* the need to protect the child from harm” (emphasis added).

We consider it neither appropriate nor necessary to introduce such a statement in legislation. Specifically, we are concerned that the proposed statement is ambiguous and appears to suggest that the best interests of the child ought to be considered alongside, rather than paramount to, other considerations. We consider that this could be an unintended departure from the principle that the welfare of the child is of paramount concern.

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.

Although there is no legal presumption of contact, we have had concern for some time that an informal presumption is applied in practice, even in cases where domestic violence and/or welfare issues have been raised. For example, research published by the Ministry of Justice in 2008 concerning a sample of 308 contact cases found that “60% of cases involving welfare concerns ended with staying or unsupervised visiting contact.”⁵³ Furthermore, the 2005 HMICA inspection report found that “[t]he presumption of contact drives and constrains practice”⁵⁴ in private family law.

According to that report, “[t]he presumption of contact was evident in all the practice sessions observed during this [the] inspection and there was consistent evidence that inappropriate assumptions about contact were made, rather than assessments about whether there was any risk associated with domestic abuse cases.”⁵⁵ Inspectors were told by practitioners that “the presumption of contact is so strong. It makes it difficult to challenge and we don’t give adequate attention to the continuing impact of the abuse on the child.”

⁵³ Ministry of Justice, *Outcomes of applications to court for contact orders after parental separation or divorce*, Briefing Note, page 6, online: <http://www.justice.gov.uk/publications/docs/outcomes-contactorders-briefing-note.pdf>, concerning 308 case files from 2004.

⁵⁴ HMICA 2005, Para 3.9, page 28.

⁵⁵ *Ibid.*

We are very concerned that the introduction of a statement in legislation such as that suggested in the Interim Report would exacerbate this situation by inferring that there is a presumption of contact that operates alongside the need to protect the child from harm, and could lead to unsafe contact arrangements being ordered.

We do not consider that a statement needs to be made in legislation strengthening the rights of children to a continuing relationship with both parents (or others) after separation. We consider that the basic principle that the best interests of the child is paramount is the only statement needed.

We strongly recommend that prior to the introduction of any new statement in law concerning contact, more research is needed into the impact that the informal presumption of contact identified by the HMICA has on outcomes for children and parents who have experienced domestic violence. As was stressed by the HMICA in 2005, “the concept of post-separation shared parenting for children is desirable. However, this can only occur if the residence and contact arrangements are safe for both children and adults.”⁵⁶

If a statement is to be introduced through legislation, we recommend that, in line with the Children Act 1989 and international child law, it must emphasise that in all cases where decisions are being made regarding contact arrangements for children, paramount consideration must be given to the welfare of the child.

Q18: Do you agree with the proposals to remove the terms ‘contact’ and ‘residence’ and to promote the use of Parenting Agreements?

Specific issue orders

The Interim Report recommends that residence and contact orders should no longer be available to parents who have parental responsibility for their child, but disputes over the division of a child’s time between parents should instead be resolved by a specific issue order. The Interim Report states 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”.⁵⁷

Whilst we welcome the commitment by the Review Panel to 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 “specific issue order” actually means. For example, we anticipate that there could be confusion within schools about a specific issue order being used in place of a residence order. Currently, a

⁵⁶ *Ibid*, page 9.

⁵⁷ Interim Report, para 112, page 22.

woman who has experienced violence can inform the school that they should not release the children to an abusing 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 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 specific issue order and their obligations with respect to children and non-resident parents.

It is not clear from the proposals what a change to the terms will mean in practice. For example, if contact orders are to be replaced by specific issue orders, how will contact be described within the order, explained to parents by solicitors, or described by judges and children specialists? It seems likely that all professionals and parties to litigation are likely to revert to using the term contact.

We would also like to seek clarity about the potential content of a specific issue order that would be made in place of a residence order. Under the current scheme, a parent who has been granted a residence order may take a child abroad for up to 28 days without having to seek permission from the non-resident parent. We consider that this scheme works very well, and would be concerned if it were to change.

We recommend that no change to terms is needed and that a change would 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 term and how to understand the content of a specific issue order.

Parenting agreements

The Interim Report also recommends that “[p]arents should be enabled and supported to come to a resolution and to construct a Parenting Agreement. This agreement would set out arrangements for the care of children post-separation, covering aspects such as education, health, finance and the arrangements for how the child is to spend time with each parent.”⁵⁸

We consider that parenting agreements could be a useful tool to support agreements post-separation. However, we are concerned that the Interim Report proposes that:

“provision should be made in legislation to ensure a signed Parenting Agreement has weight as evidence in any subsequent parental dispute.”⁵⁹

We do not think it is necessary to have this expressed in legislation and are concerned that safeguards must be put in place to ensure that weight is not given to a parenting agreement that has been made where domestic violence or imbalance of power between the parties is a concern, or where circumstances have changed which may render the agreement unsafe or unworkable. A key aspect of parenting agreements is that they are ‘agreed’. They are voluntary and they are not legally binding. Consequently, parties can easily amend agreements as situations change and children get older; this flexibility is one of the benefits of a parenting agreement.

