IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH

B E T W E E N :

THE QUEEN (on the application of Terrence White and Benjamin Garrett) Claimant

-and –

The Secretary of State for Justice Defendant.

SKELETON ARGUMENT

INTRODUCTION

1. On the 25th of June 2020, the Ministry of Justice ("MoJ") published a document titled:

   "Assessing Risk of Harm to Children and Parents in Private Law Children Cases Final Report"

   (the "Final Report"), accompanied by a "Literature Review" and an "Implementation Plan" (together, with the Final Report, the "Report"), prepared by the Ministry of Justice Expert Panel on Harm in the Family Courts (the "Panel").

2. The Report contained no disclaimer regarding the reliance that readers could have on the views and information contained within it, nor any qualification to distinguish the Report from the views of the MoJ or of the State in general. The Report was published with MoJ insignia on the title banner and it was commissioned, paid for and publicly published by the MoJ.

3. The Report included the material elements that a government policy would be expected to include, such as an Implementation Plan and performance monitoring scheme.

4. The MoJ, Secretary of State for Justice and Lord Chancellor are uniquely empowered within the Family Court system, such as through control of the policies of Cafcass and the appointment of judges.

5. Due to the confidential nature of children's proceedings, the MoJ also has entirely unique access to court records and data. This means that no body, expert or person outside the MoJ possesses the capacity to undertake significant empirical research on private law cases, nor is able to meaningfully challenge the assertions made by the MoJ

in the public arena. The MoJ is also responsible for multiple agencies and has the capacity to draw data from parallel sources such as the probation service.

6. The MoJ appointed the Panel Members who then appointed the author of the Literature Review. The Panel was co-chaired by two staff members of the MoJ, but otherwise the membership was external.

7. The Report's findings were based primarily on two pieces of work performed by the Panel: a public "call for evidence" and a Literature Review. It seems no data from the MoJ's statistical office was requested or considered.

8. The Claimants submit that the process to produce the policy was procedurally unfair, and that the MoJ's process was insufficient to meet its obligations under Article 8 of the Human Rights Act 1998.

The Claimants

9. The first claimant, Mr Terrence White is a father of three children who live in his sole custody following 7 ½ years of private proceedings which eventually concluded in public proceedings. For reasons of confidentiality he can't disclose to this court more detail but suffice to say he has encountered many of the issues considered in this matter in his personal capacity and has first-hand experience of the impact that these matters have on children. He was financially ruined by the experience. He now performs as a McKenzie Friend for both mothers and fathers litigating in person, primarily in private children's proceedings and mostly for free due to the dire straits of the people seeking his help. He is currently affected by the issues in this matter by means of this role. Very often he works with parents who have been accused by the other parent of domestic abuse, sometimes truthfully and sometimes falsely. He requires certainty and clarity from the Ministry of Justice so that he may perform his tasks competently to the best of his ability.

10. The second claimant, Mr Benjamin Garrett is currently within private proceedings concerning his daughter that have been ongoing for nearly 4 years now and are continuing. For confidentiality reasons he cannot disclose details to this court beyond saying that he is encountering many of the issues considered in this matter in his personal capacity. He is a parent who is directly affected by the recommendations of

Cafcass officers that may be guided by the policies and research published from time-to-time by the Ministry of Justice.

The Defendant

11. In this matter, the special position of the Lord Chancellor and Secretary of State for Justice ("SoSJ") and the MoJ must be considered – this is no ordinary government department making this publication. The MoJ describes itself as "at the heart of the justice system" working to "protect and advance the principles of justice."

12. The Lord Chancellor exercises disciplinary authority over judges (jointly with the Lord Chief Justice) and can choose whether to accept or reject the recommendations of the Judicial Appointments Commission.

13. The MoJ administers HMCTS and "sponsors" the Children and Family Court Advisory and Support Service (Cafcass). Despite Cafcass's ostensible status as a "an executive Non departmental Public Body", the 2014 "Framework Document" between the MoJ and Cafcass gives the SoSJ and the MoJ significant strategic control over Cafcass, including the appointments of the Chair and Board members, budget, "determining the policy and resources framework within which Cafcass should operate", and ensuring Cafcass has "an appropriate framework of objectives and targets in the light of wider Department strategic aims and objectives".

<u>The application of Article 8 in this matter</u>

14. The Report is primarily concerned about how the State will manage the rights of the child for contact with their parents where allegations of domestic abuse have been made.

15. In this respect, it addresses the Article 8 rights of the parents and the children, and in particular the positive obligation of the State to exercise "exceptional diligence" in matters concerning a person's relationship with his or her child.

16. Relevant elements of the law in respect to the Article 8 were recently summarised in *Pisica v The Republic of Moldova*[1]:

> "63. The Court reiterates that although the primary object of Article 8 is to protect the individual against arbitrary action by public authorities, there are, in

[1] 23641/17 (Judgment : Article 8 - Right to respect for private and family life : Second Section) [2019] ECHR 779

addition, positive obligations inherent in effective "respect" for family life (see, amongst other authorities, *Glaser v. the United Kingdom*, no. 32346/96, § 63). The Court has repeatedly held that in cases concerning parental contact rights, the State has in principle an obligation to take measures with a view to reuniting parents with their children, and an obligation to facilitate such reunions, in so far as the interests of the child dictate that everything must be done to preserve personal relations.

