CFLQ

Articles

‘We don’t know what it is we don’t know’: how austerity has undermined the courts’ access to information in child arrangements cases involving domestic abuse

How austerity has undermined the courts’ access to information in child arrangements cases involving domestic abuse

Joanna Harwood*

‘We don’t know what it is we don’t know’\: how austerity has undermined the courts’ access to information in child arrangements cases involving domestic abuse: Joanna Harwood

Harwood, Joanna: ‘We don’t know what it is we don’t know’\: how austerity has undermined the courts’ access to information in child arrangements cases involving domestic abuse

Child arrangements orders – domestic abuse – austerity – legal aid – Cafcass – expert evidence

Example3Begin

This article explores the impact of austerity on child arrangements disputes in which domestic abuse is alleged, arguing that financial tensions have created an environment in which there is a high risk of unsafe contact arrangements being made. The article presents a sub-set of findings from the first major empirical study to have consulted the key professional actors on practice within child arrangements disputes involving domestic abuse since the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The study involved 41 semi-structured interviews with judges, barristers, solicitors, Cafcass practitioners and domestic abuse organisations, and provides empirical insight into the worrying impact of financial tensions on the three principal sources of information to the court: litigants, Cafcass and experts. It critiques the effect of austerity-driven changes, such as the accessibility of legal aid, the problematic nature of cross-examination and the adaptability of the judicial role. It documents how both the quantity and quality of information available to the courts have been undermined, which matters as the courts cannot assess properly the risks and benefits of contact without robust information. It also addresses the inadequacies of recent Government responses to the problems caused by

* Lecturer in Law, School of Law, University of Essex, Colchester, Essex, United Kingdom. This research was funded by the Chancellor’s Scholarship at the University of Warwick and the Economic and Social Research Council. Acknowledgements: The author would like to thank Dr Matthew Stone, Dr Maebh Harding, the anonymous reviewers and the editor for their insightful and constructive comments on earlier drafts, as well as the attendees of the Society of Legal Scholars Conference 2019 for their helpful feedback. Any errors and omissions are those of the author.

LASPO.

Example3End

Introduction

The courts' handling of 'contact' disputes in which domestic abuse is alleged has come under immense criticism for several years, with the law and practice recently described as a 'cycle of failure'.[1] The repeated concern raised by academic research and women's groups has been that children and parents affected by domestic abuse are left unprotected by the legal framework and practice, in which the promotion of contact dwarfs concerns over safety. The intensity of recent concern resulted in the Ministry of Justice commissioning an expert review, which included a public call for evidence, on the treatment of domestic abuse in the family courts.[2] Within this context of intense concern about current practice, a key but underexplored issue is whether the courts are being properly supported to access, assess and act on the information necessary to make decisions which promote the safety and well-being of children, following the cuts to legal aid and broader financial tensions associated with a climate of austerity.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) brought about unprecedented cuts to the funding of legal advice within the family justice system. LASPO removed all private law disputes from the scope of legal aid, creating a limited exception for parents alleging domestic abuse.[3] In order to access legal aid, parents alleging domestic abuse must produce evidence to support their application[4] and satisfy the means test, with both requirements housed within the 'domestic violence evidence gateway'.[5] In practice, even the legal aid retained for victims of abuse has been extremely difficult to access, with victims having to resort to self-representation. The period since LASPO has also seen the tightening of access to psychological and psychiatric expert evidence,[6] and Cafcass has had to respond

[1] R Hunter, A Barnett and F Kaganas, 'Introduction: Contact and Domestic Abuse' (2018) 40(4) *Journal of Social Welfare and Family Law* 401, 401. The terms 'contact' and 'residence' were replaced with 'child arrangements orders' by the Children and Families Act 2014, but in the light of 'child arrangements orders' not distinguishing between contact and residence, 'contact' is used throughout this article.

[2] This review ran from June to September of this year. At the time of writing, the outcome is unknown. Influential in the run up to the review was significant coverage by the BBC's Victoria Derbyshire programme of this issue and a call for an inquiry by over 120 MPs (www.bbc.co.uk/news/uk-48230618, last accessed 18 October 2019). See also: Parental Rights (Rapists) and Family Courts Bill 2017–19; *Hansard*, HC Deb, vol 658, col 343 (10 April 2019).

[3] Legal aid was also retained for cases in which a parent poses a risk to children: Legal Aid Agency, *The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 – Evidence Requirements for Private Family Law Matters* (8 January 2018): www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672143/evidence-requirements-private-family-law-matters-guidance-version-8.pdf, last accessed 18 October 2019.

[4] Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098), Sch 1, paras 1–22.

[5] www.gov.uk/legal-aid/domestic-abuse-or-violence, last accessed 18 October 2019; Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch 1, Part 1, para 12.

[6] Amendments were made to the Family Procedure Rules 2010, r 25.1 in January 2013, which were then encapsulated within the Children and Families Act 2014, s 13. See also: *Re C (A Child) (Procedural Requirements of a Part 25 Application)* [2015] EWCA Civ 539, [2016] 1 FLR 707; SJ Brown, LA Craig, R Crookes et al, *The Use of Experts in Family Law: Understanding the Processes for Commissioning Experts and the Contribution They Make to the Family Court* (Ministry of Justice, 2015).

to increasing demand on its services.[7]

The purpose of this article is to share what is, to date, the only empirical insight since LASPO into the impact of these financial tensions on the three principal sources of information to the court within contact disputes in which domestic abuse is alleged:[8] the litigants, Cafcass and experts. It will do this by presenting a sub-set of findings from the author's empirical study of the perceptions of the key professional actors charged with resolving contact disputes in which domestic abuse is alleged, which consisted of 41 interviews with members of the judiciary, barristers, solicitors, Cafcass practitioners and representatives from domestic abuse organisations. Whilst financial tensions were not the focus of the study, concern about these tensions was one of the main issues which united interviewees. Through the lens of the perspectives of these key professional actors, this article will demonstrate how financial tensions within the family justice system have given rise to procedural and substantive problems, which collectively undermine the child-focused protectionist function of family law[9] and create an environment in which there is a high risk of unsafe contact arrangements being made.

This article first sets out the methodology and then the context of the study, situating the findings which follow within broader debates on the impact of neoliberal ideology on access to justice and the functioning of the family justice system. The main findings of the study explore the concerns of interviewees about the restrictions in the courts' access to information from litigants, Cafcass and experts, charting the way in which the courts' ability to access, assess and act on information has been undermined. In exploring these findings, the article documents the conflicts experienced by judges in attempting to adapt their role to compensate for the problems of information deficit. The article also considers how far recent developments are likely to have allayed the concerns expressed, focusing within the final section on the reforms housed within the Domestic Abuse Bill. It will be concluded that neither this Bill, nor other recent developments,[10] go far enough in remedying the negative impact of LASPO and the broader financial consequences associated with austerity.

---

[7] 'Cafcass' stands for the Children and Family Courts Advisory and Support Service. See most recently: Cafcass, *2018–19 Annual Report and Accounts*, HC 2292 (Cafcass, 2019), 10–11. As noted below, despite resourcing challenges, Cafcass was rated 'Outstanding' by Ofsted in its most recent inspection: www.cafcass.gov.uk/about-cafcass/transparency-information/results-ofsteds-inspection-cafcass/, last accessed 18 October 2019.

[8] The lack of recent empirical research into the courts' and professionals' handling of contact disputes in which domestic abuse is alleged has been emphasised: A Barnett, '"Greater than the Mere Sum of its Parts": Coercive Control and the Question of Proof' [2017] CFLQ 379, 387. See also: L Caffrey, 'The Importance of Perceived Organisational Goals: A Systems Thinking Approach to Understanding Child Safeguarding in the Context of Domestic Abuse' (2017) 26(5) *Child Abuse Review* 339, 348. The last study to have consulted legal and Cafcass practitioners was published in 2014: A Barnett, 'Contact At All Costs? Domestic Violence, Child Contact and the Practices of the Family Courts and Professionals' (PhD thesis, Brunel University 2014), published in A Barnett, 'Contact At All Costs? Domestic Violence and Children's Welfare' [2014] CFLQ 439. The last study to have consulted judges was published in 2013: R Hunter and A Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Cases: Domestic Violence and Harm* (Family Justice Council, 2013).

[9] There is a vast literature on the functions of family law, but the protection of children is a key element. See, for example: Sir Ernest Ryder, 'The Role of the Justice System in Decision-Making for Children' [2019] Fam Law 144, 152. For an exploration of the functions of family law in the context of 'just' outcomes and out-of-court family dispute resolution, see A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, 2017), 6–10, 174–204.