⁵⁸ Interim Report, para 111, page 21.

⁵⁹ Interim Report, Para 5.118, page 170.

The risk that women may agree to a parenting agreement that is unsafe or unworkable is particularly high in cases involving domestic violence or where an imbalance of power exists between the parties. Even if strong safeguards are put in place to route cases involving domestic violence directly to court, there is a real potential for women to disclose a risk of domestic violence later in proceedings and to reach parenting agreements that they might later need to change to ensure the safety of themselves and their children.

In our experience many women who have experienced violence or abuse are unable to understand the processes involved in family court proceedings and feel very isolated by the process. As some of the tragic cases set out in Women's Aid's report, **Twenty-Nine Child Homicides: Lessons still to be learnt on Domestic Violence and Child Protection**⁶⁰ showed, women who have concerns for the safety of their child/ren are often urged to agree to unsafe informal contact arrangements by their solicitor or the family court adviser assigned to the case, and are told that they will appear to be implacably hostile if they do not agree. One mother quoted in that report described the immense pressure that is put on women to agree to contact :

"They tell you, if you don't agree to give him access, the judge will just put you both in the witness box, you'll do a character assassination on each other, and he'll grant overnight access to him anyway. Their remit is, all children should see mum and dad. They think, no matter how badly he's beaten me, and no matter what sort of role model he might be, and no matter whether he would go on to harm them, the children should still see their father."⁶¹

The conclusions made by Lord Justice Wall in his response to that report are relevant here. In his response, Lord Justice Wall stressed (in relation to consent orders) that:

"it is essential that the court satisfies itself that each party had entered into the consent order freely and without pressure being placed upon them."⁶²

We strongly support this finding and consider 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.

We are concerned that the potential for women to be pressurised into agreeing to unsafe arrangements could be exacerbated if parents are expected to agree to Parenting Agreements and the proposed new family justice service must be alert to this possibility.

We recommend that parenting agreements include specific arrangements for contact between the non-resident parent and the children and other important issues such as specific holidays planned abroad with the children, education, welfare and health issues. We would be very concerned if parenting agreements were to set out general rights, for example, the right for a parent to take a child abroad without prior consent of the other parent as this could raise serious welfare and safeguarding concerns. Specifically, we are concerned about the very real risk that women could be

⁶⁰ 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.

⁶¹ *Ibid*, page 15.

⁶² 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.

pressurised into agreeing for an abusive father to remove the children from the country for long periods of time. It would also be useful for guidance on parenting agreements to encourage separating parents to include clauses on how changes to the agreement could be made, how much notice should be given to cancel arrangements, and the circumstances when the agreement could be breached (for example, where there has been aggressive or controlling behaviour by one party to the agreement or concerns for the children's safety). Such clauses would enable the parent with care to restrict contact with an abusive parent where there is a risk to their own safety or that of their children.

Q19: Do you agree that there should be a requirement to consider Dispute Resolution Services prior to making an application to court?

Q20: Do you agree with the processes we outline for the resolution of private law disputes?

Q21: Which urgent and important circumstances should enable an individual to be exempt from the assessment process for Dispute Resolution Services?

Q22: What do you think are the core skills required for mediators undertaking an assessment?

Q23: Is there any merit in introducing penalties, through a fee charging regime, to reflect a person's behaviour in engaging in Dispute Resolution Services, including the court?

We are considering questions 19 – 23 together under the heading of dispute resolution services and domestic violence.

Mediation

The Interim Report proposes to make it compulsory, with limited exceptions, for all parties seeking to litigate to be assessed by a mediator for suitability for attendance at a Parenting Information Programme (PIP) and for use of a dispute resolution service such as mediation. The stated intention for this proposal is that:

“a minority of cases will require court determination, namely those with significant complexity...or where there are serious welfare concerns.”⁶³

It is proposed that the mediators will 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.”⁶⁴

We agree that mediation can be effective in family law disputes at the same time as welcoming the recognition that an imbalance of power between the parties may render mediation inappropriate. 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.⁶⁵ Because of these concerns, which are set out in more detail below, **we**

⁶³ Interim Report, para 5.125, page 172.

⁶⁴ Interim Report, para 5.127, page 172.

⁶⁵ For a discussion of the links between domestic violence and child abuse, please see Dwyer, F. (ed.) (forthcoming) *Safe and Sound*, Bristol: Women's Aid.

firmly believe that cases where domestic violence is an issue are not appropriate for mediation.

