Review of Court Fees in Child Care Proceedings

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1. Summary

1.1 In his report *The Protection of Children in England: A Progress Report* of March 2009 Lord Laming recommended that an independent review should be carried out to assess whether the court fees charged to local authorities in child care proceedings were a deterrent to starting these proceedings. The Government accepted this recommendation and I was appointed to carry out the review. The overall objective of the review was stated as "to establish whether or not court fees act as a deterrent when local authorities decide whether or not to commence care proceedings".

1.2 Court fees were significantly increased in May 2008 to considerable concern from much of the judiciary, the legal profession and from many local authorities in England and Wales. The increase was based on a general HM Treasury policy objective of charging for services in the public sector and, specifically, to increase the proportion of the costs of HM Court Service funded by court users. It was suggested that charging the full costs of proceedings to local authorities would:

- promote "the efficient allocation of resources, by providing paying authorities with a greater incentive to use services economically and efficiently";
- improve "decision-making and accountability by providing greater visibility of the true costs and benefits of the services provided by both the charging and paying authority"; and
- "mean that the cost to authorities of court proceedings and alternative social services interventions are set on a comparable basis. This will remove any perverse incentive there may currently be to pursue the former prematurely or unnecessarily when the latter would be more appropriate."

To help finance the increased fees, £40 million for each of the financial years 2008/9 to 2010/11 was transferred from the Ministry of Justice to local authorities in England and Wales via the Department for Communities and Local Government and the Welsh Assembly Government.

1.3 The main concerns expressed in the consultation process, which preceded the increase, were echoed by representative national organisations seen in the course of this review. These views were widely, but not universally, held and were that:

- full cost recovery was wrong in principle;
- local authorities would not be able to afford the increased fees;
- the increased fees might result in local authorities taking other less costly routes to looking after children, such as voluntary accommodation under s20 of the Children Act 1989, or encouraging private law s8 applications from family members, and which might not necessarily be in the best interests of the child; and
- as a result of the above factors children would be put at risk.

These issues have formed the principal focus of this review.

1.4 Four local authorities were sufficiently concerned to challenge the lawfulness of the fee increase by judicial review, but this application was rejected by the High Court in November 2008, seven months after the fee increases were introduced. At the time, and to some extent even now, there was concern that the amounts transferred from MoJ would not be sufficient. I have addressed this in the review but, in my view, this concern was, in part, the result of the way the consultation process was handled. In particular, there seems to have been rather poor communication between the Departments concerned, and between central Government and local authorities. One consequence was that many authorities had fixed their budgets for 2008/9, the year when the fee increase would take effect, before they knew about the proposal. All had done so before the final fees were promulgated. Moreover, the MoJ response to the consultation process was only published after the new fees had been introduced.

1.5 This review has been conducted by a combination of analysis of national data, interviews with national organisations with an involvement in child safeguarding, and visits to a number of local authorities in England and Wales. In the local authority visits, the focus has been on how resources are allocated and managed and on relevant decision taking processes, with particular reference to the decisions about initiating proceedings.

1.6 At the time the fees were increased, there was a sharp fall in the rate at which proceedings were commenced and this caused speculation that the increased fees might have been the cause. However, almost simultaneously with the fee increase, the Public Law Outline was introduced. This is an approach to case management which, largely through better case preparation and more systematic exploration of alternatives to care proceedings, implies greater work for local authorities before a case goes to court – and thus, when introduced, some delays may have been caused as local authorities became familiar with the new procedures and carried out the work required.

1.7 A further influence was the publicity surrounding the death of Baby Peter which seems to have led to a sharp increase in referrals and, thus, to new care proceedings from mid-November last year. This increase has been sustained at least until July 2009, the most recent date for which data is currently available.

1.8 While it has been difficult to disentangle the various influences at work, from a review of data on proceedings and, in particular, a comparison of those courts which piloted the PLO with those that did not, I have concluded that the PLO was a greater influence than fees in explaining the fall in the overall volume of care proceedings in the middle of last year.

1.9 I have looked at the basis for calculating the proposed fees which was based on 2007/08 costs and volume of cases and arrived at what is, in effect, the cost of an “average” case. However, it appears that there was an overestimate of the number of cases for this purpose. Had the correct figure been used the full fee should have been some 25% higher or just over £6,000, rather than £4,825 which was the fee introduced.

1.10 I have reviewed the budgetary transfers and compared them with the amounts authorities actually incurred on court fees in the 2008/09 financial year. There are some uncertainties in the data but it appears that the notional amounts transferred were, in most cases, more than the costs incurred. However, the way in which the local government settlement works and how, in practice, the issue was handled meant that many English authorities were unaware of what the impact on the rate support grant had been and thought they had received less than they

actually did. There is also some uncertainty about the accuracy of local authorities' first year costs, but, whether accurate or not, actual fees paid in the first year of the new fee regime are likely to have been depressed by the fall in activity in the first part of the year. This is likely to be more than made up by the continued increase in applications from late 2008 onwards, the full financial effect of which is only likely to be seen in 2009/10.

1.11 While the fee increase was a very sharp one, the total sums involved are small as a proportion of the overall costs of safeguarding. However, they form a larger proportion of costs of proceedings than they did previously. And since they are demand driven cash costs, which are immediately incurred, they are both more volatile and, potentially, could be more easily influenced in the short run than the remainder of the costs of safeguarding (principally, staff and the costs of accommodating looked after children).

1.12 All Children's Services Departments in the local authorities visited are subject to budgetary pressures to which the fee increase has contributed, despite the budgetary transfers from MoJ. Partly because of the way it was handled, some authorities placed the additional revenue support grant in reserves, while for a few the amount received was less than their expenditure on the increased fees. In all of the authorities contacted, contrary to MoJ expectations, court costs are the responsibility of the Children's Services Departments and most authorities expect budget pressures to be contained within these departments by making savings elsewhere – usually on non-statutory preventative services – before drawing on reserves as a last resort.

1.13 Decision taking about care proceedings in local authorities follows a reasonably common approach following national guidelines. However, it is not simply a matter of deciding whether or not to start proceeding but of determining when the moment has arrived that proceedings should be considered and what the alternatives might be. In local authorities visited, the decision taking process normally follows a number of stages, involving progressively more senior management, as well as legal advisers, to ensure that all other options have been explored before taking the major decision to take children away from their parents and into care.

1.14 I found no evidence in this review or from published research that proceedings are initiated prematurely or unnecessarily, rather, to the contrary. The judiciary are strongly of the view that the reverse is the case and that social workers can wait too long before initiating proceedings. This seems much more likely than the premise on which the fee increase was based.

1.15 I was assured by all that I spoke to in local authorities that the interests of children were paramount and by most that court fees played no part in a decision to take proceedings. However, others – both within and outside local authorities – expressed concern that resource issues do play some part. Care proceedings are both time intensive – they are a major commitment for a social worker – and expensive and, crucially, more expensive than the alternative courses of action. These might include:

- further attempts to support the family and child concerned in the community;
- continuing to accommodate the child voluntarily under s20 of the Children's Act and deferring finding a longer term solution which may require proceedings;
- taking the option of a family placement when the opportunity occurs.

1.16 I have been told of a number of cases where it appears that local authorities may have deferred taking proceedings for budgetary reasons. In addition, there is a widespread concern on the part of the judiciary about some family placements with which, while private law cases, the local authority may be involved. There is some corroborating evidence from national data which shows an increasing number of s37 directions. These allow the family courts to direct a local authority to investigate with a view to considering s31 proceedings where the Court is concerned that a child within the family may be at risk of significant harm.

1.17 While this points to some inappropriate family placements, these may be caused simply by poor decision taking by the social workers concerned. However, given the structured nature of the decision taking process, that some of the senior people involved are also those who have budgetary responsibility and, in the light of some of the examples about which I have been told, it is hard to believe that resource issues play no part at all in decision taking. In addition, while the fees are relatively small in overall budgetary terms, they are large enough for authorities to take sometimes elaborate steps to avoid paying them by ensuring that another authority pays, or by avoiding the final part of the staged payment. They are certainly not treated as irrelevant. Given the increase for a large local authority from, say, £12,000 in 2007/8 to around £300,000 in 2008/09, the fees now need to be separately budgeted for and controlled in a way which was not necessary previously. And at the current year's level of activity this figure is likely to be much greater, around £1m according to one authority visited.

1.18 I believe that, at the margins, resource issues can play a part in determining when and if care proceedings are initiated or that alternative courses of action are preferred – at least for the time being. In drawing this conclusion, I think it unlikely that children have been left at avoidable risk, certainly not knowingly, on the part of the local authority. More plausibly, a child may be left in voluntary accommodation for longer than desirable or a sub-optimal placement with a family member attempted which, in due course, may prove unworkable.

1.19 If resource issues do play a part, then the increased court fees – although they are not actually the full cost as intended – have contributed to them. I suggest that the increased fees are an additional complication to an already complicated field and, specifically, added to the immediate costs of what was already more expensive than other ways of safeguarding children. The new arrangements also seem to be more expensive to administer than the previous arrangements.

1.20 Government's intention was to recover the full cost of care proceedings through the new fees but, as discussed, the fee fell short of the required amount. To fulfil the policy objective Government now has the option of increasing the fees accordingly. However, any deterrent effect would only be exacerbated by this as would the impression, held by some, that Government is determined to reduce the volume of care proceedings. Whatever the precise level at which the full cost fee is set and irrespective of the arguments in favour of cost recovery in other areas of justice, it is hard to see that there are any compensating advantages in the present arrangements in either public expenditure terms or, more importantly, the difficult task of safeguarding vulnerable children. In the light of this, I recommend that the fees should be abolished, with appropriate adjustments made to MoJ and local authority budgets.

1.21 There are other factors which are more important in resource terms than court fees in care proceedings. The most significant of these in the court proceedings themselves is the cost of assessments – of the children, the parents and other potential carers – some of which have to be carried out by a local authority before going to court. There was an almost universal view from local authorities that many judges and magistrates are too willing to accede to requests for additional assessments from the other parties, imposing costs on both local authorities and the legal aid budget. This has not been part of this review but may merit further investigation.

1.22 In carrying out this review, I have been struck by how complex the arrangements for safeguarding are, how poorly understood the interdependencies are by outsiders, but also by some working within the area, and by the poor quality of data. These factors perhaps contributed to the decision to raise fees, which was based on a number of misconceptions. A comprehensive review of data collected by local authorities, HM Court Service, CAFCASS/ CAFCASS Cymru and the Legal Services Commission could well be helpful to the future of this important area of public policy and, in particular, contribute to robust policy evaluation. More importantly, policy and resource management initiatives sometimes seem to have been initiated without a full understanding of their knock-on effects – usually elsewhere within the public sector as far as resources are concerned. In the light of this, I suggest there may be a case for a more comprehensive investigation of the resources used and outcomes achieved in the children's safeguarding and justice system.

1.23 I would like to express my thanks to all of those who made time for this review and for so frankly and fully answering the questions asked. In particular, the team working on the review were all impressed by the people we met in local authorities in terms of their obvious commitment to what they do and their dedication to the welfare of the families and children with whom they work and whose interests they clearly have at heart.

1.24 Finally, while the origins of this review lie in the concerns about the tragic life and death of Baby Peter, the new fee regime was introduced after his death in August 2007 and thus could not have played any part in the local authority's handling of that case.

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16 September 2009

2. Background

2.1 In November 2008, following the widely publicised death of Baby Peter, Lord Laming was appointed by the Government to review progress being made across the country in implementing effective arrangements for safeguarding children. Among matters he reviewed were the fees the courts charge local authorities when they initiate proceedings to take children into care. These fees were increased significantly in May 2008. During the consultation process which preceded the introduction of the fees, concerns had been raised that the new higher fees might act as a deterrent to local authorities initiating proceedings. These concerns were repeated in some of the submissions to Lord Laming's review.

2.2 In his report[1] Lord Laming stressed that a local authority's role in safeguarding children is of vital importance and that no barrier, however small, should stand in the way of local authorities exercising this function. He raised the concern that "the need to pay a fee might sometimes present a barrier that could influence a local authority's decision as to whether or not to commence care proceedings" while recognising that the fees themselves are a relatively small part of the overall cost of obtaining a care order. He went on to suggest that the safest course might be to abolish the fees altogether and recommended that the Ministry of Justice should undertake an independent review of their impact. He stated that, unless the review provided incontrovertible evidence that the fees were not acting as a deterrent, the fees should be abolished for the financial year 2010/11 and thereafter, with the funding transferred from the local government settlement to the Ministry of Justice.

2.3 I was appointed by the Lord Chancellor and Secretary of State for Justice to carry out this review in April 2009 as one part of the Government's overall response to Lord Laming's recommendations. In the Government's response[2], it was stated that I was expected to present my findings to the Lord Chancellor and Secretary of State for Justice by mid September 2009 and that "appropriate steps would then be taken to implement changes that [I] might recommend". This commitment was reiterated by Bridget Prentice, Parliamentary Under Secretary of State at the Ministry of Justice, at the public launch of the Government's response to Lord Laming's report on 6 May 6 2009, when she stated that the fee regime would be looked at again if I found that it had had any effect on safeguarding.

2.4 The full terms of reference for my review are attached at Annex A to this report. The overall objective is stated as:

> "To establish whether or not court fees act as a deterrent when local authorities decide whether or not to commence care proceedings."

[1] *The Protection of Children in England: A Progress report* March 2009

[2] *The Protection of Children in England; action plan* May 2009

2.5 In a written response to this review, the Family Law Bar Association expressed concern that the terms of reference do not appear to reflect fully Lord Laming's recommendations. Specifically, they said that Lord Laming had recommended that the fees should be abolished *unless* there was incontrovertible evidence that they had not acted as a deterrent. The terms of reference ask for a conclusion as to *whether or not* there is clear evidence that fees act as a deterrent. The FLBA believe that Lord Laming's recommendations were soundly based and, therefore, recommend that the fees should be abolished unless there is incontrovertible evidence that the fees have *not* acted as a deterrent.

2.6 While I understand the point that is being made, I don't believe that, in practice, differently worded terms of reference would have made much difference to how this review was conducted. As explained later in this report, my conclusions have been based on a combination of an analysis of the data showing what has happened nationally to care proceedings since the fees were increased, a series of discussions with interested parties as to their concerns about the current fee regime and an understanding of how decisions are taken in local authorities. The key point here is whether fees do have an influence in the decision taking process, whether it is separately identifiable from other influences and, if so, what is the influence that it has. While this is a complex area and the criteria used in any decision taking process are hard to discern from outside, I believe I have been able to reach some justifiable conclusions on these points.

2.7 After the fees were introduced, four local authorities, with the support of a number of other organisations, including the Law Society and the NSPCC, challenged the lawfulness of the increase in court fees by way of judicial review. There were five grounds of challenge which were, in brief, that:

(a) there were flaws in the consultation process;

(b) the justification put forward for the increase by the Ministry of Justice was inconsistent and irrational;

(c) local authorities would suffer a significant shortfall in the additional funding needed to meet the fees and that the decision was made, mistakenly, in the belief the increases would not have adverse budgetary consequences for local authorities;

(d) the decision was made in breach of assurances by Government that additional funding provided would be sufficient for all local authorities to meet the increased cost of the fees; and

(e) the fees were retrospective to the extent that they applied to applications which were already in progress at the date the fees were introduced.

2.8 All grounds of the challenge were rejected in the High Court in November 2008, seven months after the fees were introduced. The Court found that, while some people might find the justification advanced by the Government for the increased fees unconvincing, the policy was not irrational or unlawful, the principal test for successful judicial review. The fees have now been in place for longer than one financial year and I have had the opportunity to examine the actual, rather than the potential, decision taking processes in a number of local authorities. While I have commented on the process by which the fees were introduced, this is not entirely central to the matter I was asked to address.

3. Approach to the Review

3.1 Concerns about the increased fees were expressed when they were first proposed, in the Judicial Review, in the submissions that were made to Lord Laming's review, and in the interviews conducted for this review. The views expressed about the fees have been widespread and have been strikingly consistent. There has been, however, a marked difference of opinion between those working in local authorities and those working elsewhere in the child safeguarding system. Another characteristic has been a high degree of assertion as to what might be happening elsewhere rather than in the respondents' own areas of responsibility.

3.2 I have sought to establish the following:

(i) what has happened nationally to the pattern of child care proceedings across England and Wales since the fee increase and also to other related child protection activities, some of which involve court orders and some of which do not;

(ii) the actual amounts that were transferred to local authorities from HM Courts Service and MoJ to compensate for the fee increase, and how these compared with the actual costs incurred on court fees;

(iii) how these transfers were treated in local authorities' books, that is where the money ended up;

(iv) how budgets for child protection are constructed, who is responsible for them and how they are controlled;

(v) who is engaged in decisions to initiate child care proceedings or the other steps that can be taken to protect children in need or at risk of significant harm, and what are the decision-taking processes within local authorities;

(vi) what are the costs of proceedings, including, but not limited to, court fees, and what has been their overall impact on the relevant budgets in an authority;

(vii) what are the overall resource implications for an authority of taking a child into care and how do these compare with the likely cost of alternative safeguarding arrangements that might be considered; and

(viii) how far, if at all, these resource issues play a part in decisions to take proceedings and, in particular, how far the cost implications of taking proceedings are taken into account.

