IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH

B E T W E E N :

THE QUEEN Claimant

(on the application of Terrence White and Benjamin Garrett)

-and-

The Secretary of State for Justice Defendant

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SUPPLEMETARY RESPONSE TO

DEFENDANT'S GROUNDS OF RESISTANCE

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1. This Supplement is submitted following the receipt of the Defendant's "Summary Grounds for Resisting the Claim" and because:

    a) The Defendant has now unequivocally affirmed its position that "there is no automatic contact between a parent and a child";

    b) The Defendant's Grounds replaced our arguments with a number of "straw man" positions that ought to be identified;

    c) The Defendant has identified that our submission ought to have been made in respect to a Cost Capping Order, which was omitted only due to our uncertainty of when precisely that submission ought to have been made; and

    d) Some matters may be dealt with herein.

**Qualification on page 13 of the Executive Summary of the Final Report:**

*Limitation of qualification to findings:*

2. There are three parts to any decision: presuppositions, evidence, and judgement (the latter being the "findings" in this matter). Also, depending on the nature of the decision there are sometimes resolutions (the "recommendations" in this matter).

3. The limited qualification buried in the middle of a paragraph on page 13 of the Final Report relates only to the findings of that report. This may be compared to the upfront disclaimer of the Literature Review (which may still have problems with separating "views" from facts) and

the Defendant will have to answer why it chose to not include a similar Disclaimer on the Final Report.

4. The Final Report was authored by experienced professors of law under the contracted employ of the Defendant, and the extent to which the Defendant chose to separate itself from the Final Report cannot be assumed to have been reckless or accidental. The Defendant did not attempt to insulate itself from the entire Report but only to a defined part of it.

5. In particular respect to the statement that there is no automatic right of contact between parents and their children, we refer to this a "declaration" because it is an axiomatic presupposition. The offending declaration opens the panel's discussion of the law. It was not a finding - it was not a conclusion by research or analysis of evidence (self-evidently); the Defendant - a major government institution with significant powers in respect to the performance of English law - has made a public declaration of what the law of England is. We have asked that it be withdrawn or disowned and the Lord Chancellor not only refused to do so but has steadfastly insisted that it is correct.

*Invalidation of the qualification by the actions of the Defendant*

6. The co-publication together with the Implementation Plan under the combined umbrella press release of the MoJ, and certain comments in the Implementation Plan and subsequently by the Lord Chancellor, demonstrate that the Defendant effectively adopted these findings as its views and policy at the point of publication if not before, and the Defendant will not be critically assessing the Panel's findings but adopting them as facts for the further development and implementation of its policies.

7. The Undersecretary of State's forward to the implementation plan admits as much (our emphasis):

> I <u>have</u> carefully considered the panel's conclusions and <u>am determined</u> to take action to improve the experience of victims of domestic abuse in our family courts – this plan sets out the first, immediate steps we will take towards doing this…
>
> "The Family Justice Board, comprised of senior leaders from across the Family Justice System and jointly chaired by MoJ and DfE ministers, <u>will be tasked with overseeing delivery of this agenda</u> and will publish a more detailed delivery plan later this year."

8. If the panel reports were not the views and policy of the Defendant, how or why did the Defendant commence implementation? The co-publication "bootstraps" the Literature Review to the Final Report and the Final Report to the Implementation Plan under a single "Report" of policy. The distinctions claimed by the Defendant were not apparent to the British public observers (our emphasis):

> "The Government's report assessing risk of harm to children and parents in private law children cases can be read in full here." [1]
>
> "The Ministry of Justice released their final report on Assessing Risk of Harm to Children and Parents in Private Law Children Cases in June 2020….
>
> "the final report authored by Professors Rosemary Hunter, Mandy Burton and Liz Trinder on behalf of the Ministry of Justice" [2]
>
> "These barriers have been recognised by the MoJ and we are about to see a root-and-branch culture change as the implementation plan has already been approved. This was immediately noticeable in the recently reported case of R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1088." [3]
>
> "An MoJ report has found that family court workers value entitlement to contact with both parents above safety"[4]

9. Whether or not the Lord Chancellor addresses, or implements, the entirety of the Final Report is neither here nor there. The findings in their entirety led to a set of recommendations, and the findings are not divisibly attached to particular recommendations. Once the Lord Chancellor commenced implementation of any recommendation, he adopted the findings of the Final Report as a necessary and integral part of his policy.