Emergency Routes to Court

The Interim Report concedes that “there may be some circumstances where even the relatively short time required for the assessment process is too much, where there are, for example, concerns about the risk of child abduction or where domestic violence is a *strong concern*”⁶⁶ (emphasis added), and envisages an emergency route to 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 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. Please refer to our comments concerning the cross-government definition of domestic violence above.

Mediation and Domestic Violence

Any response to domestic violence must acknowledge the real and potentially fatal dangers present in bringing the victim and offender together. A relationship defined by violence, control, threats and an imbalance of power must not be subject to mediation. Domestic violence is not caused by a problem with anger, or a loss of control. It is 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*⁶⁷ 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.⁶⁸ We strongly support this proposal as a necessary safeguard and urge the Review Panel to consider it.

⁶⁶ Interim report, Para 5.129, page 173.

⁶⁷ 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.

⁶⁸ Lord Justice Wall, *Report to the President of the Family Division on the publication ‘Twenty-nine child homicides’*, March 2006, online:

We disagree with the proposal in the Interim Report that domestic violence should not automatically preclude mediation. We believe that mediation is 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.***

Evidence from the violence against women sector

There is a wealth of evidence that suggests that mediation is not appropriate in domestic violence cases. In most jurisdictions where mediation is compulsory, including in the USA and Canada, there are exemptions related to domestic violence in a number of states.⁶⁹ Research on the USA has shown that mediation and other forms of alternative dispute resolution cannot work where there is a power imbalance between the two parties. As Fischer *et al* have said, “both the ideology and the practice of mediation are incompatible with a culture of battering”.⁷⁰

The most compelling evidence comes from the individual women who have experienced domestic violence, and the specialist domestic violence workers who support them. A survey of Women's Aid members in 2007 for the Home Affairs Select Committee Inquiry into Domestic Violence found that 66% of members were concerned about the continued use of mediation in cases involving domestic violence.⁷¹

Comments received from Women's Aid members responding to the survey included the following:

“It is difficult to understand how mediation can work within a relationship where power and control lies so firmly in one camp.”

“I've lost count of the number of women I've spoken to who tell me that the mediator has started the mediation process by expressing the opinion that the woman is clearly influencing the child against the father, or that the mother has some kind of mental health issue. There is a distinct perception among women going to the Family Court that the service is biased against them....”

http://www.judiciary.gov.uk/Resources/JCO/Documents/report_childhomicides.pdf

⁶⁹ See for example Wheeler, L., (2002), 'Mandatory Domestic Violence and Mediation', *Southern Illinois University Law Journal*, 26 and Jeske, J., (2010), 'Custody Mediation within the Context of Domestic Violence', *Hamline Journal of Public Law and Policy*, 31

⁷⁰ Fischer, K., Vidmar, N. and Ellis, R., (1993), *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*.

⁷¹ Women's Aid, Home Affairs Select Committee Inquiry into Domestic Violence: Women's Aid Federation of England Results of Special Survey, September 2007.

Case study example: Women's Aid survivors' message-board

Women's Aid also provides a specialist message-board facilitating peer support for women who have experienced domestic violence. The majority of women who post on the message-board have serious concerns about the process of mediation.

(Posted 02.10.10)

"We started mediation on Thursday and it was an absolute nightmare. I had an appointment on my own on Monday with one of the mediators and he kept going on about being in the same room as my ex - I kept saying no and that I'd only do it if we were in separate rooms (which had been the idea from the outset). So on Thursday it was arranged that I'd arrive 15 minutes before my ex. When I arrived I was shown into a room and told where each person would be sitting....including my ex!!!! I refused again and the mediator spent the next 20 minutes trying to change my mind. The mediation itself was laughable. I got no idea what my ex actually wants, nothing got anywhere near being resolved and I had to put my foot down at one point to stop them talking about the marriage/divorce/finances as we're only there to sort out the family stuff. Then at the end the same mediator started on about being in the room together next time! Again I said no but it really began to feel like bullying. We have another appointment in a couple of weeks but that'll be the last I go to I think even if nothing is resolved. I wasn't allowed to take anyone with me and I felt so alone and frankly bullied a lot of the time. I can't keep putting myself through that."

Case Study Example: October 2010

Women's Aid has recently been working with a woman in a contact case where she is concerned about her children. She attended a mediation assessment meeting under the Legal Services Commission (LSC) Funding Code procedures. The mediator had not been given any case history and was unaware of the woman's ex partner's convictions for domestic violence related assault and the history of domestic violence in the relationship. The woman concerned was offered a 'shuttle service' mediation but the service could not guarantee separate entry and waiting for the woman. Again, as in the case above, the woman felt under pressure to mediate and the mediator tried for almost 30 minutes to convince her to undergo mediation despite acknowledging that domestic violence cases are not suitable for mediation. The woman eventually managed to convince the mediator that she could not and would not undergo mediation for fear of her own safety.