[10] The January 2018 reforms to the 'domestic violence evidence gateway' and the LASPO Post-Implementation Review.

Methodology

This was an exploratory qualitative study aimed at understanding the perspectives of the key professional actors on court-adjudicated contact disputes in which domestic abuse is alleged, found or proven. This article focuses on just one element of the research project: practitioners' perspectives of the impact of financial tensions on the courts' resolution of disputes. The study also explored practitioners' perspectives on the way in which domestic abuse is defined and evidenced within contact proceedings, the outcomes reached in cases in which domestic abuse is found or proven and the impact of the statutory presumption of parental involvement, which was introduced into the Children Act 1989 by the Children and Families Act 2014. These findings are presented elsewhere.[11]

The study comprised 10 semi-structured interviews with judges (three magistrates, five District Judges and two Circuit Judges), eight barristers, 10 solicitors, 10 Cafcass practitioners and three representatives from organisations that support victims of domestic abuse. The interviews were conducted within one county in England between February 2016 and April 2017.[12] All of the magistrates, District and Circuit Judges within the research county were contacted with an invitation to interview.[13] The same approach was followed for the Cafcass interviews.[14] An invitation to interview was sent to every barrister and solicitor in 10 locations within the research county who was listed as practising in private family law within four practice directories.[15] The perspectives of domestic abuse organisations were sought in the light of their involvement in the court process supporting parents affected by domestic abuse. National domestic abuse organisations were contacted because it became apparent that resourcing limitations affecting the local refuge and outreach communities within the research county restricted their capacity to participate in research.[16] A form of stratified sampling was used in order to include interviewees with different roles in, and experiences of, the family justice system.[17] Within each category, every practitioner who responded to the invitation for interview was interviewed. In the light of the sample size and its self-selecting nature, the sample was intended to be indicative rather than representative.

Some of the interview questions were pre-set, with interviewees across the practitioner groups asked an open question on their experiences of cases involving litigants in person in the light of legal aid reform.[18] The interviews were semi-structured, meaning that interviewees had the opportunity to raise new issues and pre-set issues could be explored in greater depth. The restrictions in access to expert evidence and the resourcing of Cafcass

---

[11] J Harwood, 'Child Arrangements Orders (Contact) and Domestic Abuse – An Exploration of the Law and Practice' (PhD thesis, University of Warwick, 2018).

[12] All interviews took place face-to-face, apart from one telephone interview.

[13] Permission was obtained from the President of the Family Division.

[14] Permission was obtained through Cafcass' research permission and ethics channels.

[15] These were: Bar Council Direct Access Portal; Waterlow's Directory; Law Society's 'Find a Solicitor'; and Resolution's 'Find a Member'. Some barristers were identified through the chambers' websites listed on these directories.

[16] Representatives from two national organisations and one local refuge were interviewed.

[17] Within the interviews with the legal practitioners, interviewees were asked if they predominantly represented alleged victims or alleged perpetrators in order to ensure the sample contained a diversity of experiences.

[18] In the light of the importance of avoiding the judiciary being drawn into areas of government policy and political controversy, the judicial interviewees were asked only to comment on their experiences of hearing cases involving litigants in person. Any comments on legal aid reform were volunteered by these interviewees.

were both identified as problems by interviewees, rather than being included within the original interview schedules. As a result, these topics were not discussed with every interviewee. The interview questions were designed to gather factual information on the current resolution of disputes, with acknowledgement that interviewees' responses would be shaped by their subjective experiences.[19]

Each of the interviews was audio-recorded and transcribed verbatim. A grounded/inductive thematic analysis using NVivo was conducted on the data. In order to ensure that no interviewee would come to harm through participation in the research, all interviewees were anonymised, as was the county in which the research took place. Since there are relatively few judges practising nationally, the genders of the judges have not been revealed, in case this could lead to the research county being identified through jigsaw recognition.

Changes to family law in times of austerity

Although presented as a necessary financial measure to concentrate resources on those most in need,[20] it has been widely argued that the legal aid cuts introduced by LASPO were not only driven by financial concerns, but were, at their core, underpinned by a neoliberal ideology.[21] 'Neoliberalism' represents the prioritising of 'market values' over 'welfare values', in which state and public service influence is minimised.[22] Within the context of family justice, this translates into an emphasis on private ordering and a rejection of the protectionist function of the family court. Rosemary Hunter et al have argued that the message sent by the legal aid cuts has been that family law disputes do not belong in the court arena and should be resolved privately by the parties.[23] The reforms were thus as much an ideological push-back against the protectionist function of the family court as they were a product of economic circumstances.[24]

The result of this has been what Jess Mant and Julie Wallbank have described as 'the disappearing subject of family law', with shrinking numbers of firms offering legally aided representation and increasing numbers of parents having to look outside the legal system, or resort to self-representation, as a result of no longer being eligible for legal aid.[25] That the introduction of LASPO in 2013 has led to a significant increase in the number of self-

---

[19] For methodological discussion, see, for example, M Bunge, 'Realism and Antirealism in Social Science' (1993) 35 *Theory and Decision* 207, 231.

[20] Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response*, Cm 8072 (2011), 3.

[21] R Hunter, A Barlow, J Smithson and J Ewing, 'Access to What? LASPO and Mediation', in A Flynn and J Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017); R Hunter, 'Inducing Demand for Family Mediation – Before and After LASPO' (2017) 39(2) *Journal of Social Welfare and Family Law* 189; F Kaganas, 'Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy' (2017) 39(2) *Journal of Social Welfare and Family Law* 168; J Mant, 'Neoliberalism, Family Law and the Cost of Access to Justice' (2017) 39(2) *Journal of Social Welfare and Family Law* 246. See further: J Mant and J Wallbank, 'The Mysterious Case of Disappearing Family Law and the Shrinking Vulnerable Subject: the Shifting Sands of Family Law's Jurisdiction' (2017) 26(5) *Social & Legal Studies* 629; Barlow et al, above n 9; M Maclean and J Eekelaar, *After the Act: Access to Family Justice after LASPO* (Hart Publishing, 2019), 23–25.

[22] Barlow et al, above n 9, 2.

[23] Hunter et al, above n 21.

[24] Ibid; J Eekelaar, '"Not of the Highest Importance": Family Justice Under Threat' (2011) 33(4) *Journal of Social Welfare and Family Law* 311, 315.

[25] Mant and Wallbank, above n 21, 631.

representing litigants is clear. In 2018, in 37 percent of private law disposals neither the applicant nor respondent had legal representation, compared to 13 percent in 2012.[26] Both parties were represented in only 20 percent of disposals in 2018, compared to just under half (45 percent) in 2012.[27]

In theory, parents alleging domestic abuse have always been exempted from the legal aid cuts and the neoliberal emphasis on private ordering. The stated position has been that domestic abuse victims were among those most in need of financial support and that cases involving domestic abuse justified the engagement of the protectionist function of the family court.[28] Domestic abuse victims, however, have not always been able to access legal aid. The lack of systematic monitoring of the numbers of self-representing litigants in court-adjudicated contact disputes in which domestic abuse is alleged makes precise assessments difficult, but significant evidence was amassed post-LASPO which demonstrated the lack of access to legal aid for many victims involved in these disputes,[29] despite the changes made to the regulations in response to the level of concern.

Following monitoring by Rights of Women and Women's Aid,[30] and a successful legal challenge in the Court of Appeal,[31] a number of changes were made to the domestic violence evidence gateway.[32] Most significantly, in January 2018 the time limit within the gateway was removed and additional forms of evidence introduced.[33] It appears that the changes are opening up access to legal representation,[34] but gaps remain. Reports continue to be made that many victims cannot satisfy the evidence requirements[35] and that the means test is

---

[26] Ministry of Justice and National Statistics, *Family Court Statistics Quarterly, England and Wales, Annual 2018* including *October to December 2018* (28 March 2019), 7.

[27] Ibid.

[28] Ministry of Justice, above n 20, 4.

[29] Most recently, see for example the submissions of Rights of Women and Resolution to the Post-Implementation Review of LASPO: Ministry of Justice, *Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, CP 37 (HMSO, 2019), 152.

[30] See n 32 below.

[31] *R (Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91, [2016] 1 WLR 2543.