3.3 To this end, I have carried out the linked strands of work which are described below. In doing so, I have been assisted by a small team from the Ministry of Justice comprising Mark Taylor, Paddy Johnson and Genny Rebello. I am very grateful to them for their work but should stress that the conclusions that I have drawn from the research are my own.

3.4 The main elements of the work have been as follows:

(i) a review of the relevant legislation, of national and other guidance and of some of the research in this area in order to understand the overall public policy context and, in particular, what are the responsibilities of local authorities and the powers of the Court;

(ii) a review and analysis of the responses to the consultation process when the fees were first proposed and also of the relevant responses (those referring to fees) to Lord Laming's later review in order to understand the nature of the concerns as to possible impact of fees and to guide the other aspects of the work, i.e. to ensure that the right questions were asked and to see if the data confirmed any of the concerns expressed;

(iii) a review of the available data, in particular that relating to child care proceedings both before the fee increases and afterwards but, in addition, data about other types of proceedings;

(iv) a series of discussions with the key officials in the Ministry of Justice involved with the decision to institute the new fees, plus those in the Department for Communities and Local Government and the Welsh Assembly Government involved with the associated resource transfers to local authorities;

(v) a series of discussions with bodies representing local authorities, the judiciary, lawyers working in this area of law and of other interested parties, including voluntary organisations, in order to understand their concerns and that these were properly explored. A complete list of the organisations consulted is attached at Annex B;

(vi) a series of visits to eleven local authorities in England and two in Wales. A list of these is attached at Annex C. The authorities visited are not a statistically valid sample but were selected to be representative of the 172 authorities with child protection responsibilities. They involved authorities from eight out of the nine English regions and included shire counties, unitary authorities and London Boroughs.

In these meetings with authorities there have been discussions about how decisions are taken and how resources are managed; with front line social workers, and, separately, with their first, second and, sometimes, third tier management. Meetings have also been held with representatives of the legal services and finance functions in order to understand their roles. There was considerable consistency in what I was told at these meetings with different local authorities.

In addition to those listed in Annex C, meetings have also been held, usually at a senior level, with a number of other local authorities to test out emerging conclusions. These discussions have been drawn on as well.

(vii) all of the national organisations consulted were invited to make a written submission to this review and a number of them have done so. In most cases these organisations had already made a submission in the course of the consultation on the fees so that their views on the issue were already in the public domain. The submissions made to this review are at Annex D.

3.5 In all the meetings, in particular those with local authorities, a commitment about confidentiality was given. While it was stated that what was said in the meetings would be drawn on for the purposes of this report, a commitment was given that nothing described in the report would be attributable to the organisation or the individual concerned.

4. The Children Act 1989 and Public Law Outline

4.1 The Children Act 1989 is the principal piece of legislation relevant to this review, of which three broad areas are of specific relevance:

(1) the duties and powers of local authorities to safeguard children and promote their welfare;

(2) the court's powers to determine who should have parental responsibility for a child and with whom a child should live and have contact. These powers are usually used in private family law cases, for example in cases of disputes between separating parents but may sometimes involve local authorities too; and

(3) the court's powers to remove children from their families in appropriate circumstances, for which local authorities, exercising their overall responsibilities for safeguarding children, apply to the court – so-called public family law.

4.2 In practice, the distinction between private and public family law is not always clear cut. For example, where a child is subject to a dispute between parents in a private law case but the court is concerned that the child's welfare is at risk, the court may order the local authority to intervene. Equally, where the local authority is involved in care proceedings in court, i.e. under public law, involving the welfare of a child, the outcome may be that a private law order is made granting rights to a member of the child's family or family friend. In addition, much of what local authorities do in safeguarding children does not involve the court at all, for example in providing services to families and children in the community or providing accommodation for a child with the agreement of the parents.

Duties and powers to safeguard children

4.3 Sections 17, 20 and 47 of the Act set out the main duties and powers of local authorities relevant to this review to safeguard children and promote their welfare:-

- section 17 is concerned with the provision of services for children in need, their families and others. It outlines the general duty of the authority to safeguard and promote the welfare of children in need and promote the upbringing of such children by their families by providing the appropriate services. This gives authorities the ability to provide services to families and children, and provide funding for items and services to families without the means to pay for them themselves. These can range from food and hygiene products to buying white goods and providing transport for families;

- section 20 of the Act requires the local authority to provide accommodation for any child in need where there is no person with parental responsibility, or if the parent or person caring for the child is not able to provide suitable accommodation or care. With one or two exceptions, a person with parental responsibility can remove their child from such accommodation at any time; and

- section 47 places a duty on local authorities to investigate when they have reasonable cause to suspect that a child is suffering, or likely to suffer, significant harm to enable them to decide whether they should take any action to safeguard or promote the child's welfare. S47 enquiries are the basis of the core assessment that a local authority completes when ascertaining the right course of action to take for a child at risk or a child in need.

Court powers to determine who should have parental responsibility

4.4 Section 8 of the Act gives the court powers to make orders dealing with residence and contact arrangements for children, amongst other things. These powers are primarily used in a private law context – for example, the orders are used to settle residence and contact arrangements for children whose parents are separating and cannot agree such arrangements. However, local authorities can become involved, for example by attempting to find a suitable friend or relative to apply for a residence order – sometimes with the local authority's financial support – in order to remove a child from an unsuitable home situation.

4.5 Sections 14A – 14F, inserted by the Adoption and Children Act 2002, introduced the new role of special guardian. This is intended to provide an alternative to adoption. A special guardianship order gives the special guardian parental responsibility for the child which is expected to last until the child is 18. But, unlike adoption orders, these orders do not remove parental responsibility from the child's birth parents, although the parents' ability to exercise it is extremely limited. It also provides a legal status which it is difficult for the parent to revoke or vary.

4.6 In practice, this means that the child is no longer the responsibility of the local authority, and the special guardian will have clear responsibility for all day-to day decisions about caring for the child, and for taking important decisions about their upbringing, for example their education. Moreover, while birth parents retain their parental responsibility, the special guardian has to consult them on these decisions only in exceptional circumstances.

Court and other powers to remove children from their families

4.7 Sections 31, 38 and 44 give the Court powers to remove children from their families in appropriate circumstances. In addition, section 46 gives the police powers to remove children temporarily in certain circumstances.

4.8 Section 31 deals with care and supervision orders, the principal focus for this review. The effect of a care order is that the local authority has parental responsibility for the child and can, for example, remove a child from the family home if it considers it is appropriate to do so. A supervision order does not give the authority parental responsibility, but can give it an extended range of powers with regard to the child. The vast majority of s31 applications are for care orders, and supervision orders appear to be used relatively infrequently as local authorities believe they do not confer enough powers adequately to protect children at risk of harm.

4.9 Section 31 specifies that:

"A court may only make a care order or supervision order if it is satisfied—

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to—

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control."

It is this threshold – that the child is suffering or likely to suffer significant harm – that the local authority goes to court to try and prove and which is at the centre of child care proceedings. It is the progress of these proceedings through their various court stages that incur the fees with which this review is concerned.

4.10 Section 38 gives the Court powers to make interim care or supervision orders in cases where the proceedings are adjourned or the court gives a direction under section 37 (see below). In practice, with the average length of a case lasting around a year, interim orders are applied for and granted at the beginning of the majority of child care cases in order to provide a safe environment for the child while the case is in progress. The child is fostered or otherwise accommodated or allowed to live at home under an interim care order until a permanent solution is arrived at following the conclusion of the case.

4.11 Section 44 gives the Court powers to protect children in emergencies. Emergency protection orders are granted when a child is at risk of significant harm if not removed immediately to accommodation provided by the authority. An emergency protection order lasts for 8 days, and can be renewed once for a maximum of a further 7 days. Within this time an authority can initiate proceedings under s31 and apply for an interim care order (see above) if they still consider that it is unsafe to return the child to the home environment. These orders can also be used if s47 enquiries are being frustrated and the authority believes that it needs urgent access to the child in order to complete them.

4.12 Section 46 gives the police the power to remove children if they think the children are at risk of significant harm. It is then the responsibility of the police to inform the relevant local authority of the removal. In practice, the local authorities can ask the police to remove children if they think there is immediate risk of significant harm and they are unable to get an immediate emergency protection order. Again, in these cases, the local authority can start the court process and seek an interim care order to keep the child away from the unsafe environment in the longer term.

Additional relevant powers

4.13 In addition to the key provisions above, the Act includes further provisions that can have an influence on the way that local authorities deal with child safeguarding. In particular:

- section 7 allows the court to direct a local authority to report on matters relating to the welfare of any child concerned in family proceedings under the Children Act. These reports usually arise from private law cases where the judge or magistrates believe further information is required about the child and his/her welfare before determining residence and contact arrangements; and

- section 37 allows the court in certain family proceedings to direct a local authority to undertake an investigation of a child's circumstances with a view to making a care or supervision order for the child, or providing services or assistance to the child or their family. Again these can arise from any case, including private law residence order applications under s8 where the judge is concerned that the children involved in the case may be at risk of harm.

Adoption and Children Act 2002

4.14 The other principal legislation relevant to this review is the Adoption and Children Act 2002. In addition to the special guardianship provisions discussed above, this made a number of changes to the legal framework governing adoption. In particular, it introduced the placement order, the means by which the court authorises a local authority to place a child under their care for adoption with prospective adopters chosen by the authority.

The Public Law Outline (PLO)

4.15 The Public Law Outline, introduced in April 2008 was designed to streamline child care proceedings with the aim of ensuring that cases were completed in a timely and effective manner. Development of the PLO was informed by the findings of the Review of Child Care Proceedings[3], as well as by the 2005 Thematic Review of the earlier Protocol for managing child care proceedings.[4] The Public Law Outline itself was a practice direction, issued by the President of the Family Division with the approval of the Lord Chancellor. In parallel, the Secretary of State for Children, Schools and Families and the Welsh Assembly Government issued revised statutory guidance for local authorities.[5, 6] (It is clear, however, that many of the practitioners who spoke to the review team used the term 'PLO' to mean the overall framework introduced by the Practice Direction and Guidance.)

4.16 The PLO and guidance were designed to complement each other and make the best available use of court resources by:

- streamlining the stages in court;
- placing an emphasis on the pre-proceedings work completed by the local authority before the case reaches court; and
- introducing a pre-proceedings letter triggering publicly funded legal advice for parents.

Streamlining the stages in court

4.17 One of the ways in which the PLO attempted to cut the time spent in court was to cut the number of court stages from six to four, as follows:-

(1) Issue and First Appointment in family proceedings court - to ensure compliance with the pre-proceedings checklist, and give directions.

(2) Advocates meeting and Case Management Conference - to prepare a draft case management order, identify experts and give full case management directions.

(3) Advocates meeting and Issues Resolution Hearing - to resolve and narrow issues and identify remaining key issues.

(4) Final Hearing - to determine remaining issues in accordance with the timetable for the child.

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[3] *Review of the Child Care Proceedings System in England and Wales*, Department for Constitutional Affairs, Department for Education and Skills and Welsh Assembly Government, May 2006

[4] *Thematic Review of the Protocol for Judicial Case Management in Public Law Children Act Cases*, December 2005.

[5] *The Children Act 1989 Guidance and Regulations: Volume 1 - Court Orders*, The Stationery Office, January 2008

[6] *The Children Act 1989 Guidance and Regulations: Volume One Court Orders: A Framework for the care and upbringing of children*, Welsh Assembly Government, March 2008.

4.18 In practice, this does not necessarily mean there are only four occasions when the case appears before the court. There can, for example, be a number of issues resolution hearings over the lifetime of the case. In addition to this, it was the intention of the PLO that not all cases would necessarily reach the final hearing stage as they could be resolved at any earlier stage in the process. For example, if it became apparent at an issues resolution hearing that the child would be most appropriately cared for by the local authority, and all the other parties accepted this, the case could be concluded there and then without going to final hearing.

4.19 As discussed in the next section, three of the four stages in the court process are linked to the revised court fees payable by a local authority since May 2008. The MoJ's intention in staging the fees in this manner was that local authorities would not need to pay for the later hearing or hearings if the case concluded at an earlier stage, thus providing an additional incentive for early resolution.

Pre-proceedings work

4.20 The Public Law Outline requires local authorities to do a significantly greater amount of work and produce a number of documents before cases reach court. This 'front-loading' of the pre-proceedings work was designed to reduce the time spent in court.

4.21 The documents that a local authority is expected to disclose from its files include various assessments, records of contact with the child and family, a social work chronology and the letter before proceedings (see below). The assessments are the initial and core assessments carried out by social workers but can also include psychological or psychiatric assessment of parents or a specialist assessment of a child to clarify their needs and/or to evaluate the effects of harm they may have suffered. In addition the authority has to produce a set of documents specifically for the proceedings, including the application form, a social work statement outlining the key facts in the case, a care plan (including consideration of placement and/or permanence options) arising out of the pre-proceedings meeting, a timetable for the child and the authority's case summary.

Pre-proceedings letter

4.22 As part of the pre-proceedings work, a local authority can issue a letter before proceedings (known in some authorities as a 'letter before action'). This letter must include a notification of the intention to issue care proceedings, a summary of the authority's concerns and an invitation for the parents and their legal representative(s) to attend a pre-proceedings meeting. The letter is the trigger for legal aid funding to be released to the parents' solicitor. The intention of the letter is that parents are involved in the process from the start and, although the letter shows the intention of the authority to take proceedings, it should be used if possible by the authority to give the parents a final chance to change their behaviour before proceedings are initiated.

4.23 The letter also invites the parent to a pre-proceedings meeting to discuss the authority's concerns. The aim is to reach an agreement on a proposed plan between the family and the local authority. The parents can bring their lawyer to the meeting, and if they wish to bring a person in a supportive role the local authority has discretion to allow it. One possible tool that the authority might consider using at this point if it has not already done so is a Family Group Conference or Family meeting. This might assist identification of wider family support, as well as fulfilling the requirement of the PLO and Guidance that authorities must explore the potential for other family members to care for children before initiating proceedings.

5. The Principles behind 'Full Cost' Charging

5.1 The fees that were introduced in May 2008 reflect a long standing Government policy as to the level at which fees should be set. The default position, as set out in the 2007 Treasury publication *Managing Public Money - Fees, Charges and Levies*, is that fees should usually achieve full cost recovery, although Ministers may agree lower (but not higher) targets with the Treasury where there is a policy justification for doing so. In some cases, lower targets may be agreed for the short to medium term on the basis that a service will move to full cost recovery over time.

5.2 *Managing Public Money* states that the purpose of charging for services is to help allocate resources in a rational way. The more detailed *Fees and Charges Guide* identifies other benefits, including greater visibility of the costs and benefits of services. It states that, as a general rule, Government departments (and other central Government bodies) should be charged the cost of goods and services provided by other departments. This is said to promote efficiency and value for money in the use and provision of services, and the more accurate presentation of costs. Although local authorities are not governed by the requirements set out in *Managing Public Money*, these arguments of principle for charging for services provided between different parts of the public sector apply equally to services provided to local authorities.

5.3 In the case of court fees, the term 'full cost recovery' is used to describe this charging regime. However, the agreed target is not literally full cost recovery as the taxpayer makes a significant contribution to the cost of running the civil and family courts to support the cost of the fee remission system. A better way of describing the policy is 'full cost pricing'. This means that fees should be set at levels calculated to cover the full cost of the system if paid in full in every case (which, in practice, they are not). Her Majesty's Courts Service (HMCS) reports fee recovery in its accounts by adding the value of fee remissions to the actual fees received to create a notional gross fee income figure. 'Full cost recovery' in this context means that this gross figure should equal 100% of the full economic cost.

5.4 Since 1992 the policy of full cost recovery has generally been achieved in civil proceedings (not including magistrates' courts) and non-contentious probate business. However, this has not been the case with family proceedings, where fees have remained at levels that do not cover the full cost. For example, until the fee increase in April 2008, the fees for many public law family proceedings were set at a nominal amount, typically, £150. This was, it is understood, accepted by HM Treasury in successive spending reviews, without conceding the long-term objective of full cost recovery. In some previous spending reviews, targets were set to reduce the subsidy for family proceedings. For example in the 2004 Spending Review (covering the period 2005-06, 2006-07 and 2007-08), the target was to increase cost recovery for family proceedings (not including magistrates' courts) to 66% by the final year of the period.

Extension of the full cost recovery target to public law family proceedings

5.5 The 2007 Spending Review, covering the years 2008/9, 2009/10 and 2010/11 was informed by the strategy described above and took account of the overall policy as to fees and charges. In the Public Service Agreement, settled between the Treasury and the newly formed Ministry of Justice at the conclusion of the Spending Review, it was agreed that public law family proceedings should achieve full cost recovery from the start of the period by increasing the fee levels to reflect the court costs, including judicial time, administration costs, accommodation and IT.