…

"66. In cases concerning a person's relationship with his or her child, there is a duty to exercise exceptional diligence, in view of the risk that the passage of time may result in a de facto determination of the matter.

…

"68. In deciding whether the authorities complied with their positive obligations under Article 8, the Court will take into account all relevant elements, such as … the authorities'actions throughout the proceedings"

17. Additionally, the State is responsible for all its authorities: not just the judicial organs, but all public institutions (*Martins Moreira v. Portugal*, § 60).

18. The mere publication of the Report, as well as its recommendations if finally implemented, will impact on the separation of parent and child during proceedings, often before any facts are found, and the length of time it may take to reunite them and normalise their relationship.

19. It is therefore submitted that the State's duty of "exceptional diligence" extends not just to the decisions of the judiciary in the court-room, but to all organs of government and to "all relevant elements", including the policies governing the administration of proceedings and therefore to the determination, publication and implementation of such policies.

20. It is submitted that:

    a) The Report is a policy that impacts the outcomes of private law proceedings concerning the relationships between children and their parents; and

b) the MoJ's process to produce the Report did not satisfy the consequent requirement for exceptional diligence.

Justiciability:

21. A most critical preliminary issue in this matter is whether a judicial review should be applied to what is effectively a policy statement.

22. The court does have the capacity to examine the process and veracity of assertions within policy (per DeSmtih's at [1-038- 1-039]):

> "The constitutional status of the judiciary should not, however, excuse the courts from any scrutiny of policy decisions. Courts are able, and indeed obliged, to require that decisions even with in the realm of "high policy" are within the scope of the relevant legal power or duty, and arrived at by the legal standards of procedural fairness…
>
> "Even where the courts recognise their lack of constitutional capacity to make the primary decision of policy, they should nevertheless not easily relinquish their secondary function of probing the quality of the reasoning and ensuring that assertions are properly justified."

23. There is some precedence for hearing "Decisions Without Direct Legal Effect" (per De Smith's at 3-026):

> "In some cases the court has been invited to decline to exercise its power of review because the public authority's action is characterised as being without legal effect. The courts now take a broad view and it is no longer necessary for a claimant to demonstrate that a decision or action has direct legal consequences upon the claimant. Thus the court have reviewed: statements contained in a press release, policy guidance issued by public authorities, and statements of national policy on airports by a minister to Parliament, though their "high level" character and preliminary nature of the decision limited the scope of review."

24. Further guidance may be found in *R (on the application of Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626:

> "69. It is not simply the "high-level" character of some of the policy judgments which limits the scope for review. I would also emphasise the preliminary nature

of the decision. As I have said, any grounds of challenge at this stage need to seen in the context, not of an individual decision or act, but of a continuing process towards the eventual goal of statutory authorisation. A flaw in the consultation process should not be fatal if it can be put right at a later stage. There must be something not just "clearly and radically wrong", but also such as to require the intervention of the court at this stage. Similarly, failure to take account of material considerations is unlikely to justify intervention by the court if it can be remedied at a later stage. It would be different if the failure related to what I described in argument as a "show-stopper": that is a policy or factual consideration which makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether without further ado."

25. The Claimant submits that justiciability of a policy publication within a chain of events proceeding to "a formal act having "... substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests" (per §48 of *Hillingdon*), is a two-stage test whether the alleged flaws are:

a) so obviously unacceptable that the only rational course would be to abort the policy altogether without further ado (a "show stopper"); or where there is no such "show-stopper":

b) cannot be remedied at a later stage in the process until the formal act.

26. The Claimant submits that in the first instance the Report contains several "show stoppers" that will be discussed in detail later:

a) the Final Report's assertion at [3.1.3] that there is no "automatic right" for contact between a child and their parent is a refutation of such a foundational tenet of the entire Family Court system, the body of ECHR case history, and the tradition of English jurisprudence, that no further policy initiative can be rightly undertaken until that assertion has been determined and causes the UK to violate EU law from the time of the publication in June 2020. The starting point for this determination is the Charter of Fundamental Rights, which was determined to be English Law in a previous judgement in Judicial Review. It is therefore most applicable that this element is determined by Judicial Review.

b) The Report, published under the banner of the MoJ without qualification, undermines public confidence in the competence the judiciary, the justice of existing law and the integrity of the Family Court. It identifies with certainty that the judiciary has a "pro contact culture" (which is actually established law) with the implication that family court (and ECHR) decisions have been wrong, even reckless and endangering, and have failed to properly determine the facts of the cases they hear. All these things may even be true, but the MoJ fails to support its assertions with rigorously determined facts based on verified data. The MoJ's findings are based on the unverified, self-reported anecdotes of disaffected ex-spouses, and this promotion of "mob rule" is so antithetical to the English concept of justice that the entire exercise should be abandoned without further ado.

c) The Report failed to address the title of its review: there was no "Assessing risk of harm", as there has been no academically-robust risk assessment at all. The Report is predicated on a presupposition that domestic abuse is being perpetrated in intra-court or post-court scenarios but provides no statistically valid data to support the assertion, no evaluation of the extent of the problem (if it exists at all) and no comparison to any control group. It is obviously unacceptable to continue to re-shape the practice of family law to address a risk of harm, without determining whether there is an actual risk of harm or its extent.