[32] In 2014, new and amended forms of evidence were introduced, such as evidence of police bail. In 2016, the time limit for admissible evidence was extended from two to five years and a new provision for the assessment of evidence of financial abuse was introduced. See: Rights of Women and Women's Aid, *Evidencing Domestic Violence: A Barrier to Family Law Legal Aid* (Rights of Women, 2013); Rights of Women and Women's Aid, *Evidencing Domestic Violence: A Year On* (Rights of Women, 2014); Rights of Women and Women's Aid, *Evidencing Domestic Violence: Reviewing the Amended Regulations* (Rights of Women, 2014); Rights of Women and Women's Aid, *Evidencing Domestic Violence: Nearly 3 Years on* (Rights of Women, 2015); *Eighth Report – Impact of Changes to Civil Legal Aid Under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, HC 311 (House of Commons Justice Committee, 2015); F Syposz, *Research Investigating the Domestic Violence Evidential Requirements for Legal Aid in Private Family Disputes* (Ministry of Justice, 2017).

[33] Civil Legal Aid (Procedure) (Amendment) (No 2) Regulations 2017 (SI 2017/1237). This change post-dated the conclusion of the interviews for the author's study.

[34] April to June 2019 saw an 18 percent increase in the number of applications for family civil representation supported by evidence of domestic violence or child abuse compared to the same period of the previous year, with a 19 percent increase in the number of applications granted over this period: Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics Quarterly: England and Wales: April to June 2019* (26 September 2019), 9.

[35] See, for example, the concerns of Resolution and Rights of Women: Ministry of Justice, above n 29.

unacceptably low.[36] Concerns have also been raised that public awareness of the evidence requirements is poor,[37] and that victims are being advised that they do not satisfy the gateway criteria, even when they do.[38] And many victims do not report the abuse they have experienced at all, and thus remain ineligible for legal aid, despite the amendments.[39]

It does not appear, therefore, that the 2018 amendments have gone far enough, and so the problems identified by interviewees below on the difficulty in obtaining information from litigants in person are likely to be ongoing. Following the Post-Implementation Review of LASPO, the Government has committed itself to continuing to review the support available to domestic abuse victims,[40] as well as considering alternative models for delivering family legal aid[41] and reviewing the means test.[42] But major change does not appear to be forthcoming, again underlining the ongoing relevance of the findings from this study.

Whilst the protectionist function of family law may have been retained in theory for the cases involving domestic abuse, it has been undermined in practice. The gaps in legal aid provision for victims of domestic abuse mean that victims who cannot access legal aid are left to navigate the court system alone, a system which relies on the presence of legal representation. The resolution of contact disputes in which domestic abuse is alleged is built on an evidence-based model which assumes that the courts will be able to understand the experiences of litigants, test allegations of domestic abuse and access the information necessary to assess risk. As explored below, this model is now less sustainable following LASPO and the broader financial tensions arising from a climate of austerity, with problems with information deficit arising at each stage of the court process.

An unintentional by-product of this neoliberal shift towards private ordering is that important questions are being raised about the role of judges. It has been suggested that the increase in the number of litigants in person is challenging the traditional role of the judge as the 'passive arbiter',[43] who hears each party's account at arm's length and reaches a decision.[44] This challenge feeds into broader debates on the meaning of access to justice within the family

---

[36] For example: Liberty, *Liberty's Response to the Government's Consultation on the Domestic Violence and Abuse Bill 2018* (May 2018), 13; Refuge, *Transforming the Response to Domestic Abuse: Consultation Submission from Refuge* (May 2018), 27–28, 37; Ministry of Justice, above n 29. This concern was also raised by the domestic abuse organisations within the author's study.

[37] See, for example, the concerns of Resolution, Rights of Women and Women's Aid: Ministry of Justice, above n 29, 152. The lack of monitoring of what is happening to domestic abuse victims who believe they are ineligible for legal aid and do not enter the court system as a result also remains a major concern. See further: above n 32; R Hunter, 'Exploring the "LASPO Gap"' [2014] Fam Law 660.

[38] This has been a particular concern of Rights of Women: Ministry of Justice, above n 29, 152. See also: I Pereira, C Perry, H Greevy and H Shrimpton, *The Varying Paths to Justice: Mapping Problem Resolution Routes for Users and Non-Users of the Civil, Administrative and Family Justice Systems* (Ministry of Justice, 2015), 69.

[39] J Birchall and S Choudhry, '"What About My Right Not to be Abused?" Domestic Abuse, Human Rights and the Family Courts' (Women's Aid, 2018), 8; Ministry of Justice, above n 29, 152.

[40] Ministry of Justice, *Legal Support: The Way Ahead: An Action Plan to Deliver Better Support to People Experiencing Legal Problems*, CP 40 (HMSO, 2019), 13.

[41] Ibid.

[42] Ibid, 11.

[43] R Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16(3) *Social & Legal Studies* 405.

[44] Ibid; L Trinder, R Hunter, E Hitchings et al, *Litigants in Person in Private Family Law Cases* (Ministry of Justice, 2014), 101.

justice system and beyond.[45] The risk of substantive injustice – defined broadly in this article to mean the 'wrong' outcomes being reached[46] – is pushing judges towards a more interventionist approach, adopting a more active and inquisitorial role.[47] But this, in turn, threatens perceptions of procedural justice, in which each litigant needs to feel that an 'even-handed' approach has been applied in the resolution of their case.[48]

Against this backdrop of changes to the fabric of family justice, this article builds upon existing findings with a detailed study of the way in which these changes are playing out in practice within contact disputes in which domestic abuse is alleged. The findings document the information gaps left by LASPO, along with those linked to broader financial tensions.[49] The findings also underline the difficulties experienced by judges in attempting to resolve the conflict between safeguarding substantive and procedural justice within the constraints of the current framework. Before turning to these findings, the courts' use of information pre-LASPO is considered.

How did the courts and practitioners use information on domestic abuse pre-LASPO?

The constant theme within the pre-LASPO scholarship was concern about the dominance of a pro-contact culture in which domestic abuse allegations were minimised, rarely investigated and direct contact routinely ordered, even in cases of accepted, proven or found domestic

[45] For discussion within the context of the family justice system, see for example: Barlow et al, above n 9. For a broader discussion, see for example: Moorhead, above n 43.

[46] What constitutes a 'wrong' or 'right' outcome in this context is not straightforward, not least due to the lack of longitudinal data on the risks and benefits of post-separation contact with a domestically abusive parent to children. It is submitted here, at the most rudimentary level, that an example of a 'wrong' outcome would be contact taking place when the domestically abusive parent poses a risk of harm to the child or non-domestically abusive parent, which could stem from the court not having access to information on the full extent of domestic abuse perpetration. For discussion of the different interpretations of 'substantive justice' more broadly, see Barlow et al, above n 9, 7–10.

[47] See, for example, Moorhead, above n 43, 406; Trinder et al, above n 44, 101.

[48] Moorhead, above n 43, 406. See also: Barlow et al, above n 9, 8.

[49] This article focuses on the restrictions in access to expert psychological and psychiatric evidence, along with the funding pressures on Cafcass.

abuse.[50] It has been argued that domestic abuse was 'virtually ignored'[51] until the seminal case of *Re L (A Child) (Contact: Domestic Violence)*.[52] The period post-*Re L* has then been described as a 'cycle of failure', in which changes introduced over a number of years to improve policy and practice failed to effect meaningful change.[53] The use of information on domestic abuse by the courts,[54] lawyers[55] and Cafcass[56] to fit the narrative that children 'need' contact in particular attracted significant concern.[57]

The author's study is the first and, to date, only study to consult legal and child welfare practitioners on their perceptions of post-LASPO practice within the child contact and domestic abuse context. As explored below, one of the most alarming messages from the interviews is that the courts' access to information has been restricted by austerity-related measures to such an extent that children and parents affected by domestic abuse are being put at risk. One interpretation of this is that problems with practice could be resolved by the reinstatement of legal aid and a robust injection of funding to support the functioning of the family justice system. The pre-LASPO scholarship warns against this interpretation, as do the findings from other post-LASPO studies.[58] Crucially, however, the findings from this study reveal a compounding problem: that any enduring problems cannot be solved without addressing the information deficits caused by funding tensions, to which we now turn.

The findings – barriers to information gathering, assessment

[50] For example: C Smart, 'Power and the Politics of Child Custody' in C Smart and S Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (Routledge, 1989); C Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18(4) *Journal of Law and Society* 485; M Hester and L Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (Policy Press, 1996); R Bailey-Harris, J Barron and J Pearce, 'From Utility to Rights? The Presumption of Contact in Practice' (1999) 13 *International Journal of Law, Policy and the Family* 111; C Humphreys, 'Judicial Alienation Syndrome – Failures to Respond to Post-Separation Violence' [1999] Fam Law 313; F Kaganas and C Piper, 'Divorce and Domestic Violence' in S Day Sclater and C Piper (eds), *Undercurrents of Divorce* (Ashgate, 1999); A Barnett, 'Contact and Domestic Violence: The Ideological Divide', in J Bridgeman and D Monk (eds), *Feminist Perspectives on Child Law* (Cavendish, 2000); C Harrison, 'Implacably Hostile or Appropriately Protective?: Women Managing Child Contact in the Context of Domestic Violence' (2008) 14(4) *Violence Against Women* 381; M Hester, 'The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence' (2011) 41(5) *The British Journal of Social Work* 837; M Coy, K Perks, E Scott and R Tweedale, *Picking Up the Pieces: Domestic Violence and Child Contact* (Rights of Women and CWASU, 2012); Barnett (2014), above n 8; Hunter and Barnett, above n 8; GS Macdonald, 'Domestic Violence and Private Family Court Proceedings: Promoting Child Welfare or Promoting Contact?' (2016) 22(7) *Violence Against Women* 832.