10. Additionally:

- in respect to the breaches of HRA obligations, the Panel remained an organ of the State and the State's obligations do not have regard to these internal demarcations; and

[1] https://raydensolicitors.co.uk/blog/the-harm-report-assessing-risk-of-harm-to-children-and-parents-in-private-law-cases/

[2] https://www.basw.co.uk/media/news/2020/jul/assessing-risk-harm-children-and-parents-private-law-children-cases

[3] https://www.lag.org.uk/article/208773/a-sea-change-in-sight-for-private-family-law-children-cases-involving-domestic-abuse

[4] https://www.theguardian.com/society/2020/jul/28/twisted-priorities-mean-cafcass-has-failed-to-protect-children-from-abusive-parents

- the grounds for judicial review relate to the process of forming the policy, which would include the commissioned endeavours; there is admission that the Implementation Plan is driven by the Panel's "findings" and this is not just sufficient connection for judicial review of the Panel's conduct, but the nexus by which judicial review of government policy occurs.

11. The structural design of the Defendant's policy formation process looks an awful lot like an attempt to avoid accountability for its conduct. It is certainly the case that our claim suffers from the Defendant's structural acrobatics, but it cannot be permissible for the State to structure its affairs so to avoid accountability for its conduct.

**Amenability:**

*Amenability 1*

12. Puzzingly, the Defendant relies in their defence on [32-33] of *Shrewsbury*, which explicitly states at [33] that:

> "Judicial review proceedings may come after the substantive event, with a view to having it set aside or "quashed"; or in advance, when it is threatened or in preparation, with a view to having it stayed or "prohibited". In the latter case, the immediate challenge may be directed at decisions or actions which are no more than steps on the way to the substantive event."

13. The Defendant's following objection that the Report has no legal effect and does not oblige a party to act in a particular way is defeated by his own case-law reference.

14. The question of whether or not the publication of the Final Report and Lit Review are preparatory steps is belied by the co-publishing with the Implementation Plan, which also states quite plainly that it is driven by these works:

> "This Implementation Plan sets out the immediate changes we are making in response to the panel's report"

15. That the Lord Chancellor is seeking to change the judicial outcomes is also plain from his letter.

16. The Defendant's objection based on *Shrewsbury* has neither legal merit or attachment to objective reality.

*Amenability 2*

17. It is unclear in what respect the Defendant considers our reliance on *Hillingdon* to be misplaced: his summarisation in para 15 seems to be perfectly aligned with our submission: there are two avenues for preliminary challenge: Firstly, whether the flaw is so fundamental that it is a "show-stopper", and then if flaw is not a show-stopper, whether there is an opportunity to correct the error before the substantive decision.

18. But in paragraph 16, the Defendant has then confused the decision in *Hillingdon*, arguing that there are no show stoppers because (in its view) there are future opportunities to address flaws. A show-stopper is unconcerned about such future opportunities, but looks to whether the gravity of the flaw is such that the initiative should be aborted altogether now.

19. The Defendant has failed to grapple with any of the "show-stoppers" outlined in our submission, and makes no argument that they are not "show-stoppers". In the absence of a contrary argument, it must fall that any of those items we named might be show-stoppers, which should be determined by the court, and therefore the Report is amenable to Judicial Review.

20. Of particular concern in this respect is the Defendant's insistence that there is no automatic right to contact between parents and children – which by virtue of the Defendant's submission is now inarguably the actual policy position of Defendant.

21. The Defendant demonstrates a fundamental misunderstanding of the nature of private law proceedings (as opposed to public law) - in private law children's cases there are equal and competing automatic rights for contact with the child held by each parent (and perhaps others depending on the case), and the judiciary adjudicates between competing rights. Even after judgement the parents may freely agree between themselves to ignore it. Potential intervention of the State is considered in public law proceedings subject to the s.31 threshold, and the right to contact automatically exists unless the court has been petitioned to make an order and until it does so.