Between 17 December 2010 and 31 January 2011, Rights of Women surveyed the views of just under a thousand people through three online surveys targeted at individual women, professionals who work on violence against women issues and legal professionals concerning proposals for the reform of legal aid in England and Wales.⁷² Respondents to all of the surveys were very concerned about mediation in domestic violence cases. 66% of individual women thought that mediation was not appropriate in domestic violence cases, in comparison with 70% of legal professionals and 80% of professionals who work on violence against women issues.⁷³ These figures suggest that the more that a person knows about violence against women, the less likely they are to believe that mediation is appropriate in domestic violence cases. All respondents raised concerns about safety and the re-victimisation of the women concerned. One survivor of domestic violence explained:

⁷² Rights of Women, *Women's Access to Justice: a research report*, February 2011, online: http://www.rightsofwomen.org.uk/pdfs/Policy/Womens_access_to_Justice-a_research_report.pdf.

⁷³ 336 individual women, 347 violence against women professionals and 264 legal professionals responded to the survey.

“my own experience [of mediation] ended up with me being abused further”.

Pressure to mediate and attend Parenting Information Programmes (PIPs)

Under the proposals set out in the Interim Report, the mediator conducting the assessment will need to give a certificate to allow a court application, but the Review Panel have made clear that, unlike the assessment session and the PIP, they do not recommend dispute resolution (e.g. mediation) to be compulsory.⁷⁴ However, we are very concerned that the proposals, if implemented, would place considerable additional pressure on individuals to attend mediation, even where it is inappropriate such as in cases involving domestic violence. The Interim Report proposes that:

“The court should take into account what attempts have been made to resolve the issue before the application. The certificate issued by the mediator ... should identify those parties who have refused to take part in the dispute resolution process. Judges will retain the power to order parties to attend a mediation information session and may make cost orders where it is felt that one party has behaved unreasonably.”

We are already very concerned about the inappropriate pressure that is placed on women who have experienced domestic violence to attend mediation and conciliation sessions and have concerns that the current proposals will exacerbate the situation.

Women’s Aid and Rights of Women often hear from women who feel under pressure to attend mediation even when they do not feel that it is safe for them or their children to do so. This pressure often comes from legal professionals including their own barristers and solicitors, judges, the non-resident parent and Cafcass.

As early as 2005 HMICA expressed concerns at the policy emphasis on seeking mediated agreements in the family justice system:

“[the HMICA investigation] finds an inherent danger arising from the current policy emphasis on seeking mediated agreements between parents in ever larger numbers of disputed family proceedings. We conclude that ensuring the safety of both children and adults receives insufficient consideration – this was a strong and consistent message from the women survivors of domestic violence who we consulted. We consider that arrangements for assessing the risks associated with allegations of domestic violence need markedly strengthening.”⁷⁵

The HMICA report identified that often potentially dangerous arrangements on contact were agreed further to rushed conciliation sessions where the mediator did not have the full facts. It stressed that there should be clear protocols about access to information to identify which cases were suitable for conciliation.⁷⁶ It also asserted that:

“the pressure in the court system means that decisions are taken very quickly and, under those circumstances, little opportunity is available or is taken to adequately explore whether the parties’ consent to joint meetings has been given freely and is fully informed ... [I]nspectors observed that some of the parties who were interviewed jointly with their ex- partner, did so reluctantly

⁷⁴ Interim Report, Para 5.126, page 172.

⁷⁵ HMICA 2005, Introduction.

⁷⁶ HMICA 2005.

and were clearly uncomfortable. In many of these rushed interviews, it was evident that children had seen or heard violence between the adults but these issues were not explored by CAFCASS in the conciliation session.”⁷⁷

There is a strong need to put robust safeguards in place so that women are not pressured into entering into mediation and reaching agreements that may be harmful to themselves and their children. In order to ensure that the full and informed consent of all parties is obtained prior to any mediation sessions, the parties must be given:

- ***The opportunity for initial screening assessments to be conducted separately to allow for disclosure of any domestic violence or welfare concerns;***
- ***Comprehensive information on the process involved;***
- ***The opportunity to request a separate meeting with the assessor/mediator at any stage, to disclose violence and discuss any concerns;***
- ***Advice that an agreement does not have to be reached;***
- ***Advice that mediation is not usually considered appropriate in domestic violence situations; and,***
- ***Advice that participation is entirely voluntary, and that there is an option to withdraw at any point without fear of court sanctions.***

Assessment of risk

The Interim Report proposes that mediators should have a central role assessing suitability for Dispute Resolution Services, including PIPs and mediation. It stresses that they will need training and experience as well as support and continuing professional development.⁷⁸

We agree that given the proposed role of mediators, it will be particularly important that “all practitioners are able to assess risks of domestic violence or child protection concerns”⁷⁹ and set out our recommendations below in that regard.