[51] Hunter, Barnett and Kaganas, above n 1, 401, 404.

[52] [2001] Fam 260.

[53] Hunter, Barnett and Kaganas, above n 1, 401. See also: Barnett (2017), above n 8; Birchall and Choudhry, above n 39.

[54] See, for example, Hunter and Barnett, above n 8; L Trinder, J Hunt, A Macleod, J Pearce and H Woodward, *Enforcing Contact Orders: Problem-Solving or Punishment?* (University of Exeter, 2013).

[55] See, for example, Barnett (2014), above n 8.

[56] See, for example, Macdonald, above n 50.

[57] For discussion of the role of evidence within the family justice system more broadly, see Sir Ernest Ryder, above n 9.

[58] Women's Aid, *Nineteen Child Homicides* (Women's Aid, 2016); Barnett (2017), above n 8; Birchall and Choudhry, above n 39. See also: F Kaganas, 'Parental Involvement – A Discretionary Presumption' (2018) 38(4) *Legal Studies* 549.

and action

Interviewees identified information deficits at each stage of the court process: in gathering information on allegations of domestic abuse; in assessing the veracity of these allegations; and in acting on the information on the existence of domestic abuse in assessing the risks and benefits of contact. As explored below, the findings suggest that there is a difference between a simple lack of information and deficient information: in some cases, the courts might be working with little or no information on the domestic abuse perpetrated; more often, there might be information on the abuse perpetrated, but financial tensions are, nevertheless, undermining the courts' access to, and use of, this information.

The barriers to information gathering

In the cases in which one or both parties are unrepresented, the court will still have access to the following information sources at the information gathering stage: the C100 form details the application for a child arrangements order; the C1A form is designed to inform the court about the abuse allegations and provides the parent alleged to have been abusive with an opportunity to respond; and witness statements can be submitted. This information rests predominantly on the parties' ability to communicate their experiences in written form. Interviewees' experiences explored below indicate that this carries significant risks.

In any case in which domestic abuse is alleged, the courts will also have access to external input from Cafcass, which is charged with completing safeguarding letters before the first hearing. These letters provide the court with information on the checks completed with the police, local authority and telephone interviews with the parents. The efficacy of these letters in alerting the court to domestic abuse has not been addressed comprehensively within recent research.[59] The majority of interviewees within the author's study who commented on the availability of external evidence said it is rare for any external evidence to be available beyond the parties' own testimonies,[60] particularly when the abuse is non-physical.[61] There is also no guarantee that the information recorded by safeguarding agencies will provide a basis upon which to undertake further investigation.[62] Even with the most robust safeguarding checks, therefore, there will be limits to the initial information available to the court, if the alleged victim has not reported the abuse to the police, or if the local authority has not been involved. This again underlines the importance of parents being able to articulate their experiences clearly, both to Cafcass and to the court.

Interviewees' concerns at the information gathering stage concentrated on the obstacles to parents being able to articulate their experiences clearly to the court, with a focus on the impact of legal aid reform. All of the judges who discussed the prevalence of litigants in person within contact disputes in which domestic abuse is alleged shared the concern that, following LASPO, the presence of litigants in person has been normalised, with these

---

[59] Save for some evaluation by Cafcass, which emphasised the 'essential' role played by the checks: Cafcass, *Study into Cafcass' Role at First Hearing Dispute Resolution Appointments* (Cafcass, 2016), 11.

[60] Eleven interviewees (six judges (three District Judges, two magistrates and one Circuit Judge); two barristers; two Cafcass practitioners; and one solicitor). Women's Aid and Cafcass have also highlighted that external evidence can be limited: Women's Aid and Cafcass, *Allegations of Domestic Abuse in Child Contact Cases* (Women's Aid and Cafcass, 2017), 11.

[61] Twenty-one interviewees (six Cafcass practitioners, five solicitors, four judges (three District Judges and one magistrate), three barristers and three domestic abuse organisations).

[62] These agencies may record 'no further action' or 'may not accurately reflect the domestic abuse': Women's Aid and Cafcass, above n 60.

litigants now a major feature of these proceedings.[63] One District Judge commented, 'I would fall off my chair if both parties were represented these days'. Two opposite problems with self-representation were identified: information absence and information overload. Interviewees also articulated the conflict experienced by judges in attempting to compensate for these information deficits within the constraints of their role.

Information absence

Some of the interviewees expressed concern about the way in which essential information can fail to be raised at all when parents alleging domestic abuse do so without representation, underlining the essential role played by lawyers in information extraction.[64] As one of the Circuit Judges commented, for example:

> 'The main challenge is the lack of representation of sometimes both parties. And that is challenging in every possible way. I think most judges and magistrates dealing with the cases are concerned that they are not getting at the justice of the case and they are not being enabled to get at it …'

This Circuit Judge continued:

> 'We rely on good advocacy to extract the information … and I think we all feel … we don't know what it is we don't know … most of these people are unable to tell a good point from a bad point so they may tell you a load of complete nonsense but in there, there's a nugget of information which would transform the case, but they don't bother to mention it. And how are we going to know that? We can't ask the question to extract that because we don't know.'

The problem articulated here, therefore, is that if the litigant in person does not raise the piece of essential information at all, there are limits to the extent to which judicial questioning can compensate for this, since judges 'do not know what they do not know'.

For some interviewees, the cause of the information absence problem was inequality of representation. Some of the Cafcass practitioners in particular warned that the ability of the parent alleging the abuse to communicate their experiences to the court is significantly diminished if that parent is unrepresented and the alleged perpetrator is represented. One of the Cafcass practitioners reported that this was a common and 'horrible scenario':

> 'And the dad will rock up, already a very aggressive man, more powerful because he has a solicitor by his side and the mother is just slowly disappearing because they feel so disempowered.'

Another Cafcass practitioner echoed this concern:

> 'You know, it's about how well they put their case forward. Courts are led by evidence and your ability to argue your case, so often you find quite unsafe people who have extremely good solicitors who get what they want.'

A few interviewees were also concerned that parents alleged to have been abusive are unable

---

[63] Eight judges (four District Judges, two magistrates and two Circuit Judges). Many of the Cafcass practitioners (five interviewees), barristers (six interviewees) and solicitors (six interviewees) also emphasised the prevalence of litigants in person.

[64] For discussion of this concern in relation to existing case law, see S Choudhry and J Herring, 'A Human Right to Legal Aid? – The Implications of Changes to the Legal Aid Scheme for Victims of Domestic Abuse' (2017) 39(2) *Journal of Social Welfare and Family Law* 152, 164–165.

to give their accounts to the court without legal representation.[65] A Circuit Judge voiced a concern about cases in which the parent alleging the abuse is represented but the other parent is not, and 'your guts are telling you that it's actually maybe not how it is, or it's exaggerated' but the parent is 'completely unable to defend himself'. This Circuit Judge described this as a 'real problem', and a solicitor said legal aid reform had 'annihilated the fairness or balance for private law proceedings', in part because parents cannot defend themselves against specious allegations.[66]

The judges interviewed had mixed views on the extent to which the judicial role can evolve to compensate for these information gaps left by the lack of legal representation. Some of the judges evidenced a willingness to take a more active role. One of the District Judges, for example, said that the onus now falls on the judge to 'tease out what the allegations are' and to 'home in' on the problems and 'look at solutions'. Other judges emphasised that there are limits to how far the court should push to access the information within proceedings which previously would have been collected by lawyers. This was not solely because of the challenges in knowing what questions to ask and the problem of not knowing 'what it is we don't know', but also because the system, whilst encompassing inquisitorial elements,[67] is not inquisitorial. One of the District Judges said:

> 'There will be occasions where somebody doesn't tell you something which you ought to have known, or doesn't ask the right question, and that's one of the problems with this system because we are not inquisitorial. And you have to be very careful about the extent to which you ask questions …'

This District Judge explained that this caution had to be exercised before assuming the role previously performed by lawyers because of the importance of ensuring that both litigants feel their treatment has been even-handed, which speaks to the conflict between safeguarding substantive and procedural justice previously outlined:

> '… you particularly have to be careful, I think, when you have one person that's represented and another person who is not because the person who is represented then feels very aggrieved that you are actually doing the other side's case for them.'

