

Cafcass consultation response on the Family Justice Council's Draft Best Practice Guidance on Domestic Abuse

Cafcass (the Children and Family Court Advisory and Support Service) is a non-departmental public body sponsored by the Ministry of Justice. Cafcass represents children in family court cases in England. We make sure that their wishes and feelings are heard and that decisions are made in their best interests. We are independent of the courts, local authority children's services, education and health authorities.

Domestic abuse is the most common factor identified in local authority assessments of children in need¹ and the context is similar when parents cannot agree on where a child should live or who they should spend time with (private law). As referenced in the draft Family Justice Council's Best Practice Guidance on Domestic Abuse, our small-scale study with Women's Aid in 2017 found that domestic abuse allegations featured in 62% of a sample of private law cases.² A more recent internal audit estimated that 70% of private law cases feature allegations of domestic abuse.³

Domestic abuse often occurs alongside other harm or risk and we therefore welcome initiatives in the sector to strengthen practice, including this guidance produced by the Family Justice Council, the work of the private and public law working groups, the proposed Domestic Abuse Bill and the Ministry of Justice panel review. These initiatives must be joined up to produce wider reform in the family courts and effective multi-agency working will be an essential component for their success.

We believe strongly, with the incidence of alleged domestic abuse being as high as it is, that the system must urgently consider safe mediation options and other out of court services even in these circumstances in order to reduce demand for court and Cafcass services, and better resolve issues for families. Critically and in parallel, we must also consider why, when domestic abuse is established, this does not always result in referrals to local authorities for assessment of the child/ren, in accordance with sections 17/47 of the Children Act 1989. We believe that we urgently need to revisit thresholds for harm which currently negate mediation but do not consistently mean the needs of children are properly assessed and understood as primary legislation requires if they are to be safeguarded and protected.

We value the Family Justice Council guidance, which will assist all professionals engaging with domestic abuse. In places it would benefit from greater clarity regarding the intended target audience – for example, it is to be a 'benchbook' for professionals and not litigants in person, as there are aspects of the guidance that seem targeted at litigants in person. If this is to be a professional-only resource it would benefit from being more concise and less repetitive.

Training

Most of the proposed training topics for all professionals are covered in Cafcass' existing training programme and supporting materials. The proposals are fair and workable, and we agree with the notion of supplementary learning through peer or team discussion in addition to one-day training events to embed practice.

¹ Department for Education,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843046/Characteristics_of_children_in_need_2018_to_2019_main_text.pdf

² A minor error is at the top of page 71 it states that Cafcass' research with Women's Aid into allegations of domestic abuse also looked at parental alienation. The research did not look into parental alienation, and we would request that this paragraph is amended to reflect this.

³ Cafcass private law audit, 2019

We recommend that more specific training on diversity and domestic abuse is included in the proposed training programme as this will be integral to professional understanding of the impact on the child and the family network. The guidance could also highlight the importance of involving interpreters where relevant, and training for professionals on understanding the intellectual competence of a party as this will impact on their ability to express and understand proceedings, including their experience of domestic abuse.

We are pleased that the Family Justice Council's draft guidance positively references our Child Impact Assessment Framework, which includes Cafcass' domestic abuse practice pathway. Resources from partners are an essential aspect of the pathway, such as material developed for practitioners in collaboration with SafeLives and Research in Practice on coercive and controlling behaviours.

Specialist domestic abuse lead

Regarding the proposal for a specialist domestic abuse lead within each court centre, including a Cafcass/Cafcass Cymru lead, we acknowledge the need for each part of the family justice system to take responsibility for the development of best practice in the courts, but we have concerns about how this would be resourced given the extensive proposed responsibilities listed in the guidance. Rather than appointing individuals to take on such a significant role the agencies which make up the system should commit to regular liaison and communication with named individuals within the larger regional areas and hold each other to account. This could be through formal discussions or the Local Family Justice Boards should lead on ensuring guidance is followed and, where required, hold the court to account. We also recognise the need for LFJBs to be properly resourced to undertake this work. A court user group ([HMCTS has existing engagement groups](#)) could complement the work of the LFJB, for example by making sure special measures are available in courts.