d) The procedural unfairness of the MoJ's process to produce the Report was of such an extent that it fatally undermines any further policy implementation. The process had the elements of a sham or a ritual or a mere exercise in "symbolic reassurance", which could call into question public confidence in the legitimacy of further MoJ initiatives and amendments to Family Court Practice Directions arising therefrom. It is particularly problematic that the unscientific survey/consultation of disaffected ex-spouses was applied to mute or undermine the voices of experts and the judiciary in the Final Report. The Report goes on to make unsubstantiated statements of critical facts such as:

    i) "A period of 'successful' supervised contact does not eliminate concerns or reduce the risk posed by an abuser, it merely puts their abusive

behaviour on pause." (at 9.3.3 on page [140] of the Final Report - a reference is made to a research document that does not in fact support this statement), and

ii) "research suggests that the proportion of 'false' allegations of domestic abuse is very small." (at [5.2] of the Final Report - this is referenced ultimately to a single piece of foreign research that does not actually support this assertion)

iii) "There is no automatic right to contact between a child and parent." (At [3.1.3] of the Final Report - ignoring the right under §24.3 of the Charter of Fundamental Rights (discussed later))

27. The Claimant submits that in the second instance the flaws in the Report will not be able to be remedied later in the process:

a) Given the central role of the MoJ in the administration of justice in the UK, the impact of publishing the Report under the banner and insignia of the MoJ without any qualification or disclaimer, has already instantly created a potential for legitimate expectations amongst court participants and practical effect as government guidance for Cafcass officers, magistrates, social workers and legal advisors which impacts the care of children within private proceedings. The court is reminded that the Report asserts that there is no right of contact between children and parents, false allegations are rare and that abusers regress after supervised contact. As the effect of publication is instant and on-going, there is no space for it to be remedied before it impacts substantial formal actions (such as interim orders on the basis of social worker recommendations). It was a practical effect on the conduct of third parties that meant the press release in *R. (on the Application of Baby Products Association & Anor) v Liverpool City Council* [1999] EWHC 832 was judiciable, although that case was decided on the basis of legality. Nonetheless, the State's duty for "exceptional diligence" in this matter and the instant public impact of its publication means that the process leading to the policy recommendations must be subjected to Judicial Review at this stage.

b) The Secretary of State for Justice has said on 11 August 2020 that he considers that the analysis and recommendations of the Report "do present a robust picture

of how the family courts deal with domestic abuse cases" and "the Implementation Plan points to the recommendations that we have already committed to taking forward".

c) The policy and recommendations look to change the "pro-contact culture" of multiple organisations, to tackle "the systematic minimisation or disbelief of abuse" (more commonly known as a presumption of innocence and court findings) through measures such a "re-educating" the judiciary and family court advisors. Therefore the impact of the policy will be embedded within professional judgements of risk in discrete private law cases - if the judge or family court advisor has been trained to "believe women", then the judgment of risk will fall against father's contact. There is no opportunity for the affected individual litigant to change the judgement "culture" for his own particular case. It is entirely possible that there is "systemic disbelief of abuse" in the family court system which would need to be addressed, but the MoJ has not undertaken the work to determine whether that is actually the case. It is at this stage, before any implementation commences, that the Judicial Review must occur.

d) As mentioned earlier, the MoJ has such exclusive control over the essential data that it is not possible for an external party to challenge the policy at a later stage until and even after it has taken a substantive effect, whilst the flawed survey / consultation process and Literature Review immunises the MoJ against challenge of policies it was already undertaking.

Deficient diligence in the public call for evidence

28. The public call for evidence created an evidence base for the Panel that was misleading. The public responses were applied in the Report as if they were a statically representative sample.

29. However, the Panel even admits that the survey evidence lacks scientific credibility:

> *"qualitative evidence alone is not designed to tell us how common or frequent those experiences are… The panel was well aware that submissions can be based on misunderstandings, misapprehensions or deliberate distortion as well as wishful thinking*"

and it acknowledged that experts had also raised this problem.

30. However, the Panel continued to make recommendations anyway because there were, in its view, many responses to its survey that were aligned. This is invalid reasoning because:

a) The alignment of views would be expected because the cohort was intrinsically biased:

i) the Panel specifically sought out to bias their cohort in their call for evidence:

"The panel are particularly keen to receive evidence of any harm caused to children and/or parents during or following private law children proceedings"

And hence minimising responses where there was not any harm during or following proceedings, even despite harm occurring before proceedings;

ii) There are 4 times as many female respondents to the survey as male respondents, despite almost every private law case involving one male and one female protagonist and there being of course, two sides to every story;

b) there is no verification whether responses were complete fabrications or whether the responder had even been to court (which must be considered in light of the gendered response ratio and uncertainty about how that ratio may have arisen); and

c) without basic statistical controls a cohort size of circa 1,200 is actually insignificant compared to the multi-year data-set of circa half-a-million cases, and wholly insufficient to surmount the presumption of outliers (although with a statistically valid process such a cohort size can be sufficient to indicate a statistically reliable trend, that is the very purpose of the statistical controls that are missing in this case).