There are significant risks, then, which accompany the absence of information and also significant barriers to the judicial capacity to respond to these risks. When information from litigants is forthcoming, interviewees identified the opposite problem of information overload.

Information overload

The second problem identified by interviewees was that even when litigants in person raise the information essential to the resolution of the case, they are unable to package this information into a format accessible to the court. The specific problem identified by the judicial interviewees was that parents alleging domestic abuse present generalised allegations, which lack the precision required to be processed by the court.[68] One of the District Judges said:

---

[65] Three interviewees (one District Judge, one Circuit Judge and one solicitor).

[66] A similar point has been made by Eekelaar, above n 24, 312.

[67] On this point, see Sir Ernest Ryder, above n 9.

[68] Seven judges (five District Judges and two magistrates). The remaining judges did not comment.

> 'I suppose litigants in person typically, and more particularly I suppose the victims, which typically are women, struggle to marshal the facts and the allegations in a manner that is acceptable for the court. You get a stream of generalities, typified in one I saw last week where the lady just wrote a stream of consciousness, underlinings, marginal notes, just completely chaotic and hopeless. And picking this up, this lady probably has been a victim of fairly serious abuse, I think, but she is completely unable to express it in a manner that is coherent and helps the court.'

Some of the non-judicial interviewees also expressed concern that parents alleging domestic abuse without representation struggle to focus the evidence presented to the court, either with the evidence given not being presented within statements or with statements being overloaded.[69] As one of the barristers explained:

> '[Litigants in person] don't do what they have been directed to do. They don't provide statements, or they keep providing statements one after another. You know, "here's a statement from my mate Fred down the road, and here's this and here's that". They come to court sometimes with a carrier bag full of papers and it's difficult for the judges.'

There are parallels here in relation to the role of lawyers in processing information with what John Eekelaar et al have described as lawyers' roles in 'constructing narratives from the chaos of events and acts'.[70] Adrienne Barnett has advanced a similar argument, that the problem litigants in person face is that they are not equipped to understand legal concepts or 'formulate their interests' in a manner acceptable to the court.[71] Jess Mant's interviews with 23 litigants in person suggest that it is unsurprising that they are unable to formulate and communicate their interests in this way, given the barriers to accessing quality information before they enter the court system.[72] The additional challenges for parents who have experienced domestic abuse are clear, not least given that they enter the court system aware that they may come into contact with the perpetrator.[73]

The judges within the author's study who raised this problem explained that in response to generalised allegations, it becomes necessary for the judge to clarify what the specific allegations are.[74] The most common method described by judges to clarify the allegations was to direct the parent making the allegations to identify a limited number of specific incidents.[75] One of the District Judges said the court will ask the parent to:

---

[69] Three interviewees (two barristers and one Cafcass practitioner).

[70] J Eekalaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000), 80. See also Choudhry and Herring, above n 64.

[71] A Barnett, 'Family Law Without Lawyers – A Systems Theory Perspective' (2017) 39(2) *Journal of Social Welfare and Family Law* 223, 232.

[72] J Mant, 'Litigants' Experiences of the Post-LASPO Family Court: Key Findings from Recent Research' [2019] Fam Law 300, 301–302; J Mant, *Litigants in Person and the Family Court: The Accessibility of Private Family Justice After LASPO* (PhD thesis, University of Leeds, 2018).

[73] For concerns about the lack of satisfactory measures to protect domestic abuse victims in the family courts, see, for example, Birchall and Choudhry, above n 39, 8. For the Government's commitment to improve these measures, see HM Government, *Transforming the Response to Domestic Abuse: Consultation Response and Draft Bill*, CP 15 (HMSO, 2019), 67.

[74] Seven judges (five District Judges and two magistrates).

[75] Four judges (two magistrates and two District Judges). One Circuit Judge also identified this practice but did not link this directly to parents making generalised abuse allegations.

> '"Pick out your best five. The worst five where you've got significant evidence. Let's hear those". And then obviously if they fail then there's a reasonable assumption that probably the others are not awfully important.'

One of the magistrates said:

> 'You have to decide exactly what basis you are going to make your decisions on, so what you would do is say "OK, you're alleging that this happened, that happened, that happened". You select a token of several incidents, perhaps three, possibly five maximum and really you just examine and cross-examine until you get to the point where you think "I'm convinced of one decision or the other". But you do have to try and focus because without specifics, you can't make a ruling on a generalisation, so you have to say, "The Bench believes this happened on this date in the way described by mum".'

Whilst limits to court time prohibit the exploration of an unlimited number of allegations, this practice of focusing on 'a few "sample" incidents' has been criticised because it can mean 'that the full extent of the risk posed to the mother and child is minimised or even invisible'.[76] The risk, then, arises again that information essential to the resolution of the case can fail to be taken into account, since it is being filtered out within judges' efforts to make sense of the information given to them by litigants without representation.

The barriers to information assessment

In the absence of external evidence or admissions, the principal route for the court to assess the veracity of allegations of domestic abuse is through fact-finding. The research conducted pre-LASPO, however, raised concerns about the avoidance of fact-findings.[77] Post-LASPO findings,[78] including those from the author's study,[79] similarly suggest that fact-findings are rare. Cafcass' 'Domestic Abuse Practice Pathway' directs practitioners to make use of all available information and professional judgement to support the court, but Cafcass cannot compensate for the absence of a fact-finding since its role is not to fact-find.[80] The concern of interviewees here in relation to the impact of financial tensions, however, involved a different issue: the severe challenges in facilitating cross-examination without the input from lawyers. This problem affects only the minority of cases which progress to a contested hearing,[81] but it is a problem which poses significant risks to the safety of parents and children.

Where the parties are unrepresented, they have to take on the task of cross-examination, the result being that parents raising allegations of domestic abuse have had to face cross-examination from the alleged abuser. There is a lack of systematic monitoring of the prevalence of litigant in person cross-examination in contact disputes in which domestic abuse is alleged, but research by Birchall and Choudhry found that 24 percent of the 63

---

[76] Barnett cited in Barnett (2017), above n 8, 393–394. See also: Hunter and Barnett, above n 8, 40–41, 72.

[77] Hunter and Barnett, above n 8, 22, 72; Barnett (2014), above n 8, 449–450; Coy et al, above n 50, 48–51.

[78] Women's Aid and Cafcass, above n 60, 10, 23–24; Birchall and Choudhry, above n 39, 25–26.

[79] Harwood, above n 11.

[80] Cafcass, *Practice Pathway: A Structured Approach to Risk Assessment of Domestic Abuse* (Cafcass, 2016): www.cafcass.gov.uk/grown-ups/parents-and-carers/domestic-abuse/, last accessed 18 October 2019.

[81] See, for example, J Hunt and A Macleod, *Outcomes of Applications to Court for Contact Orders After Parental Separation or Divorce* (University of Oxford, 2008), 167; Trinder et al, above n 44, 143.

women surveyed had been cross-examined by alleged perpetrators.[82] Whilst cross-examination of this kind has long been prohibited within criminal proceedings,[83] no such prohibition exists in the lower courts within the private family justice system. The attempt to remedy this problem within the Prisons and Courts Bill 2016–17 was dropped due to the 2017 general election, but provisions to prohibit cross-examination have returned within the Domestic Abuse Bill.[84] At the time of writing, the future of this Bill is again in doubt, but it is questionable whether it will go far enough, even if it enters the statute book.[85]

In the absence of legislative intervention, judges have been left to navigate the management of litigant in person cross-examination themselves. The options available to judges have been 'stark', to borrow the phrasing of the President Sir Andrew McFarlane.[86] Cross-examination is either conducted by the parent, or the judge asks the questions on behalf of the parent.[87] The significant risks that accompany permitting the parent alleged to have been abusive to conduct cross-examination were emphasised by several interviewees within the author's study.

These interviewees warned that the parent alleging the abuse cannot communicate their experiences to the court when cross-examined by the alleged perpetrator, thus blocking the courts' access to information essential to the case. As one of the domestic abuse organisations warned:

> '… you can't expect someone who has been abused for 10 years to sit in a courtroom with someone else who is then cross-examining them, and making comments to them, and doing things which – this happens quite a lot – we hear about perpetrators who will make hand gestures or certain movements. In one case a woman that we work with … when the judge couldn't see … he made like that gesture [sign of being hurt] to her and obviously to her that meant "I am going to get you", so then she was completely petrified throughout the court case and couldn't string a sentence together.'