However, we query whether mediators, who would be procured by the new Family Justice Service, would be best placed or indeed happy to perform this role. Risk assessments are currently carried out by Cafcass officers, who have access to important information such as police and local authority records. Mediators would not have access to this or other information.

Given that Cafcass has performed this role and developed guidelines for risk assessments, we would recommend that the role of initial assessment should be carried out by the organisation that will succeed Cafcass and perform court social work services within the new Family Justice Service in England. The successor organisation must also receive continuous and ongoing training from specialist domestic violence agencies.

Quality and protocol for assessments

We welcome the emphasis that the Review Panel places on the need for assessments concerning suitability for mediation to be developed carefully, and the recognition that “unless there is proper design of the process and training and

⁷⁷ HMICA 2005, Para 3.33-4, page 35.

⁷⁸ Interim Report, para 5.133, page 174.

⁷⁹ Interim Report, para 5.136, page 175.

supervision of mediators ... people who are not suitable for mediation can be pushed into it, with consequent risks to parents and children.”⁸⁰

There is emerging research suggesting that screening during Mediation Information and Assessment Meetings (MIAM) conducted under the new **Practice Direction 3A – Pre-Application Protocol for Mediation information and assessment**⁸¹ by mediators may not be as rigorous as required, and that an average of only 4 minutes is spent addressing possible issues of domestic violence.⁸²

It is essential that a clear and standardised protocol is established for the identification and management of risk related to domestic violence and child welfare concerns by risk assessors under the proposed system. Such a protocol must reflect the reality of domestic violence; for example, the low and delayed rate of disclosure that is a feature of domestic violence cases, and the reality that many women will not identify what they have experienced as domestic violence.

It is well established that an overwhelming majority of domestic violence survivors do not report instances of violence to statutory agencies, and many will delay disclosure (or never disclose) violence to a non-statutory service such as a specialist voluntary or community organisation. For example, only a minority of incidents of domestic violence are reported to the police, varying between 23% and 35%.⁸³ In addition to this, many women who have experienced domestic violence do not identify their experience as such. This is particularly, though not always, the case where the violence has not been physical in nature. Those conducting the assessments must be highly trained in the dynamics of domestic violence and alert to these realities. It takes a highly skilled risk assessor to identify the complex inter-personal power dynamics that might be at play in a relationship.

In this light, we recommend that:

- ***A clear protocol/methodology must be developed and monitored for the assessment of risk and any other factors that preclude the use of mediation. This should include clear guidelines on the length of time that an initial assessment should take;***
- ***Such a protocol should build upon good practice that has already been developed, such as the Domestic Abuse Toolkit developed by Cafcass, and must be informed through collaborative working with specialist domestic violence organisations, in particular those with expertise in conducting risk assessments,***⁸⁴
- ***Assessors (and mediators) must be highly trained in the dynamics of domestic violence and receive continuous training from specialist domestic violence trainers;***

⁸⁰ Interim Report, para 5.128, page 173.

⁸¹ This protocol entered into force on 6 April 2011, see Practice Direction 3A – Pre-Application Protocol for Mediation information and assessment, online:

http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure/rules/family/practice_directions/pd_part_03a.htm#IDAPGQLC.

⁸² Paulette Morris, *They didn't do it then but they do it now: mediation and violence*, paper delivered at the SLSA Annual Conference, University of Sussex, 14 April 2011.

⁸³ Women's Aid, www.womensaid.org.uk.

⁸⁴ For example, Respect has conducted a review, with support from the Domestic Violence Intervention Project and Ahimsa, Safer Families, which addresses what an expert domestic violence risk assessment should cover; how assessment should be conducted; the knowledge, skills and training required by experts; and recommendations on how improve consistency of expert assessments. See Newman, Chris., *Expert Domestic Violence Risk Assessments in the Family Courts*, Respect, 2010, online: http://www.respect.uk.net/data/files/domestic_violence_risk_assessment_in_family_court.pdf.

- ***The regular review of standards and conduct of risk assessments, as well as robust monitoring of their implementation; and,***
- ***Where mediation does take place, appropriate safeguards and specialist and ongoing training of mediators must be in place to ensure any violence can be disclosed and the case immediately routed to court.***

Mediation and cases that do not involve domestic violence

Finally, we recommend that the Review Panel recognise the positive role of the court in the resolution of family disputes. The emphasis in the Interim Report is to divert more cases away from court and encourage families to reach their own agreements. Whilst we recognise the positive role that mediation and other alternative dispute mechanisms can play in supporting families to come to their own arrangements post-separation, these proposals cannot be seen in isolation from the current Ministry of Justice proposals for the reform of legal aid in England and Wales.