5.6 According to the MoJ, the financial settlement for 2008/09, of which the fee issue was just one aspect, was agreed with the Treasury in June 2007 and an overall sum of £40m, reflecting the total annual cost of child care proceedings, identified as needing to be transferred from the MoJ/HM Courts Service to local authorities (£37.6m via the Department for Communities and Local Government grant to local authorities in England, and £2.2m via the Welsh Assembly Government in accordance with the Barnett formula to local authorities in Wales.) While it was suggested by MoJ officials that this should be communicated to local authorities in August, DCLG practice is only to discuss the draft local government settlement with local authorities once all adjustments and alterations have been agreed between all the relevant Government Departments. The draft 2008/09 local government settlement was announced on 6 December for statutory consultation.

Public law family fees consultation

5.7 The Ministry of Justice issued a consultation document on Public Law Family Fees on 19 December 2007 stating the intention to increase the fees to reflect the full cost of the proceedings with effect from April 2008. It was indicated that the resource implications had been taken into account in the 2007 Spending Review Settlement for local authorities. For many local authorities, the implication is that the first they heard of the proposal was when the consultation paper was published and after, at least in most cases, they had fixed their own budgets for the next financial year.

5.8 The consultation paper described the Government's strategy for developing the fees system in the civil and family courts of England and Wales, and set out for consultation proposals to make changes to court fees for Public Law Children Act cases and adoption proceedings. A number of options were proposed: either a single payment for the proceedings, albeit at a far higher rate than the £150 then in force, or a series of payments as a case progressed through the main stages of hearings. One suggestion was that the fee should reflect how well the case had been prepared by the local authority with a higher payment for a less well prepared case. The options were all, in principle, designed to encourage good case preparation and, where possible, early conclusion to a case without necessarily going through all possible stages.

5.9 The consultation was thus largely about how the fee increase should be structured rather than whether it should be done at all. It was clear that a decision that had already been taken to increase the fees substantially. This conclusion is reinforced by the closing date for the consultation being 11 March 2008, three weeks before the proposed implementation date for the fee increase.

5.10 The MoJ's consultation paper described the general policy context for setting fee levels and rehearsed the Department's strategy for court fees as a whole, specifically referring to:

- Meeting the financial targets for HMCS;
- Protecting access to justice through targeted concessions for the less well-off;
- Matching income and costs as patterns of demand change;
- Promoting the efficient allocation of resources by providing paying authorities with a greater incentive to use services economically and efficiently; and
- Improving decision taking and accountability by providing greater visibility of the true costs and benefits of the services provided.

5.11 Clearly anticipating some of the unfavourable reactions to the proposals, the consultation paper also stated that:

- children's services departments are subject to a statutory duty to protect the interests of children and it would be unlawful for them to avoid taking court proceedings for financial reasons;
- since the spending settlement reflected the "additional pressure" there was no reason to think they would do so;
- full cost fees would mean that the cost to authorities of court proceedings and alternative social service interventions would be set on a comparable basis, i.e. that the full costs of alternative arrangements would be transparent;
- that this would remove any perverse incentive to pursue court proceedings prematurely or unnecessarily when other interventions would be more appropriate.

5.12 There were 111 responses to the consultation which, apparently, was more than in any other fee consultation process and was indicative of widespread concern about the proposals. The largest group of respondents were local authorities (71 respondents) followed by the legal professions (16), the judiciary and magistracy (12), representative and other bodies (10) and individuals (2).

5.13 There were a number of themes that emerged from the consultation responses:

- full cost recovery was wrong in principle;
- local authorities would not be able to afford the increased fees;
- the increased fees might result in local authorities taking other less costly routes to looking after children, such as voluntary accommodation under s20 of the Children Act 1989 or encouraging private law s8 applications from family members, and which might not necessarily be in the best interests of the child; and
- as a result of the above factors children would be put at risk.

I have expanded on all of these points below.

Full cost recovery is wrong in principle

5.14 A number of comments showed that respondents did not agree with the principle of full cost recovery generally, or more specifically in relation to public law children cases. As one local authority stated:

> "We do not accept the premise that local authorities should have to pay court fees to issue care proceedings in order to fulfil our statutory duties to protect children, particularly as other public authorities are not penalised when instituting proceedings which are in the public interest, such as the CPS."

5.15 Other comments were made around the principle of court provision being a public service, the uniqueness of care proceedings work and the fact that charging these fees simply re-circulated public money and created unnecessary administrative costs:

> "local authorities are charged with intervening in family life to protect children on behalf of the state. We do not see the detailed reasoning for full cost recovery in this context or why it will lead to better outcomes for society or efficiency savings in court resources. Requiring local authorities to pay the full cost of care proceedings is to categorise those proceedings as being of interest only to the parties concerned."

5.16 Moreover, as some of the consultees pointed out, when MoJ consulted on civil court fees earlier in 2007, it was stated that the financial objectives for "family business" were based on "… achieving 100% recovery for most non children private law family fees. Different policy considerations may apply to public law care cases, adoption, domestic violence and private law family cases."

5.17 It is clear from the history described above and from discussions with MoJ during the review that the main driver for the change in these fees was the Treasury policy on fees and charges and the specific aim of increasing the proportion of court costs financed from users. It was also clear from discussions with MoJ officials that there was little consideration given, subsequent to the consultation on civil court fees, as to what might be the different policy considerations applicable to public law family cases and whether these did have a bearing on whether or not to increase the fees to a full cost level.

5.18 I have some sympathy with the local authority views quoted. It seems to me that there is a valid distinction to be made between cases between individuals and those between the state, acting on behalf of the citizen, and individuals. In the former, access to justice issues excepted, there seems little justification for public subsidy of the costs incurred in court. But where, as in the case of child care proceedings, the local authority is acting on behalf of the state in protecting its vulnerable citizens, how court proceedings are financed should be based primarily on the effectiveness of the process and how much it costs to do it, rather than on recovering costs from the user as a matter of principle.

Local authorities would not be able to afford the fees

5.19 In their response to the consultation document, a number of local authorities questioned whether the increases to their funding had been included in the Comprehensive Spending Review (CSR), and whether the individual amount allocated to each authority was adequate. Six responses received early in the consultation period showed that some authorities were not then aware that the increases had been reflected in the local authority funding settlement.

5.20 There were further comments regarding the way that the costs had been calculated. One authority noted:

> "Our understanding is that there are no arrangements in place for the MoJ to ascertain how many cases have been brought by an individual local authority and to ensure that the local authority is reimbursed for each of those cases."

5.21 In a subsequent section, this report discusses how the grant settlement was arrived at, and compares the "extra" allocation with the actual costs of court fees in the English local authorities visited. This demonstrates that, at least in the first year, for all but one of the 10 English authorities for which information was available, the notional amount transferred was greater than the actual court fee costs reported. However, it is difficult to assess the accuracy of the costs reported as, for most local authorities visited, the actual costs appear to be significantly lower than might be expected from the stated number of new proceedings initiated that year. Possible explanations may include the difficulties experienced initially in invoicing the fees, that some authorities did not pay initially and, for example, in one authority the amounts were shown on a cash basis rather than an accrued one.

5.22 However, what is clear is that at least part of the concern expressed by local authorities – and others – resulted from a lack of understanding about what budgetary provision had been made for local authorities in England. This was a direct result of the rather unsatisfactory way the fee increase proposals were first signalled to the family justice system by a combination of poor communication between the MoJ, DCLG and local authorities and a consultation process on the fees proposals that should have started sooner. Remarkably, in the course of the review there were a number of senior people within the family justice system although not, generally, from local authorities, who were still unclear as to whether there had been any compensation to local authorities for the extra cost of the court fees. In Wales, by contrast, the relevant amounts to cover the new fees were specifically identified in the allocations for each authority.

Children would be put at risk

5.23 61 local authorities and others expressed concern about whether adequate money had been provided to enable authorities to pay the increases in fees. A small minority, 12 authorities, made comments that the new fees might mean children being put at risk as a result of budgetary pressures. However, a number of national organisations – the Association of Directors of Children's Services, for example – specifically made the point that financial considerations did not play a part in child care decisions; the interests of the child were paramount. Even the increased fees accounted for a relatively small proportion of overall costs of proceedings and taking children into care. This view was not shared by representatives of other parts of the family justice system, specifically lawyers working in this area and members of the judiciary, who expressed concern that budgetary pressures might result in less than optimal solutions for vulnerable children.

Implementation of the fees

5.24 The new fees were implemented by means of two statutory instruments, laid before Parliament on 9 April 2008 and coming into force on 1 May, accompanied by a written Ministerial Statement on 21 April. The fees were structured as follows:-

	New fee	Previous fee
Section 31 proceedings (per case)	£4,825	£150
On application	*£2,225*	*£150*
Issues resolution hearing	*£700*	-
Final hearing	*£1,900*	-
Placement order applications (per child)	£400	£140

£500 of the application fee was refundable where a final order was made at a case management conference. The fees for the issues resolution and final hearings, due a fortnight beforehand, applied to cases already in the system as they reached the relevant stages as well as to new cases. However there were transitional arrangements that exempted cases already listed for hearings in the first half of May 2008.

Government response

5.25 The Government's formal response to the consultation, not published until 11 June 2008, drew on the general policy on fee-charging set out in HM Treasury's Fees and Charges Guide stating that:

"Charging within the wider public sector:

- promotes the efficient allocation of resources, by providing authorities with a greater incentive to use services economically and efficiently; and
- it improves decision-making and accountability by providing greater visibility of the true cost and benefits of the services provided by charging and paying authority, and
- it has long been the case that fees are not charged at all to bring criminal proceedings. So the principles of the Fees and Charges Guide do not apply. There are no plans to change this policy."

5.26 The Government also responded that children's services departments are under a statutory obligation to protect the interests of children and that there was no evidence to suggest that local authorities would act inappropriately in this sense. This sits rather uneasily, as was pointed out in the Judicial Review, with the MoJ's original justification for the fee increase that it would, in some sense, level the playing field and remove any perverse incentives to pursue court proceedings prematurely or unnecessarily. By implication, Government did think that the fee increases would have an impact on the volume of proceedings but assumed that the ones that would be deterred would be those which were premature or unnecessary.

5.27 I have found no evidence that court proceedings have been or are taken prematurely. On the contrary, in the course of this review, many judges repeated their concerns that proceedings were often initiated too late, not too early. That this was a widespread judicial point of view was confirmed by many of the social workers interviewed who felt regularly under criticism for not bringing cases to court sooner. Moreover, there is no indication from research that cases are brought unnecessarily. For example, the Research Review of Child Care Proceedings under the Children Act[7] did not suggest that proceedings were brought prematurely. And the Care Profiling Study[8] specifically states it found "no indications in court files that local authorities were considered by children's guardians or the courts themselves to have brought proceedings unnecessarily". Finally, in the small number of chronic cases I have discussed in detail or observed in the review I have frequently been left with the impression that earlier, rather than later, court proceedings would have been desirable. The increase in proceedings after the Baby Peter case also tends to confirm this impression, although firmer evidence may be obtainable from the research CAFCASS is carrying out into some of these cases.

5.28 MoJ also stated in their response to the consultation process:

> "We understand that local authorities pay court fees from legal or other budgets, not Children's Services budgets. So there is no reason to think that those making the decisions in individual cases would be improperly influenced by budgetary considerations."

5.29 This is not correct. In the majority of authorities visited, court fees and all other legal costs, including both disbursements and the time of the authority's legal staff, were charged out in the course of the year to the Children's Services Department under a Service Level Agreement. The latter Department had full budgetary and management responsibility for these costs and thus for dealing with the consequences of budgetary pressures. In one of the exceptions, these costs were charged to Children's Services, but only at the end of the year, which was when the user department first became aware of a significant over-run on the budget. In the other exceptions, all disbursements were charged out but none or at most only some of the staff costs. From other discussions, it is understood that in the vast majority of local authorities all legal costs related to child care proceedings, including court fees, are charged to and are the responsibility of the Children's Services Departments.

5.30 MoJ also stated in their response: "The 2006 Review of the Child Care Proceedings System in England and Wales found that the average cost to authorities of a case in legal fees etc. is £35,000. And it costs £40,000 to keep a child in care for a year and the average duration of a care order is 6 years. If local authorities were influenced by financial considerations, these existing costs would be far more significant than the new court fees."

5.31 This issue is examined in greater detail later in this report and it is undoubtedly true that both the immediate legal costs of taking a child into care are larger than the court fees and placement costs resulting from care proceedings can last for some years. However, this is not the whole point. The increase in court fees meant that there was a sharp increase in marginal costs of one element of the process. This has led to an increase to the overall costs of child safeguarding activities incurred by local authorities. Although there was a budgetary transfer intended to compensate for the overall increase in costs, the demand-driven nature of court

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[7] *Research Review of Child Care Proceedings under the Children Act*, Brophy, DCA Research Series 5/06, 2006

[8] *Care Profiling Study, Masson et al*, MoJ Research Series 4/08, 2008

proceedings and the uncertainty of what the demand will be, means that another element of uncertainty has been added to the management of this area of local authority budgets. The financial risk was transferred from HM Courts Service and MoJ, divided up and transferred to the 172 local authorities.

5.32 Some of those who responded to the consultation process suggested that any additional funding for local authorities for the extra court fees should be ring fenced in order that it would not be diverted to other ends. Government's response to this point was:

> "As part of the reforms announced in the 2006 Local Government White Paper 'Strong and Prosperous Communities' the Government committed itself to ensure that grants to local authorities would be increasingly paid on an un-hypothecated basis, either through formula or new area-based grants. This gives local authorities much greater freedom to spend money in a way that suits their particular local circumstances."

5.33 This view is, I understand, shared by the Local Government Association and thus by English local authorities as a whole. The decision in Wales, however, was to identify an explicit amount for the new fees in each local authority's allocation. In the course of this review, the LGA suggested that it might have been desirable similarly to earmark the allocation for fees for English local authorities in order to give them some protection from the normal budgetary pressures experienced within authorities. An alternative would have been to ring fence the fee allocation for a transitional period, particularly in the light of the uncertainty surrounding the introduction of the PLO. This does not seem to have been considered by either the DCLG or MoJ.

5.34 The Government response on the issue of administration costs was that a new accounting system would simplify the payment arrangements. While I understand that arrangements for bulk payment and payment on account were put in place, there does seem to be some validity in the argument that the fee regime created additional administrative costs. County courts have had to instigate new systems in order to invoice local authorities for the fees. In addition, pursuing authorities for payment involves "much administrative time … by an office which is already short staffed", according to a response to this review from the Magistrates' Association. For local authorities, there are more payments (three, potentially, compared to one previously) and since they are for materially larger amounts, a number of authorities stated that they require more elaborate control arrangements for authorisation. All of this requires extra time. One local authority said that they had employed a new administrative member of staff to deal with added work created around the payment of fees.

5.35 Concerns were also raised about the way in which the proposed fees were calculated. The fees were calculated by Her Majesty's Court Service. They were based on a costings model which took the full cost of the civil and family courts from the Ministry of Justice's financial accounting systems, and broke this down between different types and stages of case on the basis of detailed information and assumptions about the amount of staff and judicial time attributable to various types of process and hearing. The additional net cost (i.e. over and above beyond that recovered by the pre-existing fees) of public law proceedings as derived from this model was some £39 million, with a further £1 million for placement for adoption proceedings.

5.36 The new fees for s31 and adoption/placement proceedings were therefore calculated so as to raise an additional £40 million over a full year, on the assumptions that there would be the same number of new cases as in 2007-08 and that all s31 cases would proceed to final hearing (and therefore pay all three of the new fees). It was also part of the assumptions that s31 cases commencing but not completed in 2007-08 would reach the later stages and attract the relevant new fees for those stages in 2008-09, and that this would broadly offset the fact that cases started in the later part of 2008-09 would not reach their later stages until 2009/10.

5.37 In 2007/08, HMCS recorded some 6,380 fees paid for s31 applications in the family proceedings courts (see paragraph 6.5 below). The county court family database also recorded a further 3,580 cases commencing in the county courts in 2007/08. However, as discussed in paragraph 6.3 below, the database does not adequately distinguish between genuine new cases and cases transferring from the family proceedings courts; many of the latter are recorded as new starts. The HMCS fees team attempted to correct for this, estimating on the basis of past HMCS experience that some 2,030 of these were new cases, and the remaining 1550 transferred ones. They therefore divided the required £39m by a total volume of some 8,410 cases to derive the average additional cost per case. Adding this to the existing £150 fee gave the total new fee of £4,825.

5.38 However, it appears from conversations with the HMCS team that the indicators being relied on to distinguish new cases from transfers were no longer valid, and this figure was likely to have been a significant over-estimate of the total volume of s31 applications. By way of comparison, CAFCASS and CAFCASS Cymru both record numbers of requests for children's guardians, which are thought to be a reasonable proxy for numbers of s31 applications. A total of 6,670 such requests was recorded in 2007/08 (see paragraph 6.7 below). If this latter total had been used as the divisor, the revised fee would have been £6,010 rather than £4,825.

5.39 In summary, the increase was driven by the principle of cost recovery in the court system and, it would appear as a result of long-term pressure from HM Treasury. It was thought that the increase would have little impact on behaviour as there was to be a financial transfer and, in any case, Children's Services were thought not to hold the budgets for court costs. As we have seen, the latter point was incorrect. But at the same time it was thought that there might be some impact on premature and unnecessary care proceedings, although there is little evidence that there are such proceedings. The consultation process was started late, which caused genuine confusion and, at the very least considerable bad feeling. It also encouraged a belief that Government was determined to reduce the volume of care proceedings. Finally, there seem to have been errors in the calculation of the relevant court case volumes which, if corrected, would lead to an increase of nearly 25% from the present rate, based on 2007/08 costs, of £4,825 to £6,010.