d) Close examination reveals that there was considerable misalignment between the expert and judiciary views and the survey results. The survey is applied by

the Panel authors to quash or undermine the views that are contrary to its overriding narrative:

i) "Although some professionals supported the presumption of parental involvement in section 1(2A) of the Children Act 1989, the panel received sufficient evidence to conclude that in the cohort of cases described in submissions the presumption further reinforces the pro-contact culture and detracts from the court's focus on the child's individual welfare and safety"

ii) "When noting that domestic abuse is not a bar to contact, participants in the judicial roundtable observed that this appears to come as a surprise to some parties. Our submissions suggested that what parties experience on the ground is a disconcerting disparity between the findings of abuse and/or the established risk assessment and the orders made."

iii) "Some participants in the judicial roundtable expressed concerns that DAPPs are "too monolithic, it's a 26 week programme or nothing at all", suggesting that there is an inflexible, 'one size fits all' approach to behaviour change. Nevertheless, shifting the mind-set and entrenched behaviour patterns of an abusive parent can take a considerable time. [this is an unsupported statement from the authors] Submissions expressed concern that the pro-contact culture may lead courts to minimise the seriousness of abuse and search for shortcuts to restoring contact which are not validated or effective in reducing risk."

(This last point from the judiciary is actually very significant and it was a shame it was beaten down by the Panel authors. Statistical evidence indicates that indeed, misapplied interventions can be counter-productive in preventing IPV recidivism in certain scenarios. It seems the panel's objective may not really have been to minimise harm)

31. The public call for evidence may also create the impression that a public consultation has occurred. However, it is not sufficient for that purpose either, because whether or not consultation is a legal requirement, if it is embarked upon it must be carried out properly (De Smith's at [7-051]):

a) The consultation must be in response to proposals, rather than merely a bland generality;

b) Proper consultation requires "candid disclosure of the reasons for what is proposed" and

c) Where the authority has access to important documents which are material to its determination, those documents ought to be disclosed;

And none of these were met in this case.

Deficient diligence in the Literature Review

32. The Literature Review refers to no technical paper that is contrary to the Report's conclusions; there is little or no discussion of complex, contested issues; Other studies referred to in the Literature Review are mostly qualitative research based on unverified self-reporting claims- the sources cite each-other but there is no actual technical foundation to the assertions held; And in the few cases where quantitative data has been applied, there are such fatal flaws in basic scientific technique (such as sample selection) that they are statistically invalid or they were grossly misrepresented in the Report.

33. The product of the Literature Review is incompatible with a thorough QA process

a) Example 1: The Literature Review states that:

> "Hunter and Barnett (2013) noted that whenever objective efforts are made at quantifying 'false allegations' of domestic abuse, the proportion of unfounded allegations turns out to be very small. Allen and Brinig (2011) found not only that 'false' allegations in divorce proceedings (including in applications for protective injunctions) constituted only a very small proportion of domestic violence claims, but that the ratio of men to women making false claims was 4:1."

This view pervades the Report and is based entirely on the Author's misreading of a single study from the USA (Allen and Brinig). As the second source of this assertion, the Literature Review cites the author's own prior work (Hunter and Barnett), which has as its only source exactly the same research paper misread in exactly the same way. The A&B study actually found 3% of all divorce cases

had false claims, rather than that false claims were small proportion of domestic violence claims as the Literature Review erroneously says.

That study also found that false claims doubled after a change in law that provided benefit to domestic abuse cases and concurrently there was a decrease to mothers achieving sole custody and an increase to fathers being awarded sole custody. The study problematically defines "false claims" as allegations that did not result in a protective order, whereas other studies indicate that up to 81% of such orders granted in the USA are themselves "unnecessary or false", with the focus of the orders being to prevent the possibility of future abuse.

This definition of "false claim" explains the extraordinary assertion that "the ratio of men to women making false claims was 4:1", which really only means that Protection Orders in the USA are refused four times more often when the complainant is male, which is likely due to other factors. It is not clear how the Literature Review author determined that USA court judgements are superior to English judgements, or whether the Author contends that the absence of a protective injunction should also be the definition of "false claims" for analysing UK private proceedings, so that "false claims" in UK private law cases would constitute well over 95% of allegations.

It was in this particular respect, the "proportion of unfounded allegations", where the MoJ's unique access to significant real UK court data from private and public law sources should have been drawn upon. Instead, the Panel relied on questionable inferences from a single foreign study.

b) Example 2: In contesting the high levels of male victimisation of domestic abuse in the Crime Surveys for England and Wales, the Literature Review states that

> "Research suggests that when coercive and controlling behaviour is taken into account, the differences between the experiences of male and female victims become more apparent. (ONS, 2018, p8)."

Although that was the stated expectation of the ONS's Domestic Abuse Statistics Steering Group (DASSG) before the ONS conducted its research, that same ONS research report later states: "Our findings are not consistent with this

expectation". The Literature Review makes no mention that the actual UK data refutes the Review's assertion.

c) Example 3: The Literature Review includes the statement,

> "no empirical research studies undertaken in England and Wales focusing on parental alienation and domestic abuse were found";

yet the Final Report contains 45 mentions of parental alienation (PA), all of them in the context of allegations of PA being used as counter-claims to allegations of domestic abuse, for example (emphasis added):

> "While the panel accepts that some resident parents may be opposed to their children's contact with the non-resident parent, the strong association between claims of alienation and domestic abuse allegations, and the weight of the research evidence and submissions suggest that accusations of parental alienation are often used to threaten and blame victims of domestic abuse who are attempting to protect their children and achieve safer contact arrangements."