We believe that legal aid for legal advice and representation is necessary if mediation is to be a meaningful option for couples following relationship breakdown. For example, in relation to financial arrangements following relationship breakdown, individuals who want to resolve their dispute through mediation need legal advice on their entitlement, assistance getting disclosure and advice on any settlement proposals made. Legal aid is also necessary to turn any agreement reached in mediation into a binding legal agreement that can be enforced. A 2008 Cabinet Office and Department for Children, Schools and Families report found that even where domestic violence was not an issue, only 25 percent of couples found that mediation was the sole solution to their contact disputes.⁸⁵

While mediation is a valuable tool for couples whose relationship breaks down, it is not a substitute for the adequate provision of legal advice and representation.⁸⁶

The two-track system

The Interim Report also recommends that those cases which reach court are assigned to a “simple” or “complex” track system. We recognise that on paper this seems like a positive solution which would save both time and money. It is proposed that the “simple” track is likely to address relatively simple cases without allegations of domestic abuse, and where no findings of fact are required. However, we are concerned about the potential for a case involving domestic violence to be assigned to the “simple” track and the potentially dangerous outcomes for women.

Although we welcome that the Interim Report recommends that judges would have the power to move a case onto the “complex” track at any stage, and proposes that there should be judicial continuity in these cases, we consider that strong safeguards must be in place, including ongoing training for judges to ensure that they fully understand the dynamics of domestic violence. A particular concern is that domestic violence is often raised as an issue late in proceedings. This happens for a variety of reasons, including those related to the low rate of disclosure and delayed disclosure that is a common feature of domestic violence cases, and because domestic violence

⁸⁵ Cabinet Office and Department for Children, Schools and Families, (2008), *Families in Britain: An Evidence Paper*, page 57, available at: http://www.cabinetoffice.gov.uk/media/111945/families_in_britain.pdf.

⁸⁶ See, Rights of Women, *Rights of Women's response to the consultation 'Proposals for the Reform of Legal Aid in England and Wales'*, February 2011, available at: http://www.rightsofwomen.org.uk/pdfs/Policy/Rights_of_Womens_response_to_the_Ministry_of_Justice_s_legal_aid_proposals_2011.pdf.

might not be taken seriously by legal advisors or staff in the family justice system. We believe that this point requires further discussion with a wide range of stakeholders including the judiciary and specialist domestic violence organisations.

Q24: Do you have any other comments you wish to make on our proposals for private law?

Yes, we would like to comment on the following issues:

- Linking contact and child maintenance;
- members of the public attending hearings;
- contact with grandparents;
- the use of experts in proceedings; and,
- The online information hub.

Linking Contact and Maintenance

In January 2011, the Department for Work and Pensions (DWP) published a green paper concerning child maintenance, called “Strengthening families, promoting parental responsibility: the future of child maintenance.”⁸⁷ The DWP set out in that paper that it had requested the Family Justice Review panel to consider whether there might be circumstances when it would be right to link maintenance and contact. The Review Panel has concluded that they “firmly believe, in the interests of the child, that there should be no automatic link between contact and maintenance”.⁸⁸

However, we are very concerned that the Review Panel has recommended that:

“when contact is continually frustrated and it is in the child’s best interests, we think there is a case for providing an additional enforcement mechanism for the courts to alter or suspend the payment of maintenance via the Child Maintenance Enforcement Commission.”⁸⁹

It is our firm position that it is entirely inappropriate to link contact and maintenance and in no circumstances could it be in the best interests of the child. The emphasis in such a scenario must be on investigating the motivation behind non-compliance with contact arrangements and where necessary, the enforcement of compliance in a manner that does not affect the welfare or best interests of the child. In our experience, contact arrangements, including pick-up and drop-off, are often flashpoints where the risk of domestic violence incidents are high and such possibilities must be investigated.

Where enforcement is required, a range of enforcement options already exist. However, we stress that any financial impact imposed on the Parent with Care (PWC) for non-compliance with contact arrangements would impact directly on the welfare of the child. This recommendation is particularly striking as the financial contribution under consideration is specifically designed to help “towards a child’s

⁸⁷ Department for Work and Pensions, *Strengthening families, promoting parental responsibility: the future of child maintenance*, January 2011, online: <http://www.dwp.gov.uk/consultations/2011/strengthening-families.shtml>. Rights of Women submitted a response to that consultation which can be viewed online here: http://www.rightsofwomen.org.uk/pdfs/Policy/The_future_of_child_maintenance-Rights_of_Women_response.pdf. Women’s Aid also submitted a response which can be made available to the Review Panel.