6. Child Care Proceedings: the Facts

Looked after children

6.1 The UK Government has for many years published annual statistics on 'looked after' children in England[9]. These are collated from returns provided by local authorities to DCSF (and before that to the Department of Health), and are available on the DCSF website. The most recent figures available relate to 2007/08.[10] In summary:

- The total number of looked after children in England grew from 51,400 at the end of 1996/97 to 60,800 at the end of 2002/03, and has remained broadly at that level subsequently. Expressed as rates per 10,000 children under 18, the figures were 46 at end 1996/97, rising to 55 at the end of 2002/03 and dropping marginally to 54 in 2007/08.
- 60% of looked-after children in England at end 1996/97 were the subject of care orders and 37% were accommodated under voluntary arrangements under s20 of the Children Act 1989. At end 2002/03, 65% were the subject of care orders and 30% accommodated voluntarily. The proportion the subject of care orders fell back slightly to 63% by end 2007/08, with the proportion accommodated voluntarily remaining around 30%.
- 28,400 children in England became looked after during 1999/2000, of whom 68% were accommodated by voluntary agreement, 15% were the subject of a care order, and 12% detained for child protection. This declined to 23,000 children becoming looked after in 2007/08, of whom 65% were accommodated by voluntary agreement, 19% were the subject of a care order, and 13% detained for child protection.

6.2 *Social Services Statistics Wales* 2007-08 provides similar statistics for Wales:[11]

- The total number of looked after children in Wales has grown steadily from 3050 at end 1996/97 to 4640 at end 2006/07 and 4630 at end 2007/08. Expressed as rates per 10,000 children under 18, the figures were 45 at end 1996/97, rising to 72 in 2006/07 and 73 in 2007/08.
- At the end of 2002/03, 68% of looked-after children in Wales were the subject of care orders and 30% were accommodated under voluntary arrangements under s20 of the Children Act 1989. The proportion the subject of care orders has subsequently remained at around 71%, with the proportion accommodated voluntarily falling steadily to 24% by the end of 2007/08.
- 1,540 children in Wales became looked after in 2001/01, rising to 1,720 in 2003/04 and then falling back to 1,450 in 2007/08.

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[9] The Children Act 1989 defines a child as 'looked after' by a local authority where the child is in the authority's care or is otherwise provided with accommodation by the authority in connection with its functions under the Act.

[10] *Children looked after in England (including adoption and care leavers) year ending 31 March 2008*, Department for Children, Schools and Families, September 2008.

[11] *Social Services Statistics Wales*, Local Government Information Unit ~ Wales, February 2009.

Court data relating to care proceedings

6.3 Local authority applications for care orders and supervision orders under s31 of the Children Act 1989 are normally made to family proceedings courts in the first instance, even if cases are subsequently allocated to a county court or the High Court. The Ministry of Justice collects statistics on the numbers of such applications to the family proceedings courts. However, these figures are only available weighted by the numbers of children involved in each application. Moreover, data prior to April 2007 were collected quarterly through paper returns and are therefore believed to be less reliable. In addition to the much larger proportion of s31 cases transferring from the family proceedings courts, a small number of urgent and/or complex cases start directly in the county courts. However, the county court family database does not adequately distinguish these from the transferred proceedings, many of which are also recorded as new cases.

6.4 The family proceedings courts received applications for care and supervision orders in respect of 11,120 children in 2007/08, and 11,280 children in 2008/09. So although 24,500 children become looked after in England and Wales each year, as discussed above, only around 45% of them also become the subject of formal care proceedings. Figure 6.1 shows the monthly numbers of children subject of applications from April 2007 until June 2009.

6.5 The MoJ financial systems also track the numbers of application fees paid for s31 applications in the family proceedings courts. Figure 6.2 shows the monthly numbers of application fees paid over the period from April 2005 until July 2009. There is no similar information available on county court cases, as the relevant financial systems hold data on fees recovered only at a much higher level of aggregation.

Other data relating to care proceedings

6.6 As just discussed, it is not possible to obtain from MoJ and HMCS a consistent series of data on numbers of care proceedings applications covering both family proceedings and county courts. Given this, the review has also looked at the data held by the other principal actors, namely CAFCASS/CAFCASS Cymru and legal aid.

6.7 CAFCASS is notified immediately a local authority makes a s31 application, so that it can assign a children's guardian. It therefore keeps data on the numbers of requests for guardians received. CAFCASS received 6,600 requests in 2005/06, 6,790 in 2006/07, 6,240 in 2007/08 and 6,470 requests in 2008/09. Figure 6.3 shows the numbers of requests per month.[12] CAFCASS Cymru is similarly notified in Wales, in order to allocate a Family Court Adviser. CAFCASS Cymru received 450 requests in 2005/06, 450 in 2006/07, 430 in 2007/08 and 420 in 2008/09. Again the numbers of requests per month are shown in figure 6.3,[13] along with the combined numbers for England and Wales. This latter series is believed to be the only reasonable proxy for the numbers of s31 applications currently available.

[12] Data provided by CAFCASS.

[13] Data provided by CAFCASS Cymru.

Figure 6.1: Monthly s31 applications to family proceedings courts, weighted by number of children involved

Source: FamilyMan and aggregate FPC returns

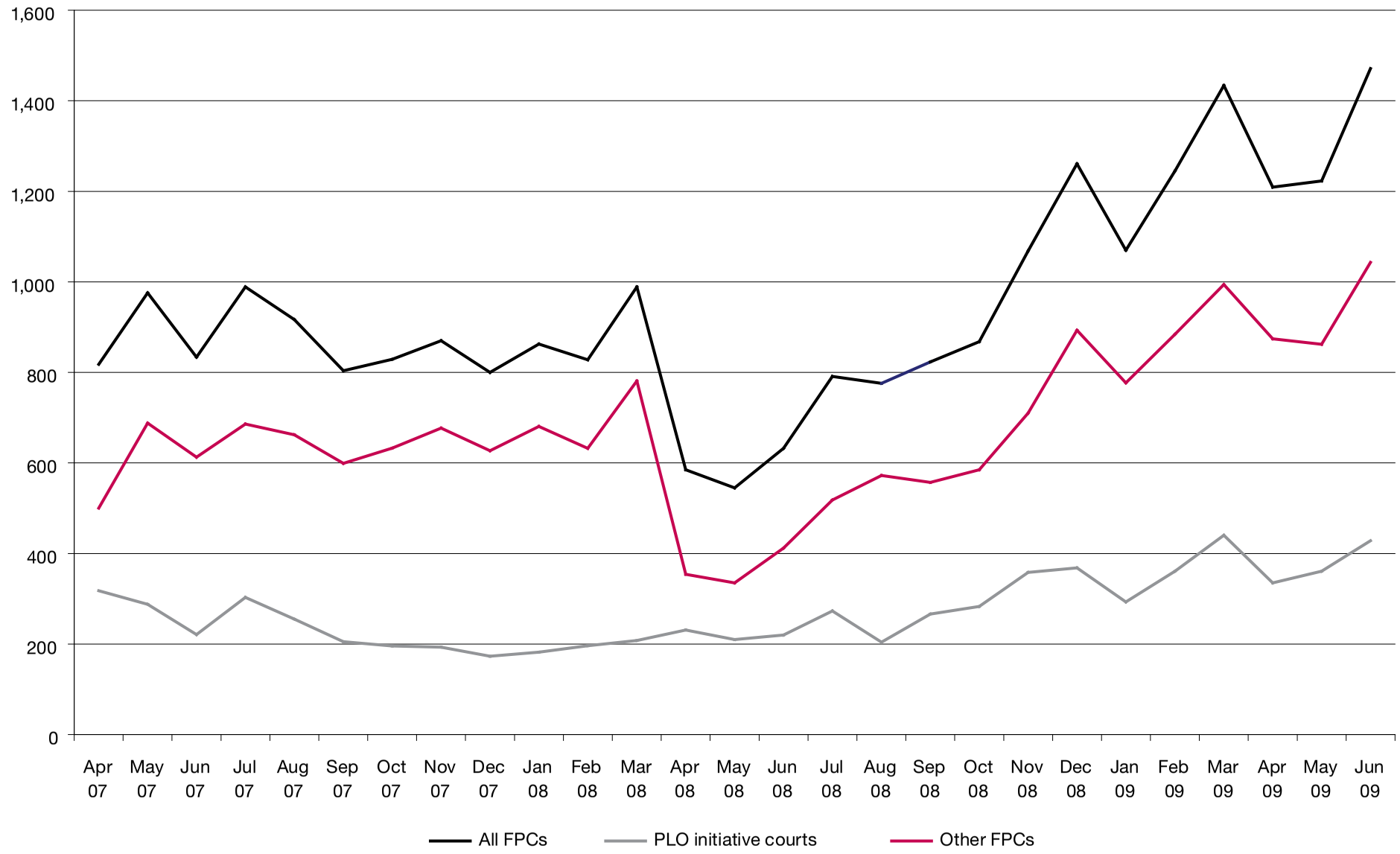


Figure 6.2: Monthly s31 application fees paid in family proceedings courts

Source: HMCS management information

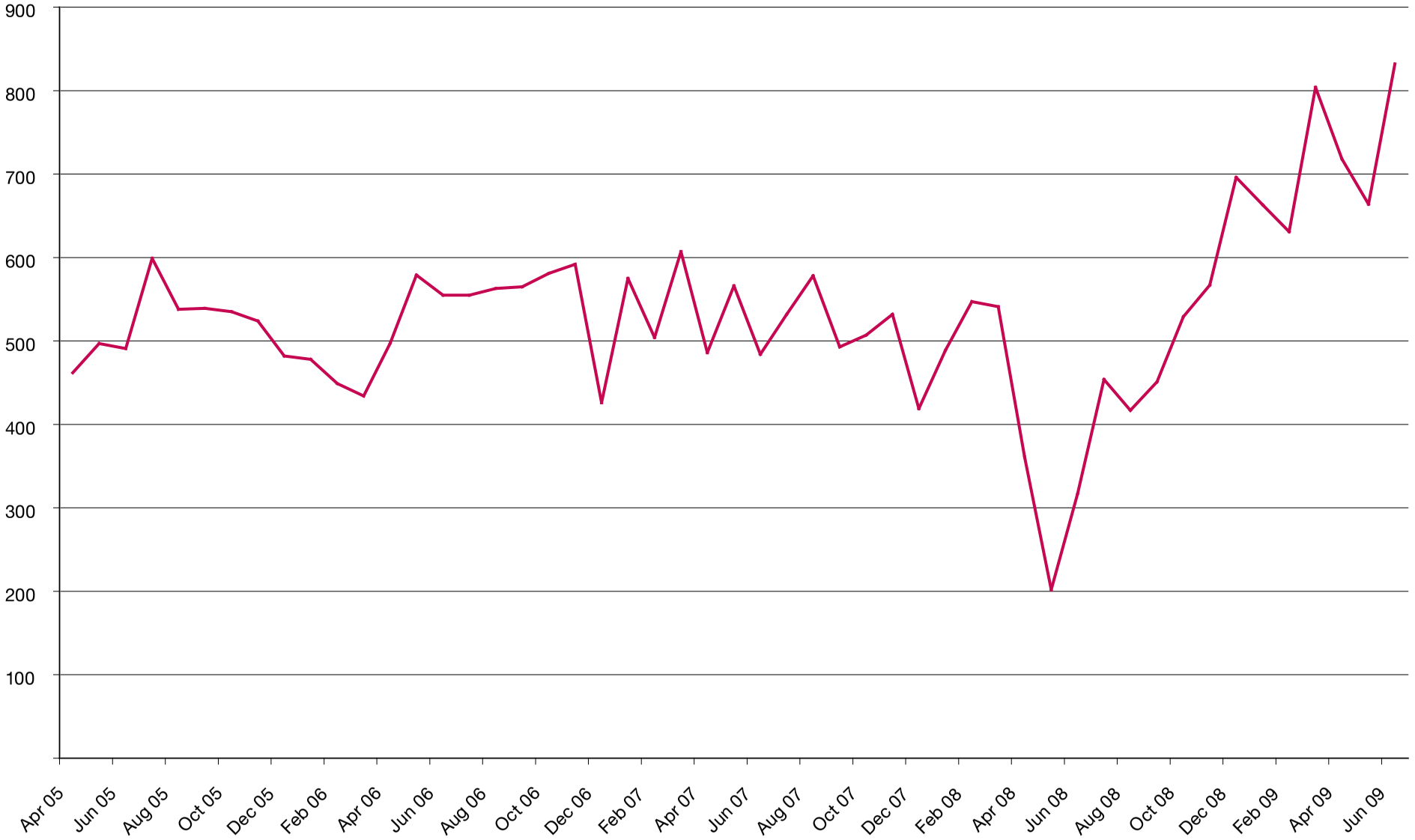


Figure 6.3: Monthly requests for Guardians received by CAFCASS and CAFCASS Cymru

Source: CAFCASS and CAFCASS Cymru

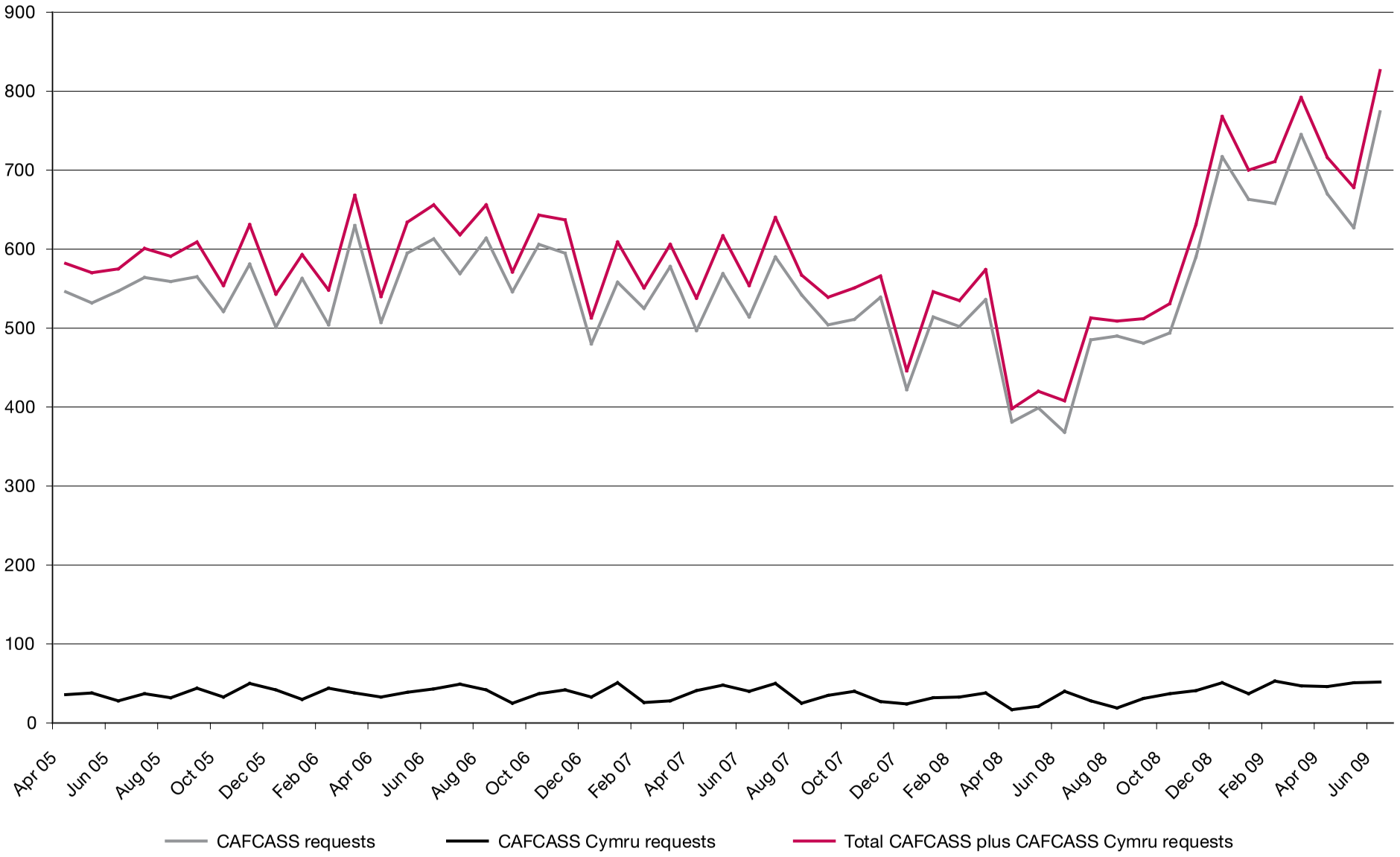
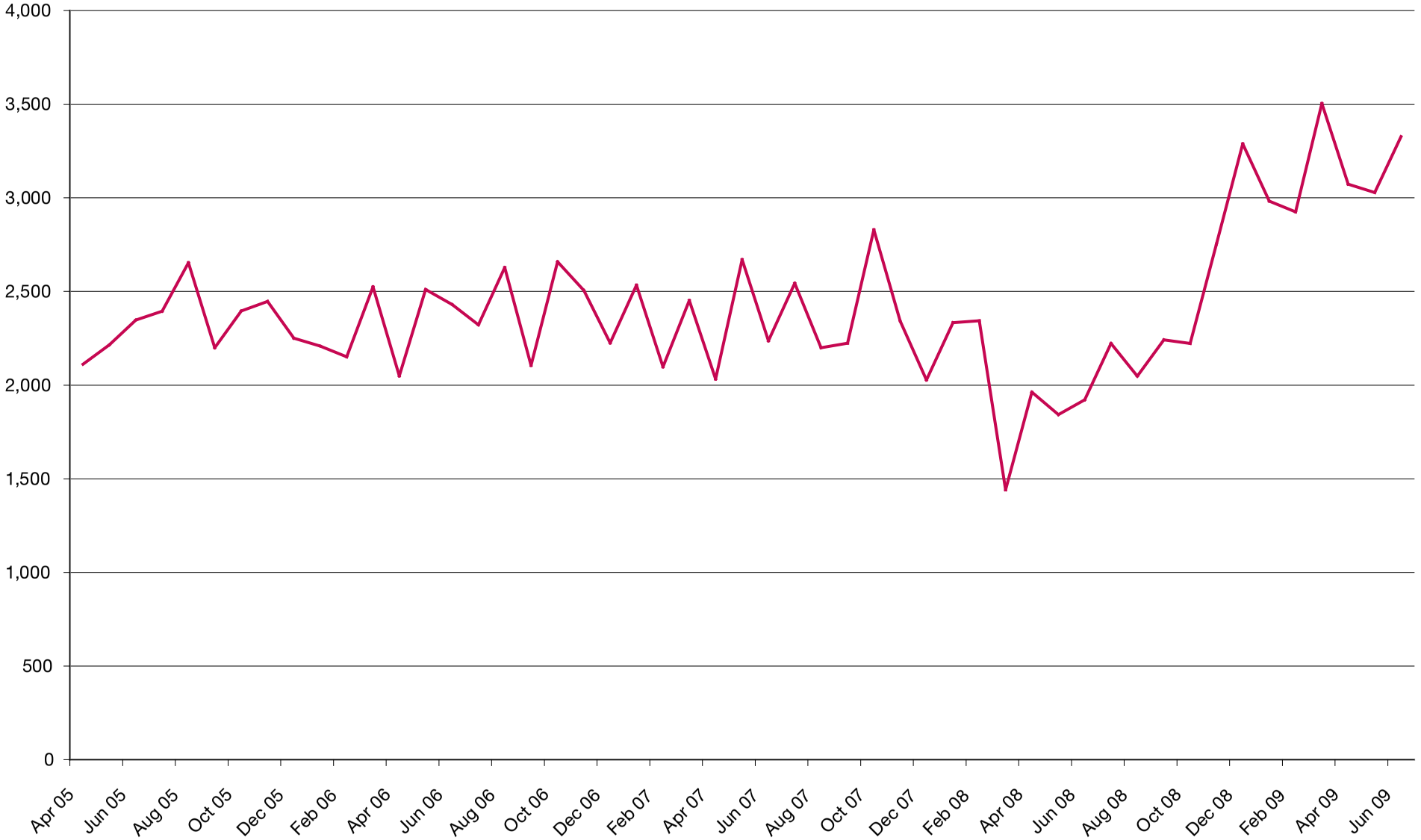