The Panel published certain and emphatic statements on this issue without "empirical research studies".

d) Example 4: Both the Final Report and the Literature Review repeatedly refer to a Women's Aid 'report' called 'Nineteen Child Homicides' (seven times between them). This 'report' is an advocate's political submission that has not undergone a robust peer review process – it lacks statistical validity (especially selective sampling) and academic rigour. (Please note that credible research on SCRs involving filicide in the UK demonstrates that in the post-separation environment, biological mothers are twice as likely to kill their children than biological fathers, and a child in the mother's household is four times at risk of filicide. In two-thirds of these cases, the killing mother has claimed to be the victim of domestic abuse – the Literature Review makes no mention of studies that may challenge the author's presuppositions).

Deficient diligence in the conduct of the process overall

34. There seems to be inadequate due diligence processes surrounding the undertaking of the panel or its task. The obligation for due diligence arises both from Article 8 "exceptional diligence" and from the Civil Service Code.

35. It is unclear whether the external panel members were contracted to conform with the Civil Service Code, but the publication under the banner and insignia of the MoJ without qualification provides a legitimate expectation that they were. The Civil Service Code creates obligations for each individual (and thereby for the group as a whole) for: Integrity, Honesty, Objectivity and Impartiality.

36. Violations of the diligence duty include:

a) To deliberately conflate allegations of abuse with findings of abuse:

The terms 'victims' and 'perpetrators' of domestic abuse or 'abuser' ... are also intended to include people who are alleged to be victims, perpetrators or abusers in the context of court proceedings.

thereby misleading the public, undermining the role of the judiciary in determining matters of domestic abuse, and rendering assertions of the Report functionally meaningless but critically misleading, such as:

"*some form of direct contact between children and perpetrators of domestic abuse was ordered in the great majority of all private law cases"*;

b) Failure to quantitively scope and determine the incidence and effect of domestic abuse during and after private law proceedings before making recommendations and implementation plans that would affect the relationship between parents and children; There is a noteable failure to reference any longitudinal, multivariate analysis of the issues at hand (ie there was no "Assessing risk of harm" as the Report title promises and so the public should expect);

c) Fail to undertake a quantitative review of the efficacy (or otherwise) of existing Respect-accredited DAPP courses (and the appropriateness of the accreditation) before recommending expansion of the applications of those courses;

d) conduct its original research processes (survey and Literature Review) without due regard to academically recognised standards in terms of representative,

unbiased sampling, and statistical significance, and accord with the Civil Service Code;

e) conduct a Literature Review in a biased manner: including material error or misrepresentation, and failing to take due consideration of evidence or arguments contrary to its conclusions;

f) form its Panel and appoint authors and Chairs with insufficient skills / without skills appropriate for the tasks;

g) form its panel with an overwhelming gender imbalance and inclusion of 2 single-gendered advocacy groups (Women's Aid and Women's Aid Wales) without appropriate countervailing balance and panelists who would "judge their own cause" , creating a real possibility of bias;

h) fail to instil in the Panel, Authors and Chairs and their processes adequate controls to counteract bias and groupthink, or to adequately vet nominations for roles for their presuppositions of the subject matter and balance them, with the result that the Panel was demonstrably "immune to contrary argument";

i) **fail to** reasonably consider the harm to children from non-contact with a parent during and after proceedings and weigh this against the risk of harm to a parent;

j) fail to grapple with the complex and relevant issue of parental alienation other than to regard it as a defence against abuse claims, despite its recognition at the ECHR;

k) assume, based on inadequate or irrelevant evidence, and ignoring the plain evidence before it from multitudinous examinations by the family court, that false allegations or misrepresentations of domestic abuse in private family proceedings in England and Wales are statistically remote:

    i) so as to not be considered the most plain and obvious rationale for judgements after the court has examined allegations and ruled against the accuser, instead assuming a "pro-contact culture" without reliable corroborating evidence;

ii) so to treat as reliable evidence the submissions of persons in its survey whose allegations seem to have been examined by the court and found wanting in some respect;

l) assert the existence of a "pro-contact culture" as a phenomenon that is something other than recognised and established English and international law;

i) fail to establish whether such a "pro-contact culture" is harmful to children before recommending that it is dismantled;

ii) fail to define or assess the alternative to a "pro contact culture" which the MoJ is aiming to implement: whether it means that allegations of domestic abuse are treated as if they are true until they are positively proved wrong, and/or whether Cafcass and the judiciary are to ignore the potential harm to children from non-contact with a parent, and/or whether such a change in "culture" would dramatically increase the risk of false allegations and ensuing harm to children;

m) call into question the incidence rate for no-contact orders yet fail to substantiate whether this is wrong or what the "correct" incidence rate should be or how it should be derived (and thereby targeting 100%);

n) fail to assess whether Non-Molestation orders, appeals and other devices already available to the justice system are adequate or adequately applied, or justify why eliminating parental involvement should be preferred to those other methods of addressing the concerns of its cohort;

o) fail to provide technical validation of its judicial re-education policy in controversial areas such as ""the gendered nature of violence" in regards to domestic abuse, "data on the incidence of false allegations of domestic abuse", and "what constitutes behaviour change in perpetrators of domestic abuse";

p) repeat and affirm "articles of faith" such as that perpetrator denial or minimisation are related to DV recidivism, which do not have valid statistical support and which available statistical analysis demonstrates are actually wrong;

q) inadequately inform the public and practicing professionals of the standing of the Report and whether it represents the views and policy of the MoJ, and thereby the State and the extent to which the author and panel members were obliged to conform with the Civil Service Code.