One of the Cafcass practitioners identified this as a significant factor which contributed to fact-findings not being regularly held. One of the District Judges described the current situation as 'very, very unsatisfactory' and a magistrate lamented the family courts being 'way behind the times'.

The second option – the judge asking the questions on behalf of the parties – did not fare much better among interviewees. Some explained that judges are adopting this second option. One of the magistrates, for example, said:

> 'Whenever that's happened in my case [litigant-to-litigant cross-examination], I've always tried to make sure that the victim is not cross-examined directly by

---

[82] Birchall and Choudhry, above n 39, 27. See also: Coy et al, above n 50, 40, 43, 80; House of Commons Justice Committee, above n 32, 40–42; All-Party Parliamentary Group on Domestic Violence, *Parliamentary Briefing: Domestic Abuse, Child Contact and the Family Courts* (All-Party Parliamentary Group on Domestic Violence and Women's Aid, 2016), 4, 14, 26.

[83] Youth Justice and Criminal Evidence Act 1999, ss 34, 36, 38.

[84] HM Government, above n 73.

[85] For the reasons explored later in this article.

[86] *Re J (Children) (Contact Orders: Procedure)* [2018] EWCA Civ 115, [2018] 2 FLR 998, [68] (McFarlane LJ, as he then was). See also: Choudhry and Herring, above n 64, 156, 159; Birchall and Choudhry, above n 39, 27.

[87] *Re J*, ibid, [65]–[75]. See also: Matrimonial and Family Proceedings Act 1984, s 31G(6); *Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm*, [28]

> the perpetrator and I always try and insist that the perpetrator asks any questions to me, and I will then re-phrase them if necessary or even say that I don't think that's an appropriate question.'

However, assuming this role within cross-examination raises important questions about judicial impartiality, which again speaks to the conflict felt in attempting to balance substantive and procedural notions of justice. The same magistrate above warned:

> '… it is quite a pressure on the Chair to have to try and be the balancing party in these sorts of situations. If you are just the solicitor who's doing it, you've only got one job to do but chairing a Bench where you've got other considerations, it's quite difficult to get a balance right and be fair to everybody.'

Similar concerns about judicial impartiality were raised within a Ministry of Justice study involving 21 semi-structured interviews with members of the family law judiciary conducted between August and October 2015.[88] That judges cannot fill the shoes of lawyers in conducting cross-examination has also been emphasised in the reported case law,[89] as have concerns about judges' filtering and re-phrasing of questions posed by litigants in person during cross-examination.[90] This lends further weight to the argument that judges should not be expected to perform this role. Even putting these concerns aside, the immense pressure exerted on judges by having to conduct cross-examination has been emphasised. Cross-examination has been described as 'extremely demanding on the judge', since the judge has to assume 'three roles of judge and lawyer for both parties, whilst also ensuring a fair, just and efficient process'.[91]

Unsurprisingly in the light of these problems with the current legal framework, respondents to the Government's 'Transforming the Response to Domestic Abuse' consultation agreed unanimously that legislative intervention is needed within the family courts to prohibit cross-examination in cases of alleged domestic abuse.[92] Clause 75 of the Domestic Abuse Bill provides that legislative response. For the reasons given towards the end of this article, it is submitted that this Bill does not offer a sufficiently robust solution to the problem.

The Bill will also not remedy the broader problems caused by LASPO, including judges having lost an opportunity to 'check and balance' themselves. This concern was raised by some interviewees in the context of testing the veracity of domestic abuse allegations. One of the District Judges, for example, suggested that the input from lawyers is important in guiding the court in making major decisions, such as whether to hold a fact-finding:

> 'You need somebody, a well-qualified lawyer in front of you to say, "Hang on a minute, judge, I think you are falling into error or capable of it" and to tell you so you can just reflect. It's quite hard to check and balance yourself. … It's much easier when you've got someone to just say "Well, what about this?" and that's a problem not having parties represented in front of you.'

---

[88] NE Corbett and A Summerfield, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses* (Ministry of Justice, 2017), 1–2, 16–18. See also: House of Commons Justice Committee, above n 32.

[89] For example: *D v K and B (a child, by her guardian)* [2014] EWHC 700 (Fam), [2014] Fam Law 1094, [6] (His Honour Judge Wildblood QC).

[90] For example: *PS v BP* [2018] EWHC 1987 (Fam), [2018] 4 WLR 119. See also: *JY v RY* [2018] EWFC B16, (2018) 168 NLJ 7793.

[91] Trinder et al, above n 44, 58.

[92] HM Government, above n 73, 57.

The importance of providing checks and balances for judges was also emphasised by a District Judge in relation to assessments of alleged perpetrators' admissions of responsibility, giving the following example to illustrate this point: a father acknowledged his responsibility for his abusive behaviour, but the mother's barrister did not accept that his admissions were genuine and, following the barrister's questioning of the father, it became clear that the father indeed did not acknowledge his responsibility. While recognising that some barristers take parents' admissions at face value, the District Judge warned:

> 'If that lady had been unrepresented, that would not have happened. … And I think with the coming of unrepresented people, that sort of thing … the forensic need to explore … gets completely lost.'

These findings again underline, therefore, the major gaps left by the absence of legal representation, both in supporting the court to assess the veracity of allegations through cross-examination and in guiding the decision-making of the court. These gaps are significant because if allegations of domestic abuse cannot be established through fact-finding, or verified by other means,[93] they cannot be taken into account in the assessment of whether contact should take place and, if it should, in what form. This again emphasises the risk of decisions on contact being taken in the dark.

The barriers to information actioning

In the cases in which it is possible to establish that domestic abuse has occurred, interviewees' concerns about the courts' ability to act on this information in assessing the risks and benefits of contact focused on two issues: the pressures on Cafcass and the lack of access to psychological and psychiatric expert evidence.

Pressures on Cafcass

Practice Direction 12J (PD12J) directs the court that in any case in which there is a 'risk of harm to a child resulting from domestic abuse', it should consider requesting a section 7 report from Cafcass, unless the court can be satisfied that this is unnecessary.[94] Section 7 reports can provide insight into children's wishes and feelings, and advice to the court on outcomes. In order to ensure that Cafcass has the facts upon which to produce the report, PD12J directs that the report should not usually be requested until after the fact-finding.[95]

Pre-LASPO research by Macdonald examined the adequacy of section 7 reports in alerting the court to the risks and benefits of contact.[96] Macdonald criticised the dismissal of domestic abuse within these reports as 'mutual conflict' or irrelevant to the contact decision as a result of the abuse being 'historic' or unsupported by external evidence.[97] Macdonald also raised concerns about the promotion of contact, even when domestic abuse was acknowledged.[98] Two significant developments post-date the publication of Macdonald's research:[99] Ofsted

---

[93] For example, external evidence or admissions from the perpetrator.

[94] PD12J, above n 8, [21]. Also possible, but less common, is the appointment of a Guardian to represent the child and risk assessment under s 16A, Children Act 1989.

[95] PD12J, above n 8, [22].

[96] Macdonald, above n 50.

[97] Ibid, 844–847.

[98] Ibid.

[99] As noted below, these developments also post-date the interviews conducted for the author's study.

rated Cafcass 'Outstanding' in its most recent inspection[100] and Cafcass has introduced the Child Impact Assessment Framework (CIAF), which brings together guidance and tools for practitioners, and distinguishes between domestic abuse and conflict.[101] The information available to the courts within section 7 reports has not been the focus of recent research, nor has the operation of the CIAF, and the present study was not designed to fill this gap. What the findings from the present study do indicate are the risks posed to Cafcass' capacity to support the court when it is not afforded the resources required to meet demand.

Concerns about the level of support Cafcass can provide to the court in assessing the risks and benefits of contact united several interviewees, with these criticisms tending to be tempered by significant sympathy for the demands exerted on Cafcass practitioners in the light of the under-resourcing of the service. Some of the judges commended Cafcass for providing a high-quality service, despite being 'very over-stretched'.[102] Others, while sympathetic to resourcing pressures, expressed concerns about the level of service Cafcass can provide when under strain.[103] One of the Cafcass practitioners themselves explained that the service had dropped from:

> '… being like gold, gold standard to probably round about silver right now. I don't think it will go to bronze but, you know, we used to have a lot more of everything in terms of time, staff, resources and I know that is austerity measures that have come to bite on everybody.'