Figure 6.3: Monthly requests for Guardians received by CAFCASS and CAFCASS Cymru

Source: Legal Services Commission



6.8 Legal aid is normally automatically available for parents whose children are subject to child care proceeding, irrespective of means. Legal representation for the children, instructed by the Guardian where children are not old enough to be involved themselves, is usually funded through legal aid. Legal aid will also pay for other parties, e.g. grandparents, to be represented where they satisfy the means and merits tests. The Legal Services Commission has monthly data on the overall numbers of legal aid certificates granted for Special Children Act cases (i.e. s31 applications) going back to 2005. These are shown in figure 6.4. A Legal Services Commission analysis of certificates issued in 2008/09 showed that 24% were for single children, 15% were for 2 or more children and 41% for parents, while the client type was not fully identified for the remaining 19%.

Commentary

6.9 The CAFCASS/CAFCASS Cymru, legal aid and HMCS family proceedings court fees data show reasonably steady rates of child care proceedings being issued from April 2005 until early 2008. The HMCS family proceedings courts application data is consistent with this, albeit only over a shorter run from April 2007. The courts and CAFCASS/CAFCASS Cymru data series show big decreases in new cases issuing from April 2008 (drops of 29% and 23% respectively), with the levels starting to rise in late summer and early autumn followed by a steeper increase in November and December. Since then the applications appear to have levelled off, albeit at a rather higher overall monthly rate than in the previous three year period. The legal aid data follows a similar pattern, except that there is also a prominent dip in March 2008.

6.10 There are three key factors that are likely to be relevant in explaining this pattern of demand:

(i) introduction of the Public Law Outline in April 2008, following some prior trialling in the so-called initiative areas from the previous July;

(ii) introduction of the new HMCS fees regime from May 2008; and

(iii) publicity following the verdicts in the Crown Court trial of Baby Peter's mother, her boyfriend and lodger on 11 November 2008. This was followed on 14 November by the Secretary of State for Children, Families & Schools ordering an inquiry into the role of local authority, health services and police.[14]

Seasonal factors may also be an influence. The legal aid data, particularly, shows regular dips in activity each Christmas and Easter, so the dip in March 2008 could easily be due to the early Easter last year.

6.11 It is difficult to disaggregate the impacts of all these factors. In particular, a number of the national organisations and local authorities that contributed to this review have pointed to the almost parallel introduction of the Public Law Outline and the new fees regime as a combined package that:

(a) was expected to lead to some reductions in the numbers of applications in the short term as local authorities, the courts and other practitioners became used to operating the new procedures. CAFCASS, for instance, commented that:

[14] As already stated, Baby Peter was born on 1 March 2006 and died on 3 August 2007, well before the new court fees were introduced.

"A similar trend – of a short-term downturn in applications – was observed following the introduction of the Children Act 1989 in October 1991 and of the Protocol for Judicial Case Management in Public Law in late 2003. This was likely to combine with changes to local authority practice as a result of the PLO in diverting families from the court process while providing varying levels of support and monitoring, resulting in fewer applications"; and

(b) sent a strong message that the Government expected local authorities to "manage more risk in the community" and "avoid care proceedings" unless there were no other safe alternatives.

6.12 The PLO was trialled in a number of courts from July 2007 onwards before its general introduction the following April. Figure 6.1 compares s31 applications in PLO initiative courts and in all other family proceedings courts from April 2007 to June 2009, covering the period before and after the introduction of the PLO and the revised court fees. While s31 applications in non-initiative courts dropped by nearly 43% in April 2008, there was no similar effect in those courts where the PLO had already been trialled. This appears to indicate that it was the introduction of the PLO, not the increased court fees, which caused the fall in applications. Less easy to explain is the increase in applications in both sets of courts from about August 2008. While in the case of the non-initiative courts this can be explained by a period of catch-up, in the initiative courts no catch up was presumably required.

Other relevant data

6.13 The MoJ holds data on the numbers of children who were the subject of applications for emergency protection orders. There were 1,480 such children in 2007/08, rising to 1,920 children in 2008/09. The overwhelming majority of these applications were to the family proceedings courts, with figure 6.5 showing the monthly breakdown. The review has not investigated this area in detail. However it is interesting to note indications of a slight peak in applications in the late spring of 2008 following the introduction of the PLO and revised fees, and clear evidence of increased numbers of emergency protection orders sought from November 2008 onwards after the publicity around Baby Peter.

6.14 Several of the national organisations with interests in child care proceedings have suggested that one consequence of the increased fees might have been to incentivise local authorities to make greater, and arguably inappropriate, use of alternative arrangements for looking after children such as placements by voluntary agreement under s20 of the Children Act 1989 or encouraging relatives to apply for residence orders under s8 of the Children Act. As discussed later, both of these approaches are usually less expensive and less time consuming than s31 care proceedings. S20 arrangements are by voluntary agreement with parents and do not involve the courts at all. S8, private law proceedings, do involve court orders, but the fee is only £150, paid by the applicant, as are the legal fees, and both may be funded by legal aid.

6.15 Data on the use of s20 arrangements are not readily available, apart from the annual DCSF and Welsh local authority statistics referred to earlier. Figures 6.6 and 6.7 present MoJ data on residence order applications. These show that:

- private law applications (which account for the vast majority of residence order applications) increased by over 10% from 2007/08 to 2008/09; while
- public law applications (i.e. those made in connection with care proceedings) declined by over 30% over the same period.

Figure 6.5: Monthly emergency protection order applications, weighted by number of children involved *Source: FamilyMan and FPC summary returns*