Populating the roles of the Panel

37. Lord Chancellor's August response that nominations for roles were carefully considered by the MoJ means that the diligence failings were not accidental.

Panel membership:

38. There is no indication of the selection criteria or due diligence processes applied in the appointment of the Panel members.

39. It seems that no Panel member had a scientific or technical qualification and all were drawn from just two disciplines: social work and law. There was no expertise in the relevant areas of adult-psychology, child-developmental psychology or criminal psychology / criminology, or specialist expertise in mathematical statistical analysis, so there was no technical capacity on the Panel to assess the technical veracity of the submissions it received or determine what information/data it required in order to make its technical assertions.

40. It is not clear why the MoJ would seek to have representation from across the industry on the panel when it was already intent on making a broad call for public evidence. The broad representation should have been in technical skills and expertise.

41. Membership of the panel included representatives of groups with vested interests in the outcomes, such as Women's Aid (x 2) and Respect, who should have been automatically excluded. Such groups could have been called upon to give evidence, but not be held in a position to judge their own cause.

42. It seems the panel selection demonstrated an ideological weighting towards feminism and women's advocacy that was not balanced by any men's advocacy group.

43. The panel consisted of 10 women and only 2 men, and both of those men should have been excluded because they were asked to judge their own cause. The gentleman representing Respect was their business development director and the Panel recommendation was to expand the use of DAPP courses which Respect is paid to

accredit; Mr Justice Stephen Cobb has been central to amending and promoting Practice Direction 12J and the efficacy (or otherwise) of his personal work conducted outside the court-room was in question, or at least it would be if the issues at hand were to be properly assessed.

Literature Review author:

44. There is no indication of the process by which a Literature Review author was selected by the Panel, not what criteria were used or which other candidates may have been considered. However, the selection of such a critical role is such a sensitive area should have been highly selective to ensure a dedication to objective reasoning and an absence of gender bias. It is submitted that this decision was made without reasonable controls against bias and groupthink.

45. The author of the Literature Review, Dr Adrienne Barnett has been described as "teaching … research methods (with a focus on feminist theory and research methodology)", she teaches "Gender and the Law" at Brunel and is currently a member of the Advisory Group of Rights of Women and of Women's Aid's Expert Advisory Group to the Child First campaign. It is submitted that this would give at least the appearance of a strong gender bias that is unsuitable for a role that requires dedication to gender-neutrality if the interests of the children are to remain paramount.

46. Her written work indicates that she has a low regard for objective science which is unhelpful in this role:

> "quantitative research is based on and validates the 'masculinist' values of neutrality and 'objective detachment'"
>
> "in order to regain a valid and authoritative voice for women in current family law we need to expose and disrupt law's construction of the 'scientific truth' about children's welfare"; and
>
> "concepts such as 'the welfare of the child' have been selectively constructed by the reductive operations of law. By deconstructing the notion of 'the welfare of the child' and locating it within its historical, social, political and ideological context, it can be seen to operate as a mechanism of power that serves particular interests."

Barnett, A. (2014). Contact at all costs?: Domestic violence child contact and the practices of the family courts and professionals

47. Dr Barnett had also recently published a work that was highly critical of parental alienation, indicating that she had already formed strong views on a highly contentious matter central to the issues being considered.

Evidence of Actual Bias in the Report

48. Actual bias can be seen in some of the outcomes of the Panel Report:

a) Example 1. The Report observes that

"Mosac reported that its most recent annual advocacy statistics showed that 7% of its cases involving child sexual abuse allegations resulted in a 'live with' order in favour of the alleged abusive parent; 92% resulted in orders for unsupervised staying contact and fewer than 1% resulted in no contact".

Given the critical sensitivities about such allegations, and that these statistics were the result of examination of the allegations by a court of law with the assistance of social workers, the obvious and plain inferences from such data are that 99% of such allegations are not true or at least grotesquely exaggerated, and it is 7 times more likely that such allegations arise from the emotional abuse of the children by the accuser than the conduct of the accused. But the Panel did not even consider false allegations as even a *possible* reason for the departure from their expectations, instead stating:

> *"Allegations of child sexual abuse raised particular issues relating to suspicion and perceptions of disbelief."*

And rightly so, it seems. The Panel never disclose what the "right" percentages "should" be, nor how they would have derived such targets, nor examined on what basis they have decided the decisions of the court are wrong and should accord instead with their own pre-supposed "right" outcomes.

b) Example 2 An example of the Panel's immunity to contrary views and gross misrepresentation of technical data is the Panel's statement that:

> *"A period of 'successful' supervised contact does not eliminate concerns or reduce the risk posed by an abuser, it merely puts their*

abusive behaviour on pause. Abusers who have been able to control their victims may be able to behave well while being watched, but upon 'progression' to unsupervised contact can resume the abuse unhindered.[158]

158 See also Perry and Rainey (2007) 'Supervised, supported and indirect contact orders: Research findings', International Journal of Law, Policy and the Family 21: 21–47, whose follow-up interviews with parents who had accessed some form of supervised contact found low levels of satisfaction and problems putting the post-supervision contact into practice."