22. The Defendant's foundational misconception of the very nature of the private law proceedings that it is seeking to influence invalidates everything it is doing in this area. It is a fatal flaw and itself a "show-stopper".

*Amenability 3*

23. In respect to the non-"show-stopper" flaws, the absence of opportunity to challenge the policy is outlined in our submission.

24. The Lord Chancellor immediately commenced implementation. There was no fair opportunity in the Defendant's process to correct or contradict what has been said before actual substantive decisions are affected.

25. The purpose of pilots and other tests are meaningless if the "success" criteria is how many unsupported allegations are found in favour of the accuser and the child's parent removed from their life.

**Prematurity:**

26. The Defendant's argument that an application is premature cannot be justified when he is already actively implementing policy that is driven by the reports.

27. This is indeed a peculiar matter before the court. The Lord Chancellor's objective to change the culture and beliefs of the Family Court in order to affect the outcomes of individual Children Act proceedings does not seem to have a legal precedent. The ultimate substantive decisions are tens of thousands of minute judgements, including decisions about interim contact, in lower courts and often litigated-in-person by the poorest members of the public.

28. Findings of fact in private proceedings are determined on the 'balance of probabilities' threshold, often for matters where there is no evidence other than personal testimony. A mere smidgen of credibility unfairly assumed for one party can have absolutely devastating consequences for the other parent and the subject children.

29. Outcomes will be altered by training to change the weighting of evidence in the minds of those advising the court and those making judicial decisions. Look to the foci of the training – for instance what does education of the "gendered nature of abuse" supposed to achieve other than that men are to be treated by the family justice system with suspicion and women with grace?

30. The Lord Chancellor has already commenced "improved" guidance and training across the Family Justice system to address "beliefs and cultural issues", whilst the Judicial College training is embedding "cultural change" in response to the MoJ's report.

**Grounds:**

***1. Illegality per the Constitutional Reform Act***

31. To the extent that the Lord Chancellor seeks to improve the experience of court users, there is little to argue, but the Lord Chancellor goes further, and indeed too far, and admits to seeking to change the outcomes for the benefit of accusers.

32. The guarantee of judicial independence is unrelated to the prevailing law and evidence and looks to the pressures and influence of the Defendant upon the judiciary. The Defendant's objection at his point 20 circumvents the core issue: that the Defendant is using his special access to manipulate the decision-making thoughts ("culture and beliefs") of court advisors and the judiciary so that outcomes of particular cases are affected on the same evidence. Such conduct is precisely the objective of the legislation. This is plainly an abuse of power that should rightly be subject to a Judicial Review.

33. He also fails to address whether the public interest is properly represented in accordance with s.3 (6) (c). This rightly should be a matter for the Judicial Review to determine as discussed later.

34. To the extent that the Lord Chancellor seeks to improve the experience of court users, there is little to argue, but the Lord Chancellor goes further, and indeed too far, and admits to seeking to change the outcomes for the benefit of accusers.

***2. Breach of EU law***

35. The Defendant's Grounds for Defence is quite emphatically clear that the rights to parental contact are repudiated by the Defendant, who is the State.

36. If there is no "automatic right" as the Defendant claims, that necessarily means a manual intervention of the State is required before the right exists. Therefore the right does not exist until that manual intervention is made.

37. We had expected that the Defendant's response would be that it was a typographical error: that it should have read "absolute" instead of "automatic". This would be an embarrassing matter considering the white wigs involved, but easy to fix without bothering the Queen about it.

38. Instead the response of the Defendant is an affirmation that his position is indeed that family members must petition the State for a right to have contact with each-other, even at the very kernel of the most minimal concept of family: the relationship between a parent and her child. It is a powerful statement: there is "no" right, and so the Defendant outrightly repudiates HRA Art 8 as well as s.24 of the Charter.