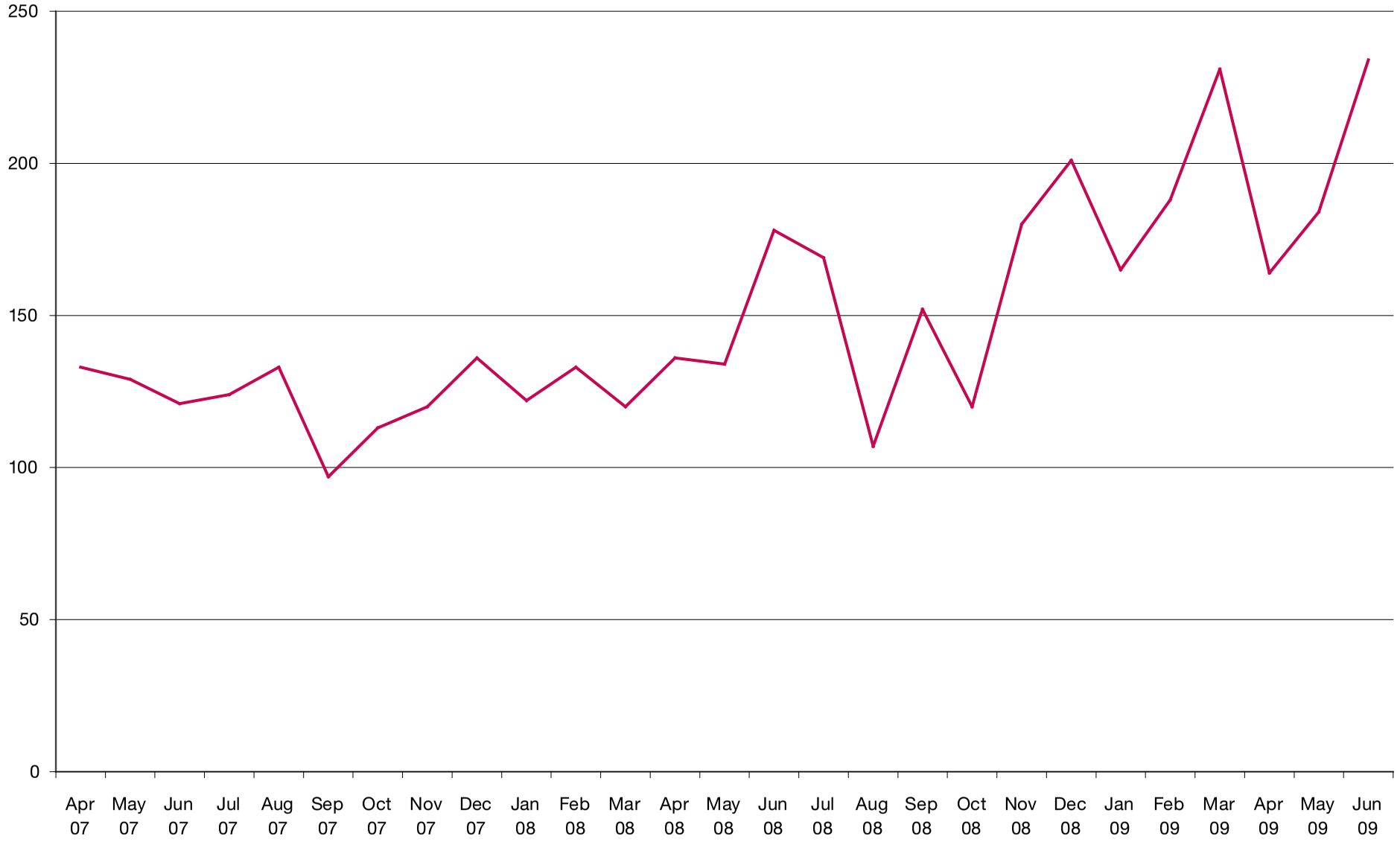


Figure 6.6: Monthly volumes of private law residence order applications

Source: FamilyMan and FPC summary returns

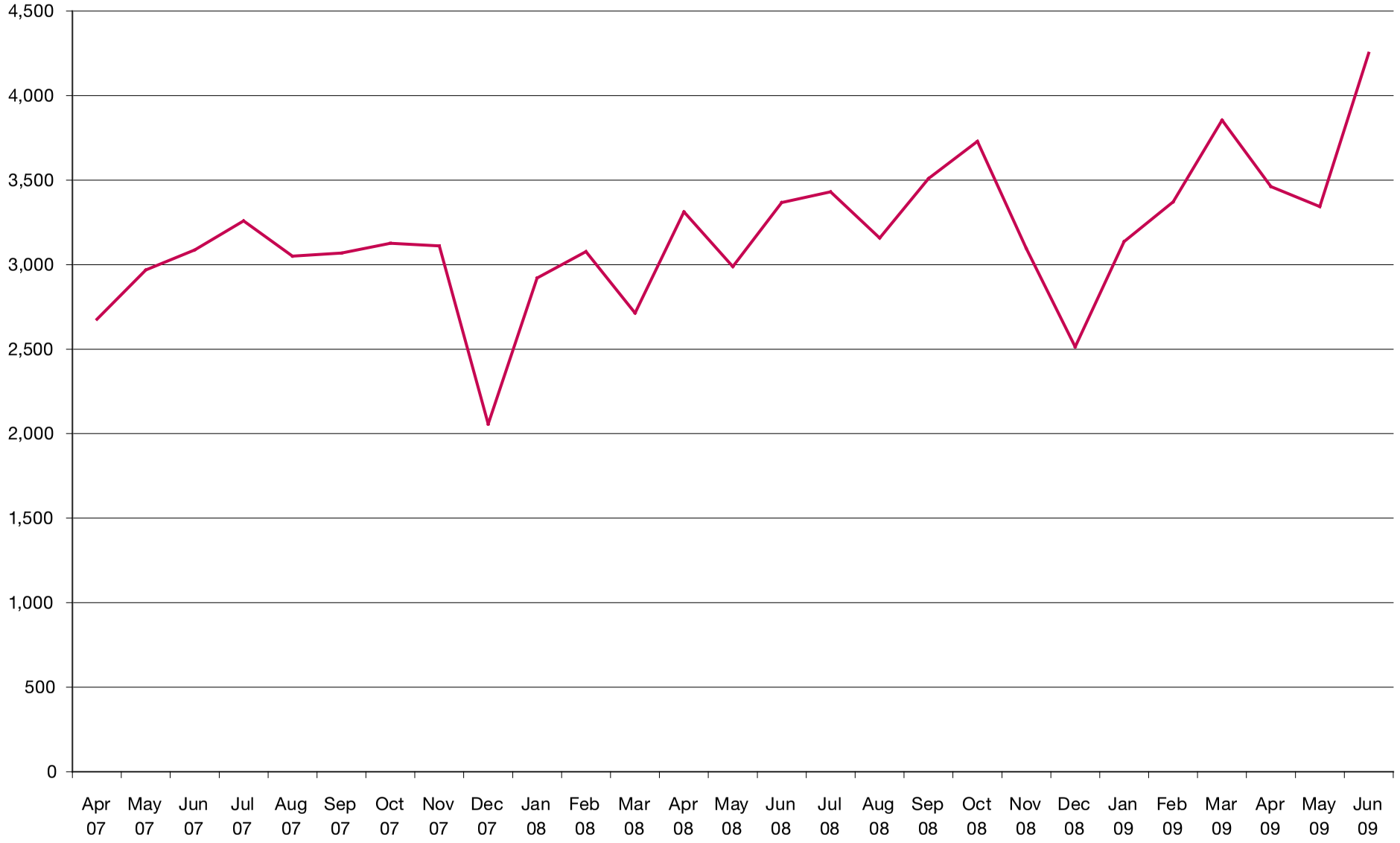


Figure 6.7: Monthly volumes of public law residence order applications

Source: FamilyMan and FPC summary returns

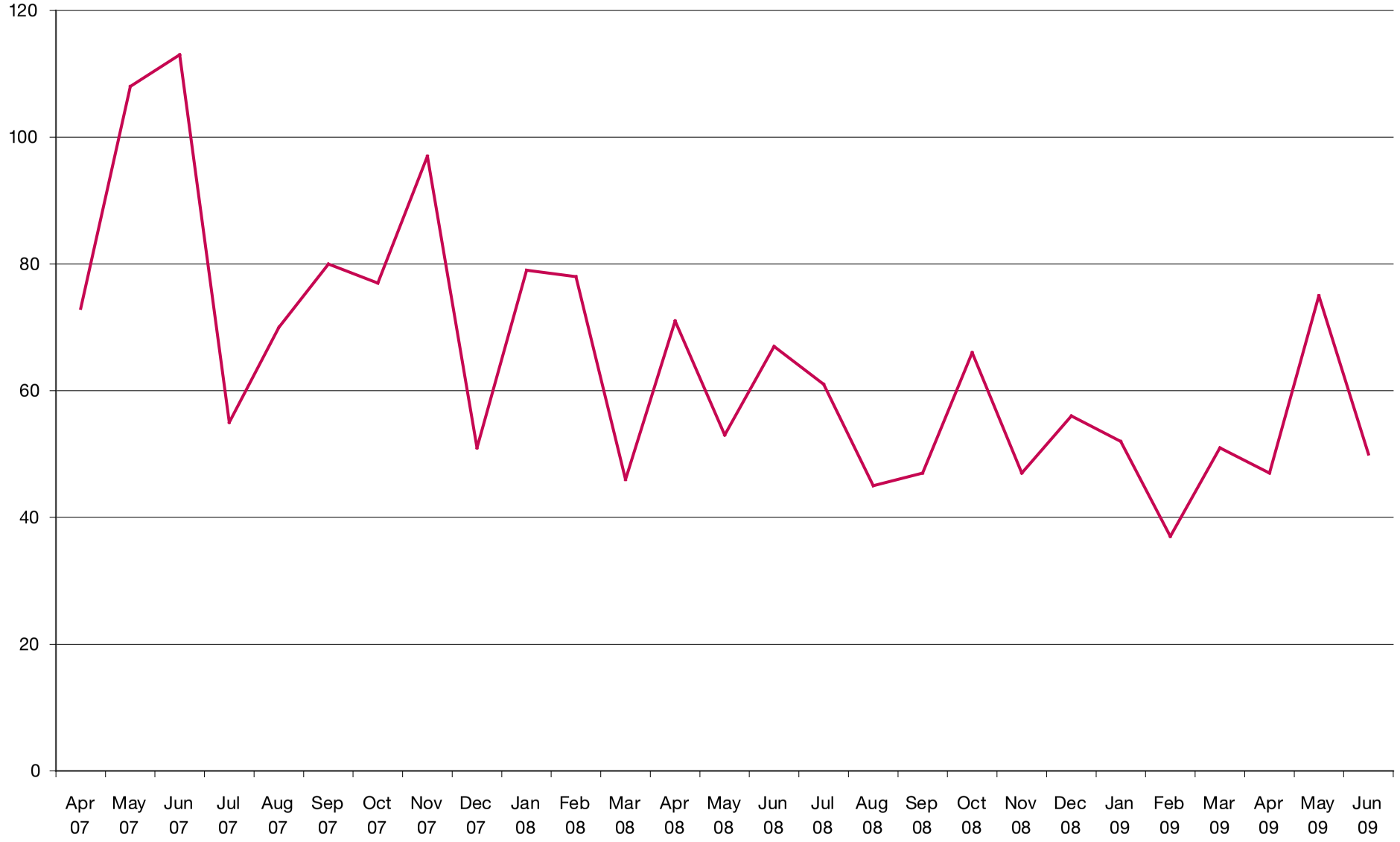
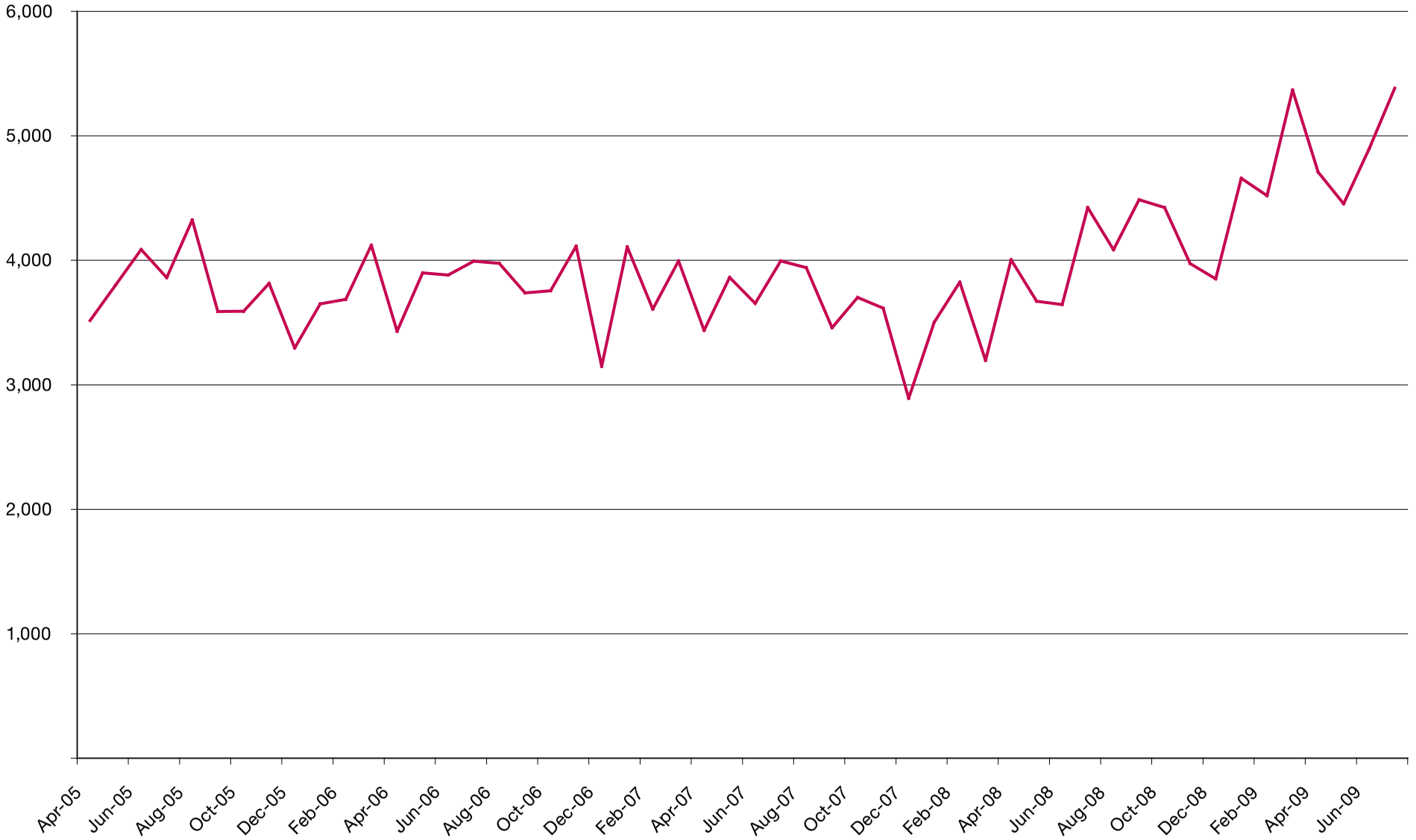


Figure 6.8: Monthly legal aid private law certificates issued

Source: Legal Services Commission



Legal Service Commission data on numbers of legal aid certificates issued for private law cases also show an increase over the same period, illustrated in figure 6.8. These trends are consistent with the policy thrust in the PLO and Statutory Guidance, encouraging local authorities to investigate the potential for placements with family members or friends, and to pursue them in preference to child care proceedings where they offer a viable and safe alternative.

6.16 There is some indication from the local authorities visited that the use of s20 has increased in the three years to 2008/9. Five of the eight local authorities who provided data about both s.20 and s31 accommodation showed an increasing proportion of s20 cases, in two examples significantly so. In another authority where the number of new s20 cases has moved up and down in the last few years, both absolutely and as a proportion of total looked after children, this was attributed to the availability of social workers indicating, perhaps, that resource issues can play a part in how local authorities proceed when looking after children. Of course, there may be many variables at work here the relative impacts of which are hard to determine.

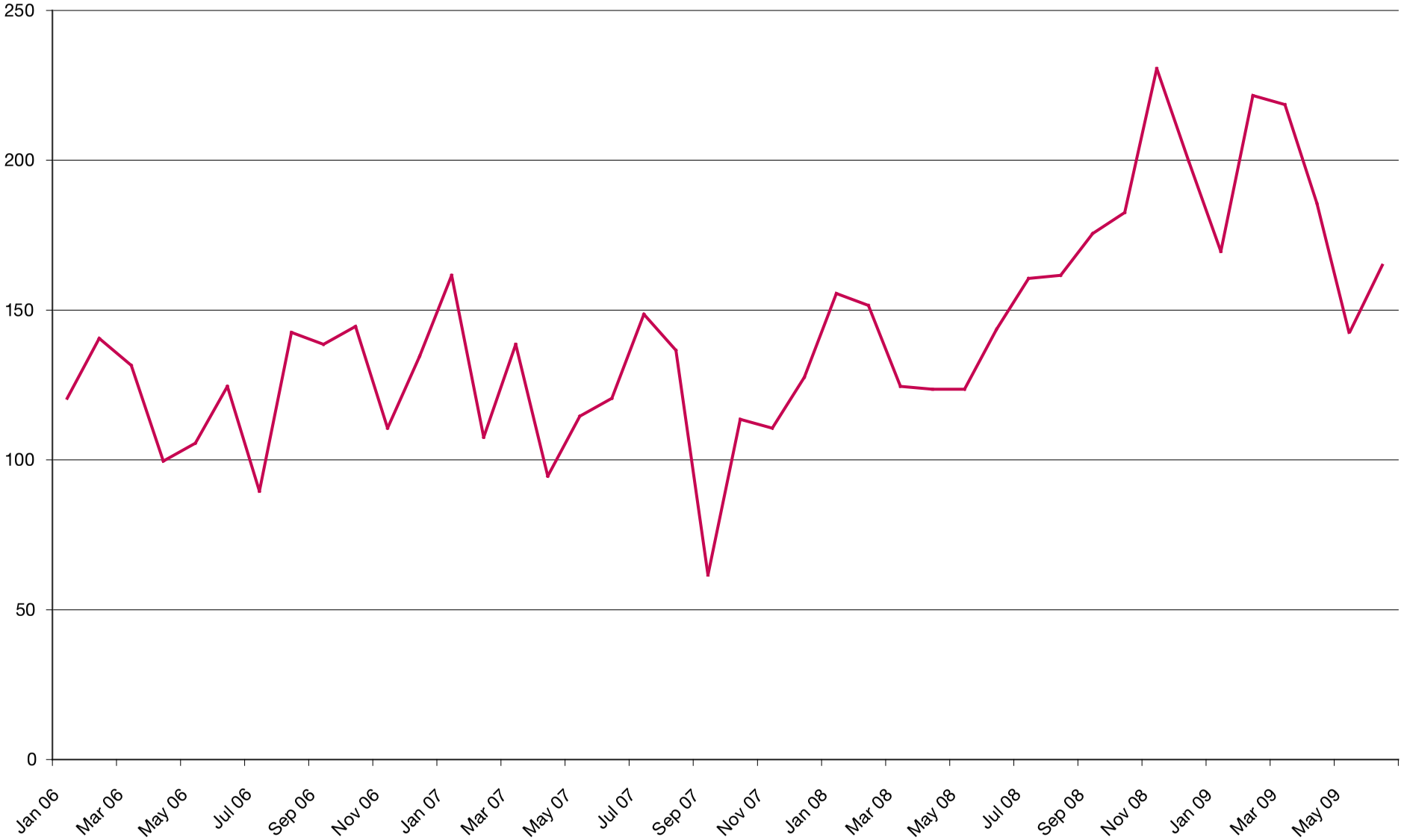
6.17 The local authorities interviewed all stated that they would support private law applications in appropriate circumstances. A number of them had also noted increasing workloads from such proceedings, especially since courts would often ask for welfare reports from the local authority, rather than CAFCASS, where the families were already known to the authority.

6.18 If issues arise in private law proceedings suggesting that care proceedings might be appropriate, it is open to courts to direct local authorities under s37 of the Children Act 1989 to undertake appropriate investigations. HMCS data on s37 directions made in county court proceedings set out in Figure 6.9 do show a marked increase from the middle of 2008, a few months after the introduction of the PLO and revised court fees. Since May 2008 county courts have issued s37 directions in respect of an average of 178 children per month, compared to 125 children per month in the 28 months before that date. This does bear out a repeated comment from members of the judiciary about the increase in private law cases where they have felt the need to intervene with a view to care proceedings.

6.19 The steep rise in numbers of child care cases since late 2008 clearly demonstrates that external events can have impacts on local authority behaviour in initiating child care proceedings. CAFCASS is currently undertaking research into the cases that local authorities initiated in the period 9 to 30 November 2008, the period immediately after the publicity about the Baby Peter case, in an attempt to understand more about the nature of those cases. This research should report in mid-autumn this year. However all the local authorities visited during the course of this review said that they had seen large increases in numbers of referrals from members of the public and from the wider set of professionals following the publicity over Baby Peter late last year. It is also possible that the Baby Peter case led to a reappraisal of risk inherent in some current cases in some authorities, with the result that proceedings were initiated sooner than might otherwise have been the case. The extent to which referrals have subsequently led to increases in numbers of children on Child Protection Plans and/or in care proceedings has varied from authority to authority. But the general impression given was that most of these cases did concern children genuinely in need or at risk of significant harm.

Figure 6.9: Monthly volume of s37 directions in the county court, weighted by numbers of children involved

Source: FamilyMan



7. The Local Government Expenditure Settlement

Basis of local authority funding in England

7.1 English local authorities are funded through a combination of Central Government support plus moneys raised through the Council Tax. The Central Government support consists of Formula Grant (made up of redistributed business rates and Revenue Support Grant) plus a series of specific grants (of which the Dedicated Schools Grant is by far the largest). Formula Grant is not hypothecated – councils are able to decide for themselves how best to use it within their overall range of responsibilities. The specific grants, on the other hand, are nearly all ring-fenced – the main exception is the so-called Area Based Grant.[15]

7.2 The Government has a general policy aim, supported by the Local Government Association, to deliver new funding streams through Revenue Support Grant wherever possible, to increase flexibility and allow authorities to meet local priorities more efficiently. This is articulated in the *2007 Pre Budget Report and Comprehensive Spending Review*,[16] for example, which stated:

> "From 2008 onwards, the presumption for all revenue funding is that it will be delivered through Revenue Support Grant. Where this is not possible for distributional reasons, funding may be distributed through a specific grant delivered through an area-based grant (previously known as a Local Area Agreement grant). Only where a programme is particularly novel, or expenditure has little or no discretionary element at the local level, would any ring-fence be appropriate. In line with this commitment, the Government is meeting its ambition, set in Budget 2007, to deliver a significant reduction in the level of funding provided through specific and ring-fenced grants such that in total over £5 billion will be provided through area-based grants or mainstreamed into Revenue Support Grant by 2010-11."

7.3 The total of Formula Grant available for distribution is decided in the triennial Comprehensive Spending Review, in which the Treasury takes account of the spending pressures on local authorities, the scope for efficiencies, and the overall economic situation. Spending pressures that are reflected in the overall Formula Grant settlement for local government may be funded by a general increase in funding or by transfer from elsewhere within Government. The Chancellor of the Exchequer announced in October 2007 the basis of the current three-year settlement, covering the financial years 2008-09, 2009-10 and 2010-11.[16] In 2008-09, the total redistributed business rates was £20.5 billion and total Revenue Support Grant £2.85 billion, giving a total of £23.35 billion to distribute between authorities. Specific grants amounted to some £47.0 billion, within which the Dedicated Schools Grant was £29.1 billion.

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[15] Area Based Grant is made up of grant streams that were previously provided to local authorities as specific grants. It is designed to enable local authorities, working with their partners, to decide where best to invest their resources in the most effective and efficient routes to delivering local priorities.

[16] *2007 Pre Budget Report and Comprehensive Spending Review*, Cm 7227, October 2007.

7.4 There is an annual statutory process for translating the total allocation for local government into allocations for individual local authorities. In November or early December of the preceding financial year, the Department for Communities and Local Government (DCLG) publishes a provisional distribution of Formula Grant to authorities together with supporting information, including a draft of the Local Government Finance Report which the Department proposes to lay before the House of Commons. This launches a short period of statutory consultation, which concludes in early January. Later in January, and after having considered representations made on the consultation, the Secretary of State for Communities and Local Government lays before the House of Commons the final draft Local Government Finance Report for approval. It is then normally debated and approved by early February. This timing is dictated by statutory deadlines for councils and related bodies to set their budgets.

Calculation of Formula Grant

7.5 The calculation of Formula Grant is described in detail in Annex D. In summary it is distributed among authorities taking account of:

- the relative costs to them of providing services – the ***Relative Needs Amount***;
- their relative ability to raise council tax – the ***Relative Resources Amount***; and
- a ***Central Allocation*** made essentially on a per capita basis.

The resulting initial distributions are then moderated to ensure that all authorities receive at least a guaranteed minimum percentage grant increase – known as the floor – on a like-for-like basis from one year to the next. This step is called ***Floor Damping***, and is revenue neutral in total. The additional moneys required to fund the guaranteed minimum increase are recouped by scaling back the increases over and above the floor received by all other local authorities.