But the Perry and Rainey study never associates abuse recidivism with supervised contact or contact progression, and domestic abuse recidivism is not even listed as a feature of reduced post-court contact. The technical paper simply doesn't support the assertion made in the Report:

"*Despite lower levels of satisfaction with the outcome and more difficulties putting the arrangements into practice in these cases, at the time of follow-up, contact was taking place according to the terms of the order or agreement in a far higher proportion of those cases which had involved previous supervision than in those cases which had not"*

Most importantly, that study actually undermines the Panel's overall conclusions with the finding (our emphasis):

"*Somewhat contrary to what might be expected, the parents in those cases in which physical violence had featured were more likely than those in which it had not to report that contact was taking place according to the terms of the court order or agreement. …**The fact that allegations of violence or harassment were made in a case did not have a negative impact on the post-court developments in contact."***

However the Panel Authors simply refused to disclose the critical implications of these findings even though they read this study, and it seems they have

ignored any other work that doesn't fit the MoJ's pre-determined biased narrative.

Such conduct by the Panel Authors must surely elicit the exclamation of "my goodness, that is certainly wrong" (per Lord Donaldson in *R v Devon CC Ex p George* [1998]).

c) Example 3: Similarly, countervailing views expressed in the father-"perpetrators" focus group were dismissed as "a limited appreciation of the impact of the abuse on the mother or the children." (at [5.6] on page 63). It must be recalled that the Panel conflates allegations and findings of abuse so that "perpetrators" includes the wrongfully accused.

Without the detailed knowledge of the individual cases, the report Authors had no means to determine whether the expressions demonstrated limited appreciation or indeed an accurate account.

It was only those members who agreed with the Panel's presuppositions and recommendations regarding DAAP courses that were heard, because this was the test of whether they had reached an appropriate "appreciation" of their behaviours (DAPP courses require such "appreciation" as a pre-condition for acceptance). It is a circular logic that can only reinforce the Panel's presuppositions.

This bias of the Panel Authors is further exposed on page 7:

> "*The courts almost always ordered some form of contact, frequently unrestricted, and usually without requiring an alleged abuser to address their behaviour*."

If this is alleged abuse - that is there are no findings - on what basis do the Panel Authors expect the accused to address "their behaviour". To the Panel Authors, there is an assumption of guilt upon allegation and any denial is merely proof of abuse that should prevent contact.

By contrast, there was no such "second-guessing" of the mother-"victims" focus group's expressions of how much they were affected, which could easily have been exaggerated or even wholly invented, particularly in a closed group

environment that would encourage social conforming, confirmation bias and group-think.

It is worth further noting that nowhere the Report has the Panel addressed the seminal research evidence on recidivism of domestic violence by Henning and Holdford (*Minimization, Denial, and Victim Blaming by Batterers: How Much Does the Truth Matter?*, 2006), which found that:

> *"Although high levels of minimization, denial, victim blaming, and socially desirable responding were found within the sample of 2,824 convicted DV offenders, analysis of new DV police reports for the sample found little evidence linking these variables to increased DV recidivism."*

This absence of any link between "appreciation" and recidivism is supported by a raft of high-quality studies (Eckhardt and Crane, *Male perpetrators of intimate partner violence and implicit attitudes toward violence: Associations with treatment outcomes*, 2014); *Treatment impact on recidivism of family only vs. generally violent partner violence perpetrators* (Cantos, Kosson, Goldstein et al, 2019), *Characteristics and recidivism in relation to arrest: differentiating between partner violent perpetrator subtypes* (Peterson, 2019) and *Personality Disorder Traits, Trauma, and Risk in Perpetrators of Domestic Violence* (Green and Brown, 2019).

It is not for the Judicial Review to assess these works, only to note that they are ignored and that the Panel have presented no countervailing evidence of similar quality to support the foundational tenet of DAPP accreditation and Cafcass policy: that an admission of guilt actually matters in some way in respect to the risk of harm to the parent or child.

Refutation of the child's right to contact with both their parents

49. At 3.1.3 of the Final Report, the MoJ declares that:

"There is no automatic right to contact between a child and parent."

50. Regular direct contact is specifically recognised as right of the child under the Charter of Fundamental Rights ("CFR"), forming part of the Lisbon Treaty and which says at 24 (3):

"Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

51. The CFR rights were affirmed as domestic law in the UK by Mostyn J in *R (on the application of) AB v Secretary of State for the Home Department* [2013] EWHC 3453, which considered the charter rights in respect to personal data:

"[13] However, my view that the effect of the seventh protocol is to prevent any new justiciable rights from being created is not one shared by the Court of Justice of the European Union in Luxembourg. In *Secretary of State for the Home Department v ME and others* (21 December 2011) it was held in paragraph 120 that:

> "Article 1(1) of [the seventh] protocol explains article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligations to comply with the provisions of the Charter or to prevent a court of one of those member states from ensuring compliance with those provisions".

"[14] The constitutional significance of this decision can hardly be overstated. The Human Rights Act 1998 incorporated into our domestic law large parts, but by no means all, of the European Convention on Human Rights. Some parts were deliberately missed out by Parliament. The Charter of Fundamental Rights of the European Union contains, I believe, all of those missing parts and a great deal more. Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our domestic law. Moreover, that much wider Charter of Rights would remain part of our domestic law even if the Human Rights Act were repealed.