⁸⁸ Interim Report, para 127, page 24.

⁸⁹ *Ibid.*

everyday living costs”.⁹⁰ The flip-side of this argument would suggest that non-compliance of the Non-Resident Parent (NRP) with maintenance arrangements should impact on contact arrangements, a position which, as the Review Panel has highlighted, would also not be in the best interests of the child.

This recommendation also raises gender equality concerns as if implemented, it would have a disproportionate and negative impact on women: women make up 95% of PWCs within the current statutory service caseload, with a similar proportion of NRPs being male (although research has suggested that for the overall eligible population, the proportion of PWCs who are female is closer to 97%).⁹¹

We urge the Review Panel to reconsider this recommendation; it is entirely inappropriate to link contact and maintenance and in no circumstances could it be in the best interests of the child.

Members of public attending hearings

The Interim Report explores the possibility of the introduction of a general principle that people – including the media – should be able to attend court hearings but not be allowed to say or do anything that might identify the parties in public. The report cites with approval an example from Australia where:

“members of the public and those waiting for their own cases to be heard could sit at the back of the court while other proceedings were in progress. This had advantages in terms of parties – particularly people representing themselves – being able to see how their own cases would be handled, and no one we met identified any problems with it.”⁹²

Whilst this finding has not been included in the main recommendations of the Interim Report, we feel it is important to comment on it.

Although on its face this proposal may be beneficial to court users unfamiliar with the court process and setting, it introduces the potential for the intimidation and harassment of parties to proceedings by other members of the public, including the family and friends of the other party. This is a very real potential in domestic violence cases, where family members often acquiesce or contribute to the violence and even subtle looks or body language can be used to threaten and intimidate. There is also the very real potential that in cases such as those raising welfare and domestic violence issues, members of the public known to one or both of the litigants would be able to sit in and listen to intimate and distressing experiences.

In our experience working with survivors of domestic violence, we consider that this is likely to threaten the safety of the litigant by increasing the potential for intimidation and abuse before, during and after a hearing; hinder the capacity of the litigant to make their case fairly; and at minimum make the court experience more stressful than it already is.

We agree that there is a general lack of availability of accurate and timely information and advice for court users and our concerns in this regard have been compounded

⁹⁰ Child Support Agency, *What is child maintenance and how does it affect me?* Online: <http://www.csa.gov.uk/en/PDF/leaflets/new/CSL301.pdf>.

⁹¹ Department for Work and Pensions, *Equality Impact Assessment, Strengthening families, promoting parental responsibility: the future of child maintenance*, January 2011, p9, online:

<http://www.dwp.gov.uk/docs/eia-strengthening-families.pdf>.

⁹² Interim Report, paras 3.18-9, pages 55-56.

by the recent Ministry of Justice proposals concerning the future of civil legal aid. Rights of Women runs a free legal advice line concerning family law matters; the increasing number of calls received by this line indicates that quality legal information is in increasing demand – and is a scarce resource.⁹³

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. Whilst this cannot be seen in isolation from recent proposals on legal aid, improvements will also require a more proactive approach on the part of the Courts Service / new Family Justice Service.

In this light, we recommend that instead of permitting the public into hearings, the Review explores the potential to:

- ***Increase the use of McKenzie friends who can be an invaluable resource for supporting litigants' understanding of court processes and increasing confidence at court;***
- ***Produce film clips of different scenarios and hearings – a tool which is already used effectively by HMCS; such information could be integrated into the proposed “information hub”; and,***
- ***Ensure that litigants are able to arrange pre-hearing court visits to become familiar with the court buildings; we recommend that this should be proactively offered to any litigants raising domestic violence or vulnerability concerns.***

Contact and grandparents

We welcome the recommendation that the need for grandparents to apply for leave of the court before making an application for contact should remain. Whilst recognising that a continuing relationship with grandparents can be important for children when their parents separate, we consider that the additional step of obtaining leave from the court ensures that only legitimate applications are dealt with in court. Removing this requirement would serve to increase applications for contact and put further pressure on a family justice system which is already under strain, increase delays and litigation within families, to the detriment of the children involved.

We further reiterate our position as outlined in Women's Aid's response to the earlier call for evidence, which is quoted in the Interim Report:

“While many grandparents can provide a vital positive role, in our experience this can sometimes be negative or harmful if it exacerbates and intensifies existing disputes or risks. WE have seen some examples of cases where grandparents perpetuate or collude in abuse against a child and their non-abusing parent, especially if they are facilitating contact between the child and the abusive parent. In our view, for a court to grant contact with grandparents this should be assessed for risk in exactly the same way as for an abusive parent.”⁹⁴

The use of experts in proceedings

⁹³ We know that the demand for the service is not met: Rights of Women register approximately 90,000 attempted calls to their telephone advice lines each year, with the capacity to handle just 1,500.