7.6 While the calculations outlined in Annex D are undoubtedly complex, the end results can be stated in fairly straight-forward terms. The combination of the relative needs and relative resources assessments establish an overall ranking of local authorities in terms of their position above or below the floor. But the final allocation is in effect just a straight cash increase on the prior year allocation (as adjusted if necessary to take account of changes in functions) with the size of the increase depending upon the authority's position with respect to the relevant floor:

- for those whose pre-floor grant calculation is below the floor (so-called 'Floor Authorities'), the final allocation is their prior year adjusted allocation increased by the floor guarantee. So in 2008/09, floor authorities responsible for children's services received a 2% increase; and
- authorities above the floor receive increases greater than the floor guarantee (although less than the pre-floor grant increase) with those higher up the ranking getting a larger increase.

Table D.4 in Annex D shows the 2008/09 pre-floor grant and final allocations for the English authorities that were visited as part of the review.

Chronology of the Public Law Family Fees adjustment for English authorities

7.7 DCLG published the draft Local Government Finance Report for 2008-09 for statutory consultation on 6 December 2007. The provisional allocations for 2008-09 reflected the transfer into Formula Grant of the £37.652 million England share of funding for the public law family fees, since that amount formed part of the total £27.490 billion of Formula Grant for 2008-09. Similarly, the provisional allocations for 2009-10 and 2010-11 also reflected provision for the fees within the Formula Grant totals for those years. The provisional settlement also included notional adjustments to the 2007/08 base year for floor damping purposes for a number of transfers. These followed discussions between DCLG and HM Treasury as to which of the pressures reflected in the Comprehensive Spending Review outcome had been funded by transfers. Unfortunately those discussions did not properly identify that the public law fees had been addressed in this way and so the proposals published on 6 December did not include an adjustment for the fees.

7.8 The MoJ consultation paper on Public Law Family Fees, published on 19 December did set out the Comprehensive Spending Review treatment of the funding arrangements as a transfer from MoJ to the local government settlement, explaining that:

- full cost recovery was to be introduced for public law family fees;
- the necessary overall amount of funding for this was provided to local government; and
- the funding was to be distributed in the normal way, i.e. via formula grant.

7.9 Publication of the MoJ consultation paper prompted a number of organisations to comment in their responses to the consultation on Formula Grant distribution. In summary:

- the Local Government Association's principal concern was that the Government should set out transparently how financing of the increase in public law family fees had been dealt with in the three-year settlement.
- the County Council Network argued that all existing funding streams that had been transferred into Formula Grant should be reflected in the baseline for floor damping purposes. This included the transfer of public law fee funding, which without the relevant baseline adjustment would not be appropriately directed to upper-tier authorities.
- six individual local authorities all argued that as this was a transfer of funding it should be reflected in the baseline calculation for the floor increase. One council's representation stated, for example:

  "Public Law Family Fees Consultation, issued 19 December by the Ministry of Justice

  The Ministry of Justice propose to increase their charges to Local Authorities for Care cases from £150 to £4,000 per case. The consultation paper states that the increased cost to local authorities for care will be £35million, and for Adoption, £5million, and that this was allowed for within the local government provisional financial settlement.

  Unfortunately I cannot find any mention of this within the provisional settlement papers, and neither can the LGA. It is not shown in Key Table 3, which is headed New Burdens and Transfers of Function affecting formula grant. I should have hoped to have seen it there."

7.10 DCLG ministers accepted that these representations were in line with the Govern-ment's usual policy for making adjustments for floor purposes, set out in Annex D. Consequently, an adjustment was introduced for this transfer in the final local government settlement announced on 24 January 2008. As the total amount of Formula Grant for 2008-09, already included England's share of the £40 million (some £37.652m), the total amount of Formula Grant was not further increased.

What English local authorities actually received

7.11 DCLG contended in the course of the Judicial Review that:

> "It is not possible to identify how much money has been allocated to a particular local authority for a particular function for the simple reason that specific amounts of Formula Grant are not allocated for specific functions. Nor is it possible to infer a specific allocation from a particular Relative Needs Formula. This is because the calculation of Formula Grant for an individual local authority:
>
> - involves several Relative Needs Formulae (which vary depending on the relevant class to which an authority belongs);
> - takes account of each authority's relative ability to raise council tax (which is unique to the authority in question);
> - includes a central allocation (which varies depending on the functions performed by the authority); and
> - is affected by the system of floor damping (which depends on the amount of grant that an authority would notionally receive *before* floor damping is applied and on the group to which an authority belongs for the purposes of floor damping).
>
> This is entirely consistent with the position that an authority's Formula Grant is not hypothecated in any way. Its use is at the discretion of each authority. All authorities have received at least the floor increase in formula grant. It is up to each authority to set its budget in a way that enables them to meet their statutory obligations and local priorities, while avoiding excessive council tax increases."

While this argument has considerable merit – especially the point that Formula Grant is not hypothecated – it is nonetheless possible to say in broad terms how much the settlement was worth for individual local authorities in terms of the transfer for the new fees.

7.12 One possible methodology, explored in the Judicial Review, is to calculate what each council would have received had the £37.65m not been transferred into Formula Grant, and to compare the outcomes of this hypothetical settlement with the actual 2008/09 allocations. DCLG have kindly made available the results of the calculations that were undertaken at the time of the Judicial Review, and the results are shown in Table D.4 for the English local authorities visited by the review team.

7.13 An alternative approach starts from the observation at paragraph 7.6 above that the practical effect of the floor damping mechanism is that the final Formula Grant allocation to individual local authorities is a straight cash increase on their prior year adjusted baseline. If the prior year adjustment for the family fees is increased in proportion to the authority's overall cash increase, this gives an approximate figure for the amount in the allocation for family fees. The results of this alternative treatment for 2008/09 are again shown in Table D.4. For most floor authorities, the figures are identical for the two methodologies. However for authorities above the floor the two treatments produce slightly different figures. This is because in the first treatment involving the hypothetical settlement without child care fees the prior year baselines are lower and hence the floors are also lower.

7.14 From the analysis above, it is pretty clear that the allocations for local authorities in England did include moneys for the new fees calculated on the usual basis for allocating grants to local government that took account of individual authorities' relative needs. Indeed, this was the conclusion that the High Court reached in the Judicial Review. However, it is also clear from our discussions with local authorities that few, if any of them, shared this perception of what was included in the settlement. This appears to have been the cumulative result of the very belated consultation on the fees themselves coupled with the omission of the public law fees baseline adjustment from the provisional settlement.

7.15 Indeed the correction of that omission in the final settlement appears to have increased the confusion:-

- For those authorities whose pre-floor grant calculations were equal to or below their adjusted prior year baseline, the correction had the effect of giving them an **increase** in their Formula Grant allocation between provisional and final settlements. This additional amount was 2% of the increase in their 2007/08 baselines, and therefore numerically equal to the notional element for the public law fees described in the preceding paragraphs. The authorities we spoke to in this position had all identified this amount and included it in the relevant Children's Services budgets.

- The remaining floor authorities and some just above the floor also saw **increases** in their Formula Grant allocation between provisional and final settlements. These increases were smaller than the notional element for public law fees, depending upon how far above the floor they were following the baseline adjustment and the degree to which their final allocations were scaled back to pay for the enhanced floor level as a result of the Public Law Fees adjustment. The authorities we spoke to in this category had assumed that this increase in their allocation was in practice what had been provided for public law fees – in spite of the publication of the baseline adjustments – and had included it in the relevant Children's Services budgets.

- The remaining authorities that were above the floor saw a **decrease** in the amount of Formula Grant that they received between the provisional and the final settle-ments for 2008-09. This is because the scaling back of their allocations exceeded the amount they got as a result of the adjustment to their baselines. Authorities with the highest overall settlement increases saw the greatest decrease between provisional and final settlement. For example, Lancashire and Norfolk both saw their allocations decrease by around £850k.

At least two authorities in this category told us that in practice their budgets had been set in December on the basis of the provisional settlement, and the adjustments downwards coupled with the need to secure adequate provision for the fees had meant some difficult discussions with corporate finance colleagues. The result of this was that a central contingency was created in reserves rather than held in the Children's Services budgets.

7.16 Table 7.1 below compares the notional amount transferred calculated as described above with the amounts local authorities visited reported as incurred in the 2008/9 financial year and shows that all but one of those for which there is information received more than their actual spend. However, these figures need to be treated with some caution as:

- there were some difficulties initially in both the billing arrangements in the court centres and also the payment arrangements by local authorities;
- some authorities effectively refused to pay, at least for some time;
- not all the amounts appear to be based on accruals, and may be cash paid rather than amounts billed; and
- the fees billed are clearly a function of the number of cases initiated. Overall the number of new proceedings in 2008/9 was similar to that of 2007/8, the base year for calculating the new fees. But the pattern in 2008/9, with a decline in the first half the year, followed by the sharp and sustained rise from November onwards implies that, for the cases initiated in the second half of the year, while the fee on application would have been paid in 2008/9 and, possibly, the issues resolution fee too, the final hearing fee will probably only become payable in 2009/10.

7.17 Whatever the explanation for the apparent differences shown above, all but one of the English local authorities visited were compensated for the fee increase. However, they may not all have realised it at the time. And not all of them transferred an amount equivalent to the adjustment for court fees into the Children's Services budget.

Table 7.1: Comparison of actual expenditure on court fees with notional amounts in revenue support grant and with overall child protection and care expenditure for English local authorities visited by the review team

Local Authority	Actual 2008/09 expenditure on Public Law Family Fees (£000)	Notional amount for fees in 2008/09 Revenue Support Grant (£000)	Overall 2008/09 child protection expenditure (£m)
A	108	167	5.7
B	359	308	25.2
C	48	145	11.9
D	151	172	18.0
E	73	347	37.5
F	-	203	-
G	95	259	35.6
H	186	326	29.6
I	292	387	45.9
J	245	471	46.9
K	623	469	74.0

The position in Wales

7.18 Local authority responsibilities for children's social services and child protection are devolved in Wales. The Comprehensive Spending Review settlement for Wales therefore included some £2.2m as the Welsh share of the transfer from MoJ, calculated in accordance with the Barnett formula.

7.19 The Welsh Assembly Government's 2008/09 revenue settlement for local government provided some £2.5m to meet the expected cost of the new fees. (This was on the basis of information from the MoJ on the proportion of care cases conducted in Wales.) This funding was distributed in accordance with the standard formula agreed with local government in Wales for children's social services, based on a number of factors including population, deprivation and other socio-economic indicators. The relevant amounts were specifically identified in the allocations for each authority, and Heads of Children's Services were advised of them so that they could ensure the monies were used for the proper purpose.

7.20 Both of the authorities visited confirmed that the sums allocated by the Welsh Assembly Government had been passported into the relevant Children's Services budget.

8. The Identified Issues

8.1 As already explored in section 5, a number of key themes arose in the responses to the MoJ's consultation on the proposed fees. Only a few of the submissions to Lord Laming's Review commented on the fees, mostly this was in passing, raising essentially the same issues that were raised in the original consultation. However:-

- CAFCASS stated:

  "Whilst there has been considerable noise and protest about the impact of higher fees for a court application … CAFCASS sees little evidence of a negative impact …"; and

- Senior Children's Services officials from one local authority commented:

  "It is worth adding here that the movement of the cost of applying for a Care Order from the Courts [to] local authorities has had absolutely no effect on our decision making around which cases we take to court. We believe that in large part this is a myth promulgated by a legal profession concerned about a drop in business."

8.2 In both the written submissions to this review and, in discussions with the organisations concerned, most recognised that it was very difficult, if not impossible, to disentangle the combined impacts of the introduction of the Public Law Outline and the new fees. A number of organisations, while disagreeing with the principle of full cost recovery, said that it was unlikely that there had been any impact from the increased fees.

8.3 CAFCASS believed that the "process of familiarisation with the PLO and more latterly the impact of the publicity surrounding the Baby Peter case have been more influential" and that "the downturn in applications may be in part be a reflection of the use of positive practices within local authorities e.g. the use of s20 accommodation, safe written agreements, family group conferences, the implementation of the Letter before Proceedings etc." Ofsted stated that "we do not agree that a link between court fees and decisions to commence court proceedings is proven" and that through their inspections "we have seen no clear evidence that court fees act as a deterrent to local authorities in instigating legal proceedings to safeguard children."

8.4 The Association of Directors of Children's Services made a distinction between the impact on individual cases where they did not "believe that individual cases are being handled differently solely because of the introduction of fees" and the impact on the system as a whole. They stated that other costs associated with court proceedings have a significantly greater impact on budgets than court fees but that the increased costs, including those attributed to court fees, do have an impact and likely to be met through the erosion of other services, usually meaning a reduction in early intervention and prevention. They also made a point about perception where "anything which promotes a direct link between actions concerned with the protection of vulnerable children and cost savings are not a helpful part of building confidence in the system".

8.5 A comparable point about perception was made by the Solicitors in Local Government Child Care Lawyers Group, who also thought that it was unlikely that any local authority could "point to a case and state that it was not the subject of care proceedings solely as a result of the fees". However, they suggested that there are risks that authorities are "perceived to be taking decisions for financial reasons rather than 'welfare' ones". They go on to suggest, based on the experience of some of their members, that the fees may have led to the risk (or at the very least suspicions) that compromises in care are reached that may be influenced more by financial considerations than the interests of children.

8.6 Those organisations that felt the fees might have had an impact included the Magistrates' Association, NSPCC, Law Society, Association of Lawyers for Children, Family Law Bar Association, and Association of District Judges. A number of issues and concerns were raised which largely echoed the earlier themes. Perhaps surprisingly, there was continuing uncertainty (especially among the judiciary and legal profession) as to whether there had actually been a transfer to moneys to fund local authorities' expenditure on court fees. In addition, there were continued concerns about s20, the use of s8 family placements and special guardianships. In the last two cases it was felt that the more comprehensive and intensive scrutiny implied by s31 care proceedings might, some cases, be more appropriate.

8.7 Additional points that were raised included:

- delaying proceedings so that a new baby can be joined with other siblings already identified as being a risk and thereby saving a court fee;
- in cases of (voluntarily) relinquished babies placed for adoption, taking a risk that the parents will not change their mind and applying only for a placement order (at a cost of £400) alone, rather than the more certain route of care proceedings followed by a placement order (cost £4,825 plus £400);
- the judiciary reported an increasing use of their powers under ss7 and 37 of the Children Act to get local authorities to investigate s8 applications more thoroughly; and
- there was also some continuing confusion as to the fees payable in cases involving siblings, arising perhaps from the way the fee proposals were first promulgated.

8.8 A number of these organisations gave examples of where they thought that these particular concerns had occurred and these are referred to later in this report. The rather contradictory references to the use of s8 kinship care and s20 voluntary arrangements point to a particular difficulty in assessing the effects of the increased court fees. Kinship care, in particular, is encouraged by the legislation, the PLO and the current guidance. The issue for this review is whether local authorities have been encouraged by resource issues to promote this type of arrangement inappropriately. And s20 arrangements cover a multitude of situations ranging from very short-term accommodation where parents are unable to cope, for example through illness or because they are undergoing some form of treatment, to children accommodated while authorities are in the process of initiating care proceedings.

8.9 Finally, in the formal responses to the review and, in some of the meetings attended, the view was expressed that it would be impossible to gain the kind of "clear evidence" the terms of reference required. The Association of Lawyers for Children said: "we suspect that the Review will be unable to identify cases where the Local Authority has explicitly decided to not to start proceedings on the basis of fees alone. That would be unlawful and nobody could be quite that naïve". Similarly, the FLBA said in their response ""local authority social workers and solicitors are unlikely to admit or acknowledge that the increased fees have acted as a deterrent to the issuing of care proceedings because to do so would be tantamount to admitting a breach of their statutory duties". They suggested that this reluctance to acknowledge that the increase may have acted as a deterrent would be likely to be even more pronounced in the light of the Baby Peter case.

9. Budgetary Management in Local Authorities

9.1 A previous section of the report discussed the public expenditure transfer that was made for 2007/8 in respect of the increase in court fees. As also discussed, virtually all local authorities in England had already prepared their budgets for the year by the time they were aware of the transfer and there was continuing uncertainty at the start of the financial year for some authorities as to what had been included. Consequently, the allocation was handled in different ways, with some authorities reflecting some or all of it directly in the budgets of their Children's Services Departments while others treated it as an addition to reserves. The Judicial Review, to which a number of authorities were party, raised at least the possibility that the fee increase would be reversed and must have also contributed to the uncertainty as to what costs an authority would bear.

9.2 How budgets were prepared in Children's Services was discussed in the visits to local authorities. With one exception, they appeared to be prepared on a pragmatic bottom up basis taking account of staffing levels, the number of children in care, their age and type of accommodation and an assessment of the likely number of new child protection cases. The exception was where, in one authority, there was a relatively new member of the finance staff who thought that the budget had been prepared by adding a standard percentage to the previous year's figure. In all cases, the greatest uncertainty in these budgets surrounded the number of new child protection cases and the costs associated with these.