Whilst this analogy of the 'gold', 'silver' and 'bronze' standard cannot be mapped onto formal quality measurement criteria, it, nevertheless, illustrates the perception that austerity measures have threatened the level of service that can be provided. Another Cafcass practitioner warned against reliance on Cafcass as the sole source of risk identification and risk management in the light of the pressures on the service:

> '… just because Cafcass are involved doesn't mean you get a practitioner who will have the time or the skills to be able to actually bring out all the risk factors or may not have the information at that time.'

In the light of the importance of Cafcass to the provision of information to the court, these findings should give rise to concern. If the courts are to be supported to make safe decisions on contact, it is imperative that Cafcass is fully resourced to meet demand.

Lack of access to psychological and psychiatric expert evidence

In cases in which there is a psychological or psychiatric issue to be addressed linked to the perpetration of domestic abuse, expert input from psychologists and psychiatrists can be requested. As discussed above,[104] the rules on when an expert can be instructed were tightened in 2013, the aim being to limit the use of these assessments because they were seen to add unnecessary delay and cost to proceedings.[105] With the exception of some publicly

---

[100] Above n 7.

[101] The CIAF was introduced in October 2018: www.cafcass.gov.uk/grown-ups/professionals/ciaf/, last accessed 18 October 2019.

[102] One Circuit Judge and one District Judge (quoted).

[103] Twelve interviewees (six solicitors, four barristers and two District Judges).

[104] See above n 6.

[105] The Child Arrangements Programme stipulates compliance with s 13 of the Children and Families Act 2014 and Part 25 of the Family Procedure Rules: *Practice Direction 12B: Child Arrangements Programme*, [14.13].

funded cases,[106] expert psychological or psychiatric assessments are only available if the parents can fund the assessment, which is an option unavailable to many. There is a lack of research into the contribution of expert psychological and psychiatric reporting to the courts' resolution of private law disputes.[107] The findings from the author's study suggest that these reports represent an important source of information on the risks posed by the domestically abusive parent, and that there are problems, as a result, with the lack of funding for this expert evidence.[108]

Several interviewees, and in particular judges, voiced concerns about the lack of funding for expert evidence.[109] One of the District Judges said: 'A court can't fund it. The parties can't afford it and even if one party has got legal aid, legal aid services are not going to fund it'. As a result, one of the barristers reported expert psychological assessments to be 'extremely rare' and a solicitor agreed that expert evidence is immensely difficult to access, even when it is 'really, really necessary'.

Several interviewees suggested that this lack of access to expert evidence is a problem because the courts' ability to risk assess is diminished without it. A District Judge, for example, made the point starkly that without expert evidence, 'you are, potentially, putting children at risk'. A similar point was made by one of the Circuit Judges who described how expert evidence can make a 'big difference' to the courts' ability to resolve cases, with there being limits to how far Cafcass can compensate for the absence of this evidence:

> '… psychiatric evidence, sometimes psychological evidence … it could make a big difference. We turn to Cafcass as experts in a way, a lot, much more than I think we would have to otherwise but to get some advice … and the Guardian is an expert, really, to get her expertise in but it's very hard to deal with this without those things [expert reports] so, yes, we would very much want to use that [expert reports] if we could.'

One of the solicitors also described expert psychological assessments as 'unbelievably useful in identifying the risks'. Another solicitor identified the value of expert assessment as being that it supports the court to 'look at the whole picture'. One of the District Judges was particularly concerned that the lack of access to expert evidence means that the courts are 'ill-equipped to recognise … and diagnose' the psychological impact of contact on parents who have experienced domestic abuse.

Interviewees had mixed views on the impact of the restrictions in access to expert evidence on the judicial role. One of the barristers expressed concern about the pressure exerted on judges to assume the role of the 'expert' in the absence of expert assessment:

> 'I think possibly what it [lack of access to expert evidence] does is take away the ability to help the court because if you've got a diagnosis that someone has a severe personality disorder and because of that it makes … because the assessor will go on and give a view about whether the parent can successfully parent a

---

See: *Re C*, above n 6 [45] (Aikens LJ); Brown et al, above n 6.

[106] Interviewees reported, however, that even in these cases, funding is not guaranteed.

[107] Brown et al, above n 6, 5–7.

[108] For concerns to the contrary that expert psychological assessment can be harmful for domestic abuse victims in the context of counter-allegations of parental alienation, see: Birchall and Choudhry, above n 39, 8, 35. Birchall and Choudhry called for a review to investigate concerns about experts' 'credibility, standards and consistency'.

[109] Nine interviewees (five judges (three District Judges, two Circuit Judges), two barristers and two solicitors).

> child. So that gives the judge his or her reasons because they've had an expert who has assessed this person as not being safe. So, they have to pretty much do that assessment themselves from the witness box.'

These findings on the gaps left by the absence of expert evidence again underline the enormity of the task facing judges: judges are having to respond to the challenges posed by the increase in self-representation within an environment in which Cafcass is under increasing strain and without access to the specialist information which can be provided by psychological and psychiatric expert evidence. These stresses are intensified by the broader financial tensions undermining the functioning of the family justice system, which further limit the extent to which the courts can adapt to compensate for the information deficits discussed thus far.

Under-funding and the information deficit

Far from the courts being freed up to focus on the cases most in need of judicial intervention,[110] reports since LASPO have repeatedly warned that the family justice system is overstretched to the point of being unable to cope.[111] The rise in self-representation is widely acknowledged as a significant factor in causing delays throughout the system.[112] Several interviewees described the courts as being at breaking point. One of the Circuit Judges said the situation was a 'nightmare'. This Circuit Judge spoke frankly of how judges can no longer feel confident that the right outcomes are being reached as a result of pressures on the system:

> 'At the moment we are all completely overloaded anyhow, particularly care, but private law has picked up again. So, lists are over-full. Resources, well, you know, there are just not enough resources generally and particularly of lawyers. So … we do our best, but I don't think we can necessarily feel confident that we are always getting to the … the right outcome because we are not being equipped to do so anymore.'

A District Judge shared the concern that judges are having to hear cases at 'such breakneck speed', and a magistrate explained how magistrates and judges 'are all under pressure the whole time'. The time pressure on the judicial role was also emphasised by one of the Circuit Judges, who explained that the problem is 'us not having enough judges and enough courtrooms'. Time pressure does not automatically lead to bad decision-making, but it at least intensifies the risk of unsafe outcomes, since the opportunities for the court to access, assess and act on the essential information to the case being heard are being squeezed. These findings suggest that there are practical limits to the extent to which judges can be expected to compensate for the problems with information deficit, even when the argument on whether

---

[110] The justification consistently given for the legal aid cuts was that it would enable the 'targeting [of] limited resources at the most vulnerable': Ministry of Justice, above n 29, 3.

[111] See, for example, I Plumstead, 'Looking at it from the Outside' [2019] Fam Law 241; J Edwards, 'Latest Family Court Statistics Show Divorces Are Taking Longer' (March 2019): www.familylaw.co.uk/news_and_comment/latest-family-court-statistics-show-divorces-are-taking-longer, last accessed 18 October 2019; KL Richardson and AK Speed, 'Restrictions in Legal Aid in Family Law Cases in England and Wales: Creating a Necessary Barrier to Public Funding or Simply Increasing the Burden on the Family Courts?' (2019) 41(2) *Journal of Social Welfare and Family Law* 135.

[112] See, for example, Barnett, above n 71, 234; Plumstead, ibid. The pressures on the court caused by litigants in person were emphasised by 20 interviewees within the author's study (six judges (three District Judges, two magistrates and one Circuit Judge), six barristers, four Cafcass practitioners and four solicitors), with 10 interviewees identifying delay as a specific concern (four barristers, three judges (two District Judges and one Circuit Judge) and three solicitors).

they can do so without compromising their role is put to one side.

The future

Interviewees' responses paint a worrying picture of the current state of the family justice system. Do more recent developments offer any hope that the problems identified by interviewees may have been allayed? As discussed earlier, the problems with the domestic violence evidence gateway do not appear yet to have been solved. There is also no sign of any injection of funding for expert evidence. On a more positive note, Cafcass has been rated 'Outstanding' by Ofsted.[113] Measures to prohibit cross-examination within the family courts have also been included within the Domestic Abuse Bill, to which we now turn.