⁹⁴ Interim Report, para 5.84, page 161.

We are very concerned about the focus in the Interim Report on a stated need to reduce the use of expert reports in family law proceedings. The report sets out that:

“We need to reduce reliance on expert reports. The criteria against which it is considered necessary for a judge to order expert reports should be made more explicit and strict. We seek views during the consultation period on what the criteria should be and how they might be expressed.”⁹⁵

Whilst this recommendation is made in respect of public law proceedings in the Interim Report, we feel it is an issue relevant to both public and private law proceedings. The Interim Report asserts that:

“We now have a culture, created by pressures from parents combined with decisions from the Court of Appeal (and perhaps part of a national trend), where the need for additional assessments and the use of multiple experts is routinely accepted. The increasing numbers of these coupled with the time taken to secure them – partly from the nature of the assessments and partly from a shortage of qualified experts – contributes to delay.”⁹⁶

We firmly believe that where domestic violence is a concern, expert assessments play a vital role in ensuring outcomes that are safe for adult and children parties to proceedings. Furthermore, these assessments must be carried out by appropriately and highly qualified experts with relevant and current experience. We are very concerned to stress that any efforts to reduce time delays and costs associated with proceedings must not undermine the focus on ensuring safe outcomes.

We recommend that any proposals concerning the use of expert assessments must be informed through collaborative working with specialist domestic violence organisations, in particular those with expertise in conducting risk assessments.⁹⁷

In this regard, we endorse and draw to the attention of the Review Panel the recommendations contained in the report, *Expert Domestic Violence Risk Assessments in the Family Courts*, published by Respect in 2010:

“Those commissioning domestic violence risk assessments should seek out practitioners who have applied knowledge of risk assessment methodology, and the capacity to apply findings from the research literature to the specifics of the case, as well as experience of direct work with domestic violence perpetrators and victims, preferably in treatment settings (it cannot be automatically assumed that mental health professionals, or those with experience in other areas of child protection work, have the experience and expertise to assess the dynamics of domestic violence).

Given the high level of risk in some domestic violence cases, it is recommended that assessors should be able to demonstrate that they have access to guaranteed, high-quality supervision/consultation time,

⁹⁵ Interim Report, Para 89, page 18.

⁹⁶ Interim Report, para 63, page 14.

⁹⁷ Newman, Chris., *Expert Domestic Violence Risk Assessments in the Family Courts*, Respect, 2010, paras 5-6, online: http://www.respect.uk.net/data/files/domestic_violence_risk_assessment_in_family_court.pdf.

focused on case planning, constructive challenge, detailed proofreading of reports and professional development.”⁹⁸

The online information hub

The Interim Report recommends that an online information hub and helpline should be established for England and Wales to give information and support for couples to resolve issues following divorce or separation outside court.⁹⁹ It sets out that the hub will “provide a single point of access for information, legal documents and applications for family related issues. The online system would be supplemented with a telephone helpline and paper based information for those without access to the internet or who need further information on a specific issue.”¹⁰⁰

We recommend that the hub have clearly marked and dedicated information pages, written in accessible language, about domestic violence and other forms of violence against women. These pages should be developed in close consultation with specialist violence against women and girls organisations and set out clearly:

- ***Prominent information on emergency routes to court and civil remedies available to address the violence (including non-molestation orders, occupation orders, forced marriage protection orders)***
- ***clear information on the support available within the new Family Justice Service for any individual who has experienced gender-based violence and is involved or will be involved in proceedings;***
- ***clear information that mediation and other alternative dispute resolution services are not appropriate in domestic violence cases;***
- ***the policy and procedure related to family law cases that involve domestic violence and other forms of gender-based violence; and,***
- ***links to statutory and voluntary/community organisations that can provide legal, practical and psycho-social support to survivors.***

Particular consideration must be given in the design of the hub to the access needs of all service users, including needs related to a disability and level of English literacy skills.

Rights of Women and Women’s Aid would welcome the opportunity to discuss any of these issues with the Review Panel and the Ministry of Justice.

For any further information about the issues raised in this consultation response please contact:

⁹⁸ Newman, Chris., *Expert Domestic Violence Risk Assessments in the Family Courts*, Respect, 2010, paras 5-6, online:

http://www.respect.uk.net/data/files/domestic_violence_risk_assessment_in_family_court.pdf.

⁹⁹ Interim Report, page 30 (recommendations).

¹⁰⁰ Interim Report, para 5.114, page 169.

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