'Either or' section 7 reports and fact-finding hearings

Regarding section 13.4.9 on 'rolled up hearings' (a combined fact-finding and welfare hearing) Cafcass does not accept that 'either/ or' section 7 reports (a report making alternative recommendations on a 'facts established' and a 'facts not established' basis) are ever appropriate. Cafcass Assistant Director and Principal Social Worker, Sarah Parsons, compiled a guidance note to the Greater London Family Panel (Annex 1) which clarified Cafcass' approach to section 7 reports when the court is considering fact-finding. This made clear that in the uncommon circumstances where a court requests a section 7 report before a fact-finding hearing Cafcass **will not** make recommendations on an 'either or' basis and will instead set out the specific allegations (if any) the FCA advises require judicial determination before any recommendations can be made. Additionally if Cafcass is directed to provide a section 7 report following a fact-finding hearing, the report prepared by Cafcass will be based on the narrative established by the court in its judgment.

The complexities of domestic abuse – and family life more generally - mean that matters can rarely be simplified to one recommendation for contact if abuse is proved, and a different recommendation if it is not. Our Family Court Advisers (FCAs) fed back the reasons they did not support directions for 'either/ or' section 7 reports as they are essentially asking the FCA to provide the court with two reports on different bases, and to carry out two different risk assessments in advance of understanding or being told what the factual matrix is and how it is likely to impact on the child. The factual matrix is essential for an FCA to understand the experience of the child and to make safe recommendations that are in their best interests. 'Either/ or' reports can also give mixed and confusing messages to parents.

FCAs were deeply concerned about the risk this might pose to the child which could potentially lead to an unsafe outcome if the recommendation was made on the basis of establishing an allegation was not true, rather than there being no enquiry into the allegation. Practice Direction 12J paragraph 22 says that when the court directs that a fact-finding hearing shall take place it will not usually request a section 7 report.

We do not support the proposal to appoint a children's guardian in order to ensure there is legal representative in the court who will conduct cross-examination of the parties in a fact-finding hearing where both parties are unrepresented. It is disputed that the child's advocate should take responsibility for ensuring that the article 6 rights of the parents are protected, which should be the responsibility of the Legal Aid Agency, neither is it appropriate in most cases for the child's advocate to pursue allegations against the parents about which the child has no knowledge. We are concerned that the courts will adopt this as a default position in all cases where the parties are unrepresented, and in any event we could not resource that number of appointments. If the court does make an order for a children's guardian to be appointed then there would have to be an appreciation that they could not necessarily be present at the entire hearing, in line with our [guidance on the use of professional time](#).

The courts need to appreciate that allegations of domestic abuse do not always arise within specific time periods and may not be disclosed at the same time. Feedback from FCAs has included:

- If the court decides to make some findings and not others the court should direct that these are not to be considered by the author of the section 7 report as the alternative is that the FCA is presented with allegations which remain unresolved but could be a significant contributor to risk.
- There are rare situations where new information arises after facts have been determined, such as corroboration of an allegation of domestic abuse from the child. It is not always clear what the FCA should do in these circumstances when a finding has been made that the allegation was not proven. FCAs are making recommendations within incredibly complicated scenarios and we would welcome more guidance.
- The very nature of coercive control makes it difficult to establish facts as it is defined by patterns of insidious behaviours rather than specific incidents. We support the proposal that training for all professionals, but particularly the judiciary, on coercive control would be helpful.

Data on domestic abuse

As stated in the guidance document, Cafcass records data on domestic abuse but this data is dependent on FCAs manually recording domestic abuse allegations on individual case records, and we know recording is not yet consistent. A new Cafcass electronic case management system will launch this year and conversations are taking place about what and how we want to record on that system, including specific details on domestic abuse data. Any decisions will be made in the context that the electronic case management system is primarily a social work tool, and we cannot overburden our social workers with too much data collection, but Cafcass is keen to improve the data available to the system.

Court ordered interventions

The guidance could clarify the following to ensure that the right orders are made in the right circumstances:

- Clarify that the domestic abuse perpetrator programme is currently only available to male perpetrators of domestic abuse.
- Page 73 states that 'A phased child arrangements plan may be considered using Cafcass commissioned supervised contact sessions where it is deemed safe to do so and the midway point is the recommended stage where this could be considered' – This is a misunderstanding of the current service as a domestic abuse perpetrator programme has to be completed before a recommendation on contact is made. Our practitioner guidance is being updated to reflect this and will be available at the end of February.
- Paragraph 1 of 14.3 states that 'the [provider's] report at the conclusion of the DAPP will set out whether and to what extent the individual has engaged with the programme' – The guidance should make it explicit that it is not the provider's completion report alone that assesses risk or determines the recommendation for contact. The FCA preparing the section 7 report will make the recommendation as they may have other information which is not available to the DAPP provider.
- At the end of section 14.3 it would be helpful to add that the court order must clearly state the role expected of Cafcass if we are to remain involved in a case.