As currently drafted, the Bill gives the courts three circumstances in which litigant in person cross-examination can be prohibited: first, if any party has been convicted, cautioned or charged with a specified offence;[114] second, if an 'on-notice protective injunction is in force';[115] and third, if the 'other cases' provision applies. The first two arms of protection are, therefore, limited to cases in which there is evidence of engagement with the criminal or civil law. The third 'other cases' provision gives the courts the discretionary power to prevent cross-examination if the 'quality condition' or 'significant distress condition' is satisfied, and the court considers that it would not be 'contrary to the interests of justice to give the direction'.[116] The 'quality condition' is satisfied if the quality of the witness' evidence 'is likely to be diminished' without the prohibition on litigant in person cross-examination and the quality of the witness' evidence 'would be likely to be improved' with the prohibition.[117] The 'significant distress condition' is satisfied if significant distress 'would be likely' to be caused by cross-examination in person and that this would be 'more significant' than the distress caused by cross-examination conducted by someone other than the litigant.[118] These provisions have been described as a 'cut and paste job from criminal procedure'.[119]

When one of the above circumstances applies, the court must consider if 'satisfactory alternative means' exist for the cross-examination to take place or the evidence to be obtained.[120] Failing that, the court must ask the party to appoint a qualified legal representative to perform the cross-examination.[121] If this is not possible, the court must consider whether it is 'necessary in the interests of justice' for a qualified legal representative to be appointed by the court to perform the cross-examination, and to appoint that legal

---

[113] See above n 7.

[114] Clause 75 of the Domestic Abuse Bill 2017–19 to 2019–20 would insert 'Part 4B' into the Matrimonial and Family Proceedings Act 1984. The references below are to 'Part 4B', in this instance s 31R(1). The Bill also prohibits victims and alleged victims from cross-examining such a party: s 31R(2). 'Specified offence' will be defined in secondary legislation.

[115] Section 31S(1) and (2).

[116] Section 31T(1)(a) and (b).

[117] Section 31T(2)(a) and (b).

[118] Section 31T(3)(a) and (b). Section 31T(5) lists the factors to consider when determining if the quality condition or significant distress condition is satisfied.

[119] Plumstead, above n 111, 241.

[120] Section 31V(2).

[121] Section 31V(3).

representative if merited,[122] with attendant funding implications.[123]

One of the principal problems with the Bill is that, as is well-known, domestic abuse often goes unreported. Over half of the interviewees consulted for the author's study, for example, identified a lack of evidence beyond the parties' own testimonies as a problem within contact proceedings in which domestic abuse is alleged.[124] This suggests that it is highly likely that judges will have to grapple with the third 'other cases' category. Indeed, Rights of Women has predicted that the majority of women within proceedings will come within this category, since most perpetrators have not been convicted, cautioned or charged, nor will protective injunctions be in place.[125] The problem here is that the level of protection available hinges on the presentation of the alleged victim and the understanding of domestic abuse possessed by the judge. Given that victims of abuse may not display the types of behaviour stereotypically associated with a 'victim', and coercive and controlling behaviour can masquerade as innocent acts, there is a risk that the quality of the victim's evidence may be impaired, or significant distress caused, without this being identified by the judge.[126] As a result, the Law Society has emphasised the need for judicial training to 'avoid relying on gendered or stereotyped interpretations of the party's behaviour in determining whether cross-examination will indeed cause stress'.[127]

Concerns have also been raised about the risk of inconsistency in the exercise of judicial discretion.[128] The findings from the Ministry of Justice study, which highlighted the judicial call for 'clearer guidance on appropriate case management practices' in relation to litigant in person cross-examination, suggest an empirical foundation for these concerns.[129] Also identified as problematic are the resourcing implications for judges in having to hold 'time-consuming case management hearings' to establish whether cross-examination should be prohibited on a discretionary basis.[130]

The most common solution proposed has been to minimise the scope for judicial discretion. Suggestions have included engaging the ban on cross-examination in any case involving allegations of domestic abuse[131] or when there has been a finding of fact that the abuse has

---

[122] Section 31V(5) and (6).

[123] Section 31W(1) gives the Lord Chancellor the power to 'make provision for the payment out of central funds' for legal representation fees or costs.

[124] Twenty-nine interviewees (eight judges (three District Judges, three magistrates and two Circuit Judges), eight Cafcass practitioners, eight solicitors, three domestic abuse organisations and two barristers).

[125] *House of Commons and House of Lords Joint Committee on the Draft Domestic Abuse Bill: First Report of Session 2017–19*, HC 2075 (2019), 44.

[126] Concerns already exist about judicial perceptions of who constitutes a 'victim': Barnett (2017), above n 8, 394; Choudhry and Herring, above n 64; Hunter, Barnett and Kaganas, above n 1, 411. See also: Joint Committee, above n 125.

[127] Joint Committee, above n 125.

[128] Ibid. See also: Joint Committee on Human Rights, *Response to the Domestic Abuse Bill* (April 2019): www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/domestic-abuse-letter-published-17-19/, last accessed 18 October 2019; Private Law Working Group, *A Review of the Child Arrangements Programme: Report to the President of the Family Division* (June 2019), [92]: www.judiciary.uk/wp-content/uploads/2019/07/Private-Law-Working-Group-Review-of-the-CAP-June-2019.pdf, last accessed 18 October 2019.

[129] Corbett and Summerfield, above n 88, 2.

[130] Private Law Working Group, above n 128 (quoted); Joint Committee, above n 125.

[131] The suggestion of Rights of Women: Joint Committee, above n 125.

occurred.[132] The compromise proposed by the Joint Committee on the Draft Domestic Abuse Bill is to extend the automatic ban on litigant in person cross-examination to any case in which the legal aid evidence threshold is met.[133] Even if this amendment is made, however, the ongoing problems with access to legal aid for victims of domestic abuse makes it likely that the 'other cases' provision will continue to be engaged, therefore giving rise to the problems outlined above.

Whilst it is clear that legislative intervention is necessary to remedy the problem of litigant in person cross-examination, it is far from clear that a legislative solution has yet been found which provides robust protection for victims. Furthermore, the findings from the author's study suggest that the problems caused by LASPO run far deeper, such that this intervention can only ever be a small plaster on a far bigger wound.

Conclusion

Whilst it is understandable that judges and lawyers accustomed to a system of full representation will always criticise the deficit left by its absence, the findings from this study reveal that the lack of legal representation is a particularly acute problem in cases in which the courts must navigate the delicate balance of assessing the risks and benefits of contact when domestic abuse is an issue. LASPO has fundamentally altered the fabric of family justice, with litigants in person struggling to present their cases to the court and problems with information deficit arising at each stage of the court process, as highlighted by the interviewees in this study. Resourcing pressures have also restricted the courts' access to expert psychological and psychiatric evidence, and concerns have been raised about the resourcing of Cafcass. Broader time and resourcing stresses on the family justice system are further limiting the courts' opportunities to deal robustly with each case. Without access to the full suite of information on the perpetration of domestic abuse and the risks posed, the courts 'will not know what they do not know', and cannot reach judgments which ensure the safety and well-being of children and parents affected by domestic abuse, ultimately putting the lives of children and parents at risk. One of the solicitors gave this stark warning: 'I think everything is being done on a shoestring, and I think that there will be cases where children or mothers will die. Will that change things? No. And that's terrifying'.

LASPO was presented as a necessary austerity measure in response to economic circumstances, but its implicit neoliberal rejection of the protectionist function of family law has pushed the resolution of contact disputes outside the court arena. Whilst the protectionist function of family law was intended to remain engaged for cases involving domestic abuse, the way in which the domestic violence evidence gateway has been constructed has meant that victims of abuse have often not been able to access legal aid. This, in turn, has necessitated self-representation in cases taken to court. The burden of responding to these challenges has fallen principally on judges, who are charged with safeguarding conflicting notions of substantive and procedural justice, a problem highlighted by many of the interviewees in this study. The significant body of pre-LASPO scholarship highlighted major problems with the courts' and practitioners' treatment of victims of domestic abuse, which extended beyond the problems with information deficit. But changes to policy and practice cannot be made without ensuring that the court is equipped with the information necessary to

[132] The suggestion of Elspeth Thomson (Resolution): Joint Committee, above n 125, 45.

[133] Joint Committee, above n 125, 46. The Government's response was that it will reflect on this recommendation: *The Government Response to the Report from the Joint Committee on the Draft Domestic Abuse Bill Session 2017–19*, CP 137 (2019), 33.

make decisions which promote the safety and well-being of children.

What next? Despite claims that austerity is ‘over’, there is no sign of any radical investment in restoring legal aid, nor is funding for expert psychological and psychiatric evidence forthcoming. The proper resourcing of Cafcass to meet demand remains critical. The reforms to cross-examination, while needed, are problematically constructed and tinker at the edges of a far bigger problem. The findings from this study add to the existing body of evidence which suggests the need for a fundamental review of the way in which family justice is conceptualised and delivered. This would involve a reappraisal both of what role judges should be playing within contact disputes in which domestic abuse is alleged, and how the risks posed by domestic abuse can be accessed, assessed and acted upon.