"[15] …So it can be seen that even if the Human Rights Act were to be repealed, with the result that article 8 of the European Convention on Human Rights was no longer directly incorporated into domestic law, an identical right would continue to exist under

the Charter of Fundamental Rights of the European Union, and this right is, according to the Court in Luxembourg, enforceable domestically.

"[16] … This right to protection of personal data is not part of the European Convention on Human Rights, and has therefore not been incorporated into our domestic law by the Human Rights Act. But by virtue of the decision of the court in Luxembourg, and notwithstanding the terms of the opt-out, the claimant is entitled, as Mr Westgate QC correctly says, surprising though it may seem, to assert a violation of it in these domestic proceedings before me."

52. The CFR allows for deprivation of a child's direct contact with her parent only if that contact "is contrary to the child's best interests". That is, the right is "automatic" and only disapplies subject to conditions. Furthermore:

a) It uses the term "contrary to", which is a stronger and more difficult test than merely deciding which of indirect or direct contact might be preferred – those seeking to deprive a child of this right must go further and prove that direct contact would be positively detrimental to the child;

b) It refers to "the child's interests" (rather than saying, say "unless there is a risk to the child's safety"), and therefore requires a holistic view of the entire situation of the child including the harm done by prohibiting direct contact;

c) It uses the present term "it is", which is a statement of fact (rather than, say "it is possible that"), and therefore requires a determination of the matter before direct contact should be suspended.

53. Notwithstanding the impact of Brexit, the CFR was law at the time of the Report's publication and remains UK law at least until the conclusion the 2020 transition period.

54. The Commons debate on 5 February 2008 concerning the Lisbon Treaty and Protocol 30 thereto (often referred to as the "opt-out"), made clear that parliament's view was that the CFR merely affirmed existing rights already in English law. Per the then-Lord Chancellor and Secretary of State, Jack Straw:

> "We have made it clear that the charter does not create new rights, but simply records existing rights. It is an amalgamation of existing rights from different sources …

> …the protocol does not operate like an opt-out, but the broad purpose is similar: opt-outs and protocols are there to provide safeguards for the UK. It does not disapply rights to UK citizens; given that the United Kingdom fully accepts the rights reaffirmed in the charter, there would be no need to do so. However, it ensures that what is in the charter is not additionally justiciable, as it might have been had it not been for the charter"

55. This right must exist in order for the UK to represent to the EU that it has implemented EU directives that require compliance with s24 of the Charter, including without limitation:

- 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings
- 2011/92 on combating the sexual abuse and sexual exploitation of children and child pornography
- REGULATION (EU) No 656/2014 establishing rules for the surveillance of the external sea borders
- 2011/36 on preventing and combating trafficking in human beings and protecting its victims
- 2013/32/EU on common procedures for granting and withdrawing international protection
- 2012/29 establishing minimum standards on the rights, support and protection of victims of crime
- 2003/9/EC laying down minimum standards for the reception of asylum seekers
- 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.
- 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals

- Regulation No 343/2003 (Dublin II) – Determining the Member State responsible for examining asylum applications lodged by unaccompanied minors who are third-country nationals

- 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

56. As affirmed in *Stefano Melloni v Ministerio Fiscal [2013] EUECJ C-399/11*:

"[60] It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised"

57. That the UK government has indeed made these representations to the EU (but without enacting legislation to separately create the s24.3 right in respect to these narrow circumstances) means that the UK government acknowledges that *as a minimum*, the right must exist under UK law generally.

CONCLUSION

58. The Ministry of Justice is uniquely able to access the private-law family court records, as well as public law family records, the probation services and criminal data sources. It has no excuse not to use this position to scientifically assess the probability and drivers of domestic abuse recidivism and ensuing risks of harm in the separated family environment and in private law proceedings. External experts simply do not have the data which the MoJ possesses. It is incumbent on the MoJ, (and, practically, only the MoJ), to define and quantify the problem it is seeking to address before publishing policy.

59. The decision to develop policy by means of public submissions and a Literature Review of external sources was an abdication of the Ministry's positive obligation for exceptional diligence in matters concerning a child's parental contact under Article 8 of the HRA. This was further exacerbated by diligence failures in the policy-development process itself.

60. The Report further calls for urgent and radical revision of current law regarding the presumption of parental involvement, preventing parties from returning to court, and the elimination of any threat of sanction for the non-performance of court orders for contact. The overall effect is a recipe for parental removal, with little if any regard to the psychological effects on the children.

61. The further mismanagement of that process to introduce the appearance of bias and actual bias in the Report, and to allow the Panel to breach the Civil Service Code, has introduced a fatal level of procedural unfairness that must be addressed by Judicial Review as there is no other means to address the problem.

62. The further publication of the Report under the insignia of the MoJ without disclaimer or qualification, considering the position of the MoJ, and including the repudiation of the child's rights that are essential for the UK's continuing compliance with EU law, created an immediate real impact on the children's protected rights to contact with their parent.

63. Together with the "show-stopper" flaws of the Report and the process, a Judicial Review is required at this stage of the chain of events leading to formal decisions.

Prepared by Terrence White

70 Avebury Avenue, Tonbridge, TN9 1TQ