Draft templates in annex 1 of the guidance document

There appears to be two separate templates setting out the necessary directions for a fact-finding hearing and Cafcass supports the need for clarity and detail in the directions which will assist in particular litigants in person. It is not clear which version the guidance is endorsing and it may not be appropriate to have two versions in the guidance.

In relation to the orders Cafcass would only ask that it is emphasised that there should be a direction that the court provides a copy of the judgment or a written document setting out the findings of the court to Cafcass. Cafcass is not able to commence any enquiries before having sight of the findings and being provided with a factual context in which to undertake a risk assessment. Cafcass would endorse the Model Order in Appendix A1.3.2 in which it is clear that a section 7 report should be ordered after the fact finding.

In Appendix A1.4 paragraph 20 suggests that the court will hold a rolled-up hearing and make decisions on welfare at the same time as making findings on the allegations of domestic abuse and the impact, if any, on the child of any findings. Cafcass has referred above to the difficulties with rolled up hearings where the court seeks advice on welfare and re-states that it is not appropriate to undertake an assessment on hypothetical outcomes.

In Appendix A1.5 Cafcass requires orders to be clear that any referral to a DAPP is undertaken by Cafcass and the court cannot direct a party to make the referral themselves to a programme commissioned by Cafcass. It is also important that the courts understand that Cafcass will not fund attendance at a programme unless they have had some previous involvement in a case. A local authority cannot make the referral on behalf of Cafcass.

Regarding the proposal for court staff to complete a pro forma for data collection in cases raising allegations of domestic abuse (Appendix A1.6) we recognise that more data is needed but unless data collection is universal its value is limited and in its current form we do not feel it is a realistic ask of court staff.

The primary concern for Cafcass is to ensure that orders are consistently sent out as soon as any work is directed so that there is no delay to our work and families receive the best possible service.

Conclusion

We value and support the Family Justice Council's development of Best Practice Guidance on Domestic Abuse and believe it will be a useful resource for professionals engaging with domestic abuse. Quality guidance, greater multi-agency working and clear signposting to resources can only help to better protect families who are affected by domestic abuse. Cafcass will happily assist with any amendments to the guidance.

Annex 1:

Guidance note issued by Sarah Parsons, Assistant Director, Cafcass to the Greater London Family Panel

This note is intended to clarify the approach to Cafcass reporting, pursuant to s.7 Children Act 1989, when the court is considering listing Fact-Finding hearings.

1. Cafcass is bound by the Practice Direction 12J (Family Procedure Rules) in relation to its practice in this regard.
2. PD12J (paragraph 22) makes clear that if the court directs a Fact-Finding Hearing on the issue of domestic abuse, it will not usually request a section 7 report until after that hearing. The reason for this is that a Fact-Finding Hearing should not be directed unless the future arrangements for the child depend on the truth of a specific allegation or counter-allegation being judicially determined.

Whilst it is recognised that ordering a section 7 report *before* deciding whether a Fact-Finding hearing is necessary has been a common practice in London, where this happens, Cafcass will not make recommendations on an either/or basis (i.e. if findings are made then course of action A, or if findings are not made then course of action B.). Rather, subject to the direction of the court, Cafcass will set out what specific allegations (if any) it advises require judicial determination before any recommendation can be made.

3. FCAs should advise a Fact-Finding hearing is needed only if the future arrangements for the child depend upon the truth of a specific allegation or counter-allegation being determined or 'found' judicially.
4. Further, the impact on the child of a Fact-Finding process should be taken into account by Cafcass when advising the court regarding the need for a Fact-Finding Hearing.
5. As a rule, FCAs should not sit through (or be directed to attend) Fact-Finding hearings unless their analysis of what the child needs hinges upon hearing some or all the evidence.
6. When Cafcass is directed to provide a s.7 report *following* a Fact-Finding Hearing, the findings of the court are binding on all parties and any report prepared by Cafcass under section 7 will be based on the narrative which has been established by the court.
7. However, there may be circumstances where Cafcass wants to ask the court to reconsider or reopen a fact finding, for example when:
 - significant relevant information has come to light which was not available to the court at the time of the Fact-Finding hearing; or
 - relevant and significant risk information comes to light during the assessment.
8. In these circumstances, which it is expected will be rare, Cafcass should set out to the court how this will impact upon the risk assessment and if necessary ask for the Fact-Finding to be reconsidered.