39. If, as claimed by the Defendant, there is indeed a manual intervention of the State required in order for a mother to have the right to breastfeed her new-born child, he should make plain and public what that intervention is; For it would come as quite a surprise to many in the

British public who had hitherto assumed they already had that natural right and they may want to apply to the Lord Chancellor for his permission.

40. The UK substantiated its compliance with EU law by relying on these common law rights that the Defendant, who is the State, now repudiates. There is no UK regulation or law separately enacted so that the UK would otherwise be complaint with the EU directives.

41. A Judicial Review is now absolutely required to find that the Defendant is wrong in law and that the UK complies with EU law and with the Human Rights Act.

42. Further, we hereby seek permission to amend the Claim so that a Declaration of Incompatibility is sought as a relief.

***3. Breach of HRA***

43. The breach of HRA is now a critical issue in this matter per the above.

44. Additionally, in respect to HRA Art 8, the Defendant fails to appreciate that *Pisica* up-streamed the duty for exceptional diligence from the judiciary to other supporting public authorities surrounding the court's decision to the extent they are "relevant elements" in the ultimate substantive decision. Article 8 is profoundly different from the other HRA rights, as it demands of the state "respect for" family life and this attaches to actions of the State well beyond the court-room.

45. The Defendant is disingenuous to suggest that the issue at hand is a mere publication of some random report. It is a State-procured and sanctioned argument that is being relied upon to implement policy intended to affect judicial determinations of children's contact with their parents.

46. A Judicial Review is required to determine how far upstream this duty for exceptional diligence goes. We submitted that the Defendant is obliged to exert exceptional diligence when evaluating and considering changes to the family justice system intended to affect decisions about whether a child continues to have contact with their parent. The Defendant is right that Article 8 does not require a particular strategy, but it does require the Defendant to be cautious and conscientious of his obligations in determining his strategy.

47. In respect to Article 6, the Defendant is indeed contending that there is no automatic right to contact between a parent and her child – that is a determination of a civil right. To the extent that the Defendant would argue that this was a finding of the panel, the panel constituted a tribunal determining civil rights. Legal consequences are inevitable from a State's repudiation

of a civil right, but evermore so where the resulting policy is intended to impact legal decisions.

***4. Unacceptable Risk of Systemic unfairness***

48. The Defendant claims that none of the criteria are met but this is not true:

    i) There is a policy or system – the Defendant is implementing *something*

    ii) The objective of the Defendant's policy is to affect the outcomes of individual proceedings as the Lord Chancellor personally says in his letter;

    iii) There is inherent unfairness in the change to "culture and beliefs" that the Defendant is seeking, that would elevate the credibility of testimony of certain subsections of society based on their immutable characteristics, and favouring an accuser in eliminating the children's contact with their other parent as interim and final measures;

    iv) The actual intent of the policy is to create this unfairness.

49. The Defendant is wrong to suggest that the three elements of the report (Lit Review, Final Report and Implementation Plan) do not together constitute policy and policy formation.

50. The degree to which the Defendant's policy creates such risk of systemic unfairness (so as to be unacceptable) is a matter that can and should be determined in Judicial Review.

51. The Lord Chancellor has already commenced "improved" guidance and training across the Family Justice system to address "beliefs and cultural issues", whilst the Judicial College training is embedding "cultural change" in response to the MoJ's report.

***5. Defective Reasoning***

52. The Defendant argues against a straw-man of his own creation - the defective reasoning does not arise from inappropriate weight to considerations but because the Defendant's process did not generate the information necessary to assess proportionality between competing rights. There was a failure to balance considerations at all, because balance was impossible.

53. The Defendant has not addressed the other considerations that amount to defective reasoning, such as the absence of skills required to understand the technical papers to which the Defendant refers. There is little point referring to peer-reviewed papers if one doesn't know what they mean and they are then misrepresented, as has been adequately demonstrated at **SoF/ 43 and 57 (b)**.

54. That the panel admits to defective reasoning (**FR/pp21-22**) due to time constraints and poor-quality evidence-gathering processes is absolutely not a supportive argument for the Defendant to ram through with publication of findings and recommendations and policy implementation regardless. Such conduct is simply reckless. Here the Defendant actually makes an argument for Judicial Review.

55. Despite the request in our PAP, the Defendant has not provided the minutes or records of the experts' and judiciary round-tables, which barely feature in the report other than to be cut - down by the panel's unscientific survey. Such transparency would be demanded of a public inquiry. We submit that without a Judicial Review the public will never know what has really been advised to the panel.

56. Anxious scrutiny attaches to the rights of parental contact and family life arising from the common law as articulated in s.24.3 of the Charter of Fundamental Rights and Art 8 of the HRA respectively per **SoG/20** (which rights the Defendant explicitly repudiates). Over-familiarity with our own work led us to think this was plain from the context and apologise for not being more specific in the Grounds.

57. In particular, at the very minimum the Defendant should be able to say what the recidivism rate of domestic abuse is before and after private law proceedings, what forms it takes, how it relates to child contact, how that has changed over time and how it compares to public law proceedings. This is not rocket science - this is the very, most basic tenet of responsible policy formation: what is the policy seeking to achieve?

58. The Defendant should also be able to say what is the harm of its policies on children (and to a lesser extent, parents) generally, and so to determine whether those harms are proportionate to the harm it is seeking to address.

59. There is no indication that the Defendant is intending to do any of this work. It is insufficient to simply acknowledge that there is "further work to do" in the narrow scope of one recommendation (changing the resumption of parental involvement, which would require legislative intervention anyway), before implementing policies to undermine the "pro contact culture" (rights) generally. Quant assessment is only being considered to determine "a pre-reform baseline prior to the implementation of the reforms recommended by the panel", not to consider whether the reforms are required or proportionate at all. This admission that further work is needed in the narrow consideration only strengthens the general case against the Defendant.

***6. Procedural Fairness***

***1(i) – call for evidence is vitiated by bias***

60. The Defendant again argues against a straw man of his own creation. Our Grounds state quite clearly that the vitiation by bias is in respect (at least) to the determination of the risk of encountering domestic abuse in private family proceedings. Clearly if one asks for responses concerning domestic abuse, one cannot conclude from receiving mostly responses about domestic abuse that there is a disproportionate amount of domestic abuse going on, because one has tainted the data set.

61. It is therefore the case that there has been no assessment of the risk of domestic abuse arising during or after private proceedings in family court.

***Procedural Fairness 1(ii) – call for evidence is an unfair public consultation***

62. We accept the Defendant's representation that they have not conducted a public consultation of their policies, and anticipate that the Defendant will not suggest otherwise in these proceedings or in public. It is noteworthy that the report can be found in the "consultation hub" of the Ministry of Justice website under "closed consultations".

***Procedural fairness 2 (i) – Actual bias***

63. We accept that "actual bias" was used in our submission in the colloquial rather than the legal meaning, so that it meant actual occurrences of biased conduct. So we ask the court to please consider what has been labelled in the submissions as "actual bias" as "actual examples of applied bias".

***Procedural Fairness 2 (ii) – Apparent bias***

64. The Defendant has not addressed the significant problem of panel members judging their own cause. As such the claim should be tested in Judicial Review.

65. It is unclear why the Defendant believes the representation of Respect's business development director on the panel would in any way balance the presence of the 2 Women's Aid advocacy groups. Respect is not a men's advocacy group, has never petitioned for men's rights, has close links with Women's Aid and has a vested financial interest in increasing referrals to DAPP programs if courts unfairly find that men have committed domestic abuse.

66. That the panel obtained evidence from both men and women (for the timebeing setting aside the overwhelming 4:1 ratio of responses), is neither here nor there if the panel then

undermines the evidence from men and effectively ignores them but treats the women very differently (**SoF 57 c and e**).

67. The Defendant wrongly claims that the examples of bias in **SoF 57** are merely disagreements with conclusions reached on the evidence - this is plainly not the case. One need only read them- we proffer no counter-position but highlight plain examples of biased thinking by the report authors.

***Procedural Fairness 2 (iii) – "Predetermination"***

68. The Defendant wrongly mischaracterises the claim regarding pre-determination and immunity to contrary argument.

69. The "mere exercise in symbolic reassurance" relates to the Defendant's decision to shun his own internal access to large quantities of real data in favour of externally-sourced unverified anecdotes, which he then uses to undermine the views of experts and judiciary. Whether the information is qualitative or quantitative in nature is not particularly relevant to this point. Nonetheless, quantitative data is also essential as the panel itself identities, and that the possibility of obtaining quantitative data was also shunned also indicates the exercise was bogus.

70. The Defendant suggests that **FR/pp 20** somehow makes it clear that there were differing views of the panel but there is no evidence of that at this reference.

71. The Defendant's claim that Dr Barnett is an academic with relevant expertise is plainly wrong. Dr Barnett may be an academic in law but she has no technical expertise for dealing with technical issues, as demonstrated by her performance in assembling the flawed Literary Review. Despite questions in the PAP, there is still absolutely no transparency as to how she was appointed for such a role, given her open publicised disdain for empirical evidence and the efficacy of science. This goes well beyond Dr Barnett's parental alienation report. Nonetheless that report also reveals that she views PA as a "backlash against perceived feminist gains" and as such is a threat to her entrenched personal belief system. Dr Barnett's immunity from contrary argument across a number of areas is adequately identified in our submission.

***7. Failure to into account for relevant considerations***

72. The Defendant has taken it upon himself to invent a whole new separate Ground for us. This is nothing more than yet another straw-man of the Defendant's own creation, and is not contention of ours.

73. This "ground" is actually included in Defective Reasoning and speaks to whether the Defendant has made such assessments as are necessary to determine proportionality between these factors. It is clearly stated there that the assessment is inadequate, not absent.

**Interim Relief:**

74. The interim relief sought does not interfere with the Defendant's work. The Claimants, and the public, would benefit enormously from ensuring that the rights to contact with our children do not continue to be publicly repudiated by the Lord Chancellor. There are most likely personal and public benefits to ensuring the UK complies with EU law. There is no significant inconvenience to the Lord Chancellor from withdrawing the Report from the MoJ website and sending out a corrective message in one narrow respect to people who may have been misled by him and would most likely be engaged in or influencing court decisions about these issues right now.

**Cost Capping Order:**

75. We hope the court would forgive us but it was not plain from the Judicial Review Guide precisely when our submissions relating to the Cost Capping Order should be made.

76. With the court's grace, the Claimants will submit our Precedent H schedules separately very shortly.

77. Whether the application is "public interest" proceedings:

    a) The application directly addresses the deprivation of rights of (probably) thousands of unrepresented children every year across the breadth of England and Wales, as well those of other parents who have not the means, knowledge or resources to defend their rights against the Defendant's intrusion into the very institution to which they must apply for remedy. Women's Aid estimate that 70% of private family law cases now involve allegations of domestic abuse, but not only is the ability of a child to maintain direct contact with their parent of significant importance to them, it is also of significant importance their parent and their wider families including grandparents, siblings, cousins, aunties and uncles, so that the number of persons to which the outcome is of significant importance is a substantial multiple of the number of cases involved;

b) A Judicial Review is the only means by which these issues may be addressed, as what is in question is the legality of the Defendant's intrusions into the very practice of the family proceedings, so that a litigant's fair resolution through the family court will not be feasible after the Defendant's policies are realised;

c) the proceedings provide a means to resolve the issue by the remedies proposed.

78. The application is complex, technical and wide-ranging, whilst the Secretary of State has substantial resources to pursue a costly defence. Both Claimants are on universal credit and can't even afford representation for ourselves; We would each therefore face financial ruin if the court orders the State's costs against us and so we would not be able to pursue the application.

**Costs in the application*:***

79. The Defendant only responded to our PAP after our submission was made and has not provided any of the documents requested in our PAP. To the extent that our application is unsuccessful, we ask that no costs order is made.

TERRENCE WHITE AND BENJAMIN GARRETT