9.3 All authorities were experiencing budgetary pressures and in 2008/09 a number had had serious overruns. Authorities reported that this had been the result of a number of factors:

- increasing pressures in the costs of accommodation, especially fostering;
- changes in the legal aid arrangements introduced in October 2007 whereby residential assessments, the most expensive type of assessment, were taken out of scope, meaning that where they are used the full cost is now borne in full by the local authority;
- uncertainty as to the volume of court cases;
- the increase in court fees which for many authorities had been too small previously to be accounted for separately but were £200,000 to £300,000 in 2008/9 for some of the larger authorities visited;
- a continuing increase in the number of assessments required in care cases. This was said to be driven by two factors. First, the PLO had placed greater emphasis on undertaking assessments prior to commencing formal proceedings. But second, many of those assessments had then been challenged during the course of proceedings, with the courts often agreeing to further assessments.

9.4 The following table shows a comparison of the 2007/8 and 2008/9 costs of Children's Services Departments of four of the English authorities visited. These figures may not be presented on a fully comparable basis and a number of authorities gave caveats on some of their figures. But they serve to illustrate the relative importance of the different cost elements, including court fees, and how these changed in the last two years. In all cases, the costs shown for fees are less than what might be expected given the number of new care proceedings initiated. This is presumably because either cases did not proceed or, alternatively, because, as suggested earlier, the later stages of the process had not yet taken place and therefore the fee had not yet been charged.

Table 9.1: Cost breakdown of local authority spend on child protection

£,000	Authority 1		Authority 2		Authority 3		Authority 4	
	2007/8	2008/9	2007/8	2008/9	2007/8	2008/9	2007/8	2008/9
Staff costs	10,130	10,760	16,910	16,240	12,340	13,320	1,850	2,030
Accommodation	11,650	11,880	23,390	22,600	18,730	18,370	7,970	8,030
Legal costs	590	980	670	730	350	160	230	420
Other professional costs	0*	0*	110	50	0*	400	0*	0*
Court fees	160	360	20	290	0*	100	0*	50
Other	830	1,240	4,000	5,950	3,000	3,280	2,380	1,390
Totals	**23,360**	**25,220**	**45,100**	**45,860**	**34,420**	**35,630**	**12,430**	**11,920**

** Figures are included in the legal costs.*

9.5 Local authorities have different approaches to handling the overruns referred to above. For the most part, and in the first instance, departments are told to "consume their own smoke" or to find compensating savings from elsewhere within the departmental budget. In some authorities this requirement to find savings departmentally is enforced with some rigour. However, although the overall Children's Services budget is a large one, the point was made that, given the ring fencing of the Education grant, there was limited opportunity to vire between different budgetary headings. Before the split of social services, it was said that there had been more scope for budgetary flexibility and for finding compensating saving elsewhere in the (then) wider social services budget. A typical response reported in interviews was to find savings within non-statutory services such as children's and family centres. This may involve leaving posts unfilled or, in extremis, closing some units altogether. Since these services are essentially preventative, the point was made forcibly that, in the longer run, this might mean more children at risk and entering the care system.

9.6 Many of the authorities visited were in the process of reviewing their fostering arrangements with a view to reducing the unit costs of fostering. Steps taken included tougher procurement arrangements including joint purchasing with neighbouring authorities, reviewing the balance between agency and own foster carers. The creation and use of Resource Panels, referred to in section 10 of this report, in order to ensure that there was a consistent and appropriate response to the needs of the child concerned, was also prompted by the need for economies.

9.7 Where departmental budgets cannot accommodate the scale of overruns, then a transfer is made from the authority's reserves. In some cases, where the assumed amount for the fees had not been transferred to the departmental budgets, an equivalent amount had been earmarked in reserves in case it was required. In one case, where the transferred amount was still in reserves, only a small part was required in the year as compensating savings had been required, and had been made, in the departmental budgets.

9.8 In some of the authorities visited in this review, there appeared to be relatively little difficulty in obtaining resources from reserves where this was required, perhaps unsurprisingly given the high profile of the Baby Peter case and the subsequent events in the authority concerned. However, in all authorities the financing of any cost overrun has to be fought for against other competing priorities, some of which have more obvious political upside than children's safeguarding. And most of the authorities visited were anticipating increasing budgetary pressure in safeguarding generally but also specifically from fees. Many said that the budgetary pressures would increase as the recent rise in care cases worked their way through the system and became part of the longer term cost base of the authority, although not all authorities had experienced the same rise in cases. One said "all bets are off for next year", and another that they were on the cusp of a considerable increase as a result of the rise in care proceedings. A further authority told us that, in the current financial year to end-August they have spent the full annual amount included for the fees in their 2008/09 formula grant. While a large authority anticipated court fees in 2009/10 of around £1m compared to a few thousand pounds two years previously.

10. Decision-Making in Local Authorities

Introduction

10.1 In order to assess the potential impact of the fee increase, it is necessary to have an understanding of the decision-making processes within local authorities; who is involved and what criteria, explicit and implicit, do they use in reaching a decision. The decision to initiate proceedings is not a straightforward one.

10.2 First, there are various routes to safeguarding children in an authority's area. Many of the steps that the local authority may take, including providing support to families in the community and where children are accommodated voluntarily, do not involve the courts. In addition to public law cases where the authority seeks to take children away from their parents, there are private law proceedings with which the authority may not be involved at all (although in some it may be actively involved in encouraging a private law case, or become so at the direction of the Court).

10.3 Second, the overall policy context suggests that an authority should seek to keep families together, unless there is a risk of significant harm to the child. In some cases assessing the risk may be straightforward. But, in others – and it was said repeatedly in the visited authorities that these were the chronic cases where children were at risk through neglect – it may be difficult to identify the point where support arrangements for poor parenting have proved inadequate and that the only option is child care proceedings

10.4 *Working Together to Safeguard Children*[17] provides statutory guidance on how a child[18] is dealt with once the local authority receives a referral. The detailed decision-making process, however, differs between local authorities, and indeed between individual cases. The specific circumstances of each case, the established practices of the individual authorities and the availability of resources both within the authority and in the wider area inform how each case is managed.

10.5 The social workers interviewed made clear that professional judgment had to be exercised as to the most effective way of dealing with each individual case.

Referrals

10.6 A local authority first becomes aware that there is a potential child in need in their area through referrals. These may come from a number of sources, the primary ones being education workers, health workers, the police and concerned members of the public or wider family. Within 24 hours of receiving a referral, the duty social worker will decide, in conjunction with their manager, as to whether an initial assessment is required. This decision is based on whether the concerns outlined in the referral are significant enough to warrant further action. If there appears to be no substantiated risk to the child, it could be decided that no further action will be taken at this stage.

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[17] *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, The Stationery Office, 2006.

[18] In this section, for clarity's sake I have used the term child in the singular. Cases of this nature can (and often do) involve a number of children at a time.

Initial Assessment

10.7 Initial assessments are required to be completed within seven working days of the referral. In the course of the assessment the local authority should ascertain:

- is this a child in need? (s17 of Children Act 1989); and
- is there reasonable cause to suspect that this child is suffering, or likely to suffer, significant harm? (s47 of the Children Act 1989)

10.8 Initial assessments should be led by a qualified and experienced social worker and involve seeing and speaking to the child and family members, drawing together and analysing available evidence and involving and obtaining relevant information from professionals and others in contact with the child and family. The information for the initial assessment should be gathered with regard to the child's developmental needs, the parents' or caregivers' capacity to respond appropriately to those needs, and the wider family and environmental factors.

10.9 On the basis of the initial assessment the social worker, in conjunction with their manager, makes a decision whether to initiate proceedings immediately (if the risk of harm to the child is significant), take forward a core assessment under s47 of the Children Act 1989 (if the child is suffering, or likely to suffer, significant harm), take other action to support the child and their family (if the child is in need) or take no further action.

10.10 In most of the local authorities visited, all of this initial work – referrals and initial assessments – is done by duty referral teams. These teams also have the ability immediately to take cases to proceedings if there is sufficient concern and the care proceedings threshold had been met. If it is decided that they are dealing with a child in need, including one suffering or likely to suffer harm, but that proceedings are not appropriate immediately, they pass the case on to a team set up to deal with longer-term cases. These teams, usually area-based, carry out the core assessment and further work with children and families.

10.11 A number of local authorities interviewed said that the fees had had an influence at this early stage in a local authority's involvement with a child. This is in circumstances where it is clear that a child is at risk of significant harm but where the risk has been identified, or the harm done, in an authority where the child and parents are not normally resident, for example in a hospital where the child has come for treatment and the risks have been identified on admission. This has led to disagreements between the two authorities concerned, each trying to avoid being the one to initiate proceedings and incur the court fees. These disagreements have led to unnecessary delays.

Core Assessments and the Child Protection Plan

10.12 A core assessment assesses the needs of a child and capacity of their parents or wider family network to ensure the child's safety, health and development. The basis of the assessment are the enquiries made under s47 of the Children Act 1989. These should always involve separate interviews with the child who is the subject of concern and – in the great majority of cases – interviews with parents and/or caregivers and observation of the interactions between parents and child. Enquiries may also include interviews with those connected with the child, specific assessments of the child by other professionals and interviews with those connected with the child's parents and/or caregivers.

10.13 The s47 enquiries and core assessment can have three outcomes:

(1) concerns not substantiated;

(2) concerns substantiated but child is not judged to be at continuing risk of harm; or

(3) concerns substantiated and the child is judged to be at continuing risk of significant harm.

For the first two outcomes, the social worker may decide that the child is a child in need and therefore put in place services or interventions for the child and family, or they may decide that no further action needs to be taken, other than monitoring the situation.

10.14 If the third outcome is reached, so that the child is considered to be at continuing risk of significant harm, then a child protection conference will be convened. The initial child protection conference brings together the child (where appropriate), family members and those professionals most involved with the child and family. Its purpose is to:

- bring together and analyse the information that has been obtained about the child's developmental needs, and the parents' or carers' capacity to respond to those needs within the wider family and environmental context;
- consider the evidence presented to the conference, make judgements about the likelihood of a child suffering significant harm in future, and decide whether the child is at continuing risk of significant harm; and
- decide what future action is required to safeguard and promote the welfare of the child, how that action will be taken forward, and with what intended outcomes.

10.15 Child protection conferences are chaired by a professional who is independent of operational or line management responsibilities. In the authorities visited as part of this review, this was frequently an independent reviewing officer, but it does not have to be.

10.16 The child protection conference produces an outline child protection plan, which has the aims of ensuring the child is safe, promoting the child's development and supporting the wider family to safeguard and promote the welfare of the child. The plan draws on the assessments made and sets out what work needs to be done, why, when and by whom. The plan should describe the needs of the child and include ways of meeting those needs and achieving positive outcomes for the child as well as identifying the roles and responsibilities of both professionals and family members involved with the child.

10.17 The core group is responsible for developing the child protection plan as a detailed working tool. Membership should include the key worker (the social worker designated by the initial child protection conference to carry future responsibility for the case), the child (if appropriate), the family members and professionals or foster carers who will have direct contact with the family. The first meeting of the core group should take place within 10 working days of the initial child protection conference. The purpose of this first meeting is to flesh out the child protection plan and decide what steps need to be taken by whom to complete the assessment on time. Thereafter core groups should meet sufficiently regularly to facilitate working together, monitor actions and outcomes against the child protection plan, and make any necessary alterations as circumstances change.

10.18 As long as the child remains the subject of a child protection plan, child protection review conferences are held at regular periods of between three and six months after the initial child protection conference. The purposes of the review are to review the development of the child against planned outcomes in the child protection plan, ensure the child continues to be safeguarded from harm and consider whether the plan should continue in place or be discarded / changed. Attendees should include those most involved with the child and family in the same way as at an initial child protection conference.

10.19 The child protection plan is discontinued when either the child is not at risk of continued harm, the child and family have moved to another authority or the child has reached 18 years of age, died, or left the UK.

Commencing Proceedings

10.20 At any stage in the process described above, from the initial referral onwards, the local authority can decide to issue proceedings under section 31 of the Children Act 1989, if they decide that the threshold for harm to the child has been met. This can be relatively quickly after the child has come to the attention of the local authority but this is far from being usually the case. In many of the cases discussed during the course of this review, a family has been known to the authority for a number of years and subject to support and help.

10.21 At all stages throughout the process, the social workers and their immediate line managers will be in close contact, monitoring the child's welfare and making decisions on whether to escalate the level of their involvement, or the timetable for dealing with the child. In all of the authorities visited decisions of any importance, especially those involving accommodating children, whether as a result of care proceedings or voluntary arrangements under s20 are not made by individual social workers, but together by staff at two or sometimes three or more levels higher in the management structure. The level at which decisions have to be ratified differs between authorities and depends on the nature of the decision, and services available, but in all authorities senior and experienced staff are involved in the significant decisions surrounding the welfare of the child.

10.22 The initial decision to escalate cases is usually taken by social workers in collaboration with their immediate line manager. At this level in the organisation there was no evidence from interviews that resource issues played any part in the recommendations for action. In fact, most front line social workers and their team managers were unaware of the cost implications of their work. With the exception of one large authority visited, where there has been an attempt to push budgetary management responsibility down to first tier of management, the monitoring and control of budgets is exercised at least three levels above front line social workers. One social worker in another authority interviewed said she had recently tried to work out the likely resource costs of taking a child into care to satisfy her own curiosity – it certainly did not play a part in her decision taking process. Another said costs never entered her head although in a third local authority a team leader said that she was much more aware of costs than she used to be. Moreover, while the social workers interviewed knew in general terms that there had been a significant increase in the court fees for care proceedings, few if any were aware of the detail. As one of them commented: "We were told about the fees in our training on the PLO. We remembered for about a week, and then forgot about them."

10.23 Recommendations for proceedings usually have to be agreed by the second level of management above the social worker (known in most of the authorities visited as a Service Manager, or some variation thereof) before involving the authority's lawyers.

10.24 The authority's lawyers become involved through what is usually known as a legal planning meeting. This meeting is a held between social workers/managers and lawyers to determine whether the threshold for harm has been met and whether s31 proceedings should be pursued. In addition, the lawyers can advise social workers on how to manage their case going forward into proceedings. The timing of this meeting varied in the authorities visited and this does influence both the nature of the meeting and the role of the lawyers.

10.25 In most of the local authorities visited, the legal planning meeting was held after a decision to initiate proceedings. However, in others the legal planning meeting was part of the decision-making process itself and the meeting appeared to have a greater challenge role as to whether, for example, all other options e.g. family placements had been fully explored. Of course, this would be likely to be explored in court too, so it is only reasonable for the legal team to ensure that the social workers have a properly prepared case. But the impression given in some authorities – admittedly a minority – was that lawyers played a gate-keeping role, although it was frequently added that the lawyers' role was to advise while that of the social work team was to decide. One consequence of the timing and nature of lawyers' involvement is that they are not necessarily aware of those cases where proceedings are not being considered.

10.26 The management level at which care proceedings decisions are ratified is, in many cases, the same level at which budgets are held and where the managers concerned are certainly conscious of the resource implications of the decisions that are being taken. However, managers at this level in all the local authorities visited stated that resource issues played no part in the decision whether or not to issue proceedings and that court fees, in particular, were not an issue.

10.27 Once a decision to initiate proceedings has been taken, there is a need to consider what the care plan and preferred outcome for the child might be and also, in the process of so-called 'parallel planning', what the alternatives are. Thus, options for placement within the wider family need to be considered along with the possibility of adoption if family placement proves unviable.

Timing

10.28 If there is sufficient concern about the immediate welfare of the child the authority can seek an Emergency Protection Order (EPO) from the Court. An EPO, which lasts for eight days and can then be renewed for up to a further seven days, is made when a child or young person is in immediate danger and may have to be removed from home quickly. Local Authorities can apply for an EPO where enquiries are being made for other orders, and where these enquiries are being frustrated or unreasonably refused. An alternative to seeking an EPO, which some authorities said was their preferred practice, is to request the police to remove a child at risk of significant harm.

10.29 In the case of an EPO or in any other situation where the social workers believe urgent action is required the sequence of events may not follow the process described above. Ratification of decisions by more senior management may take place after the event with the involvement of the authority's legal team taking place by telephone.

10.30 Under normal circumstances the case would now enter the pre-proceedings process as described in the section 4 of this report.

Accommodating children

10.31 All local authority interventions for children in need, including those suffering or likely to suffer significant harm, may have resource implications in terms of accommodation of some kind, but how the child is accommodated is not determined by the status of the child. Thus children accommodated under a voluntary agreement under s20 may be fostered or placed in residential accommodation, as will children in care as a result of the initiation or conclusion of s31 proceedings. In both cases, children may end up living with other family members or under the care of special guardians. In all these cases, irrespective of whether the child is subject to care proceedings, the local authority will have a bill in the form of direct costs from contractors or allowances paid to carers, including family members. And some of these may last for several years, especially where the children concerned are, for age or other reasons, difficult to place for adoption.

10.32 The costs of accommodating children are much more significant than either court costs or the court fees elements as the table in the previous section of this report indicated and in a number of authorities have been a major contributor to budget overruns. A regular phrase heard in the authorities visited was that fostering was, due to shortage of supply, a "sellers market". In one authority, for example, following a recent OFSTED inspection which had been critical of the authority's own foster carers, the authority was having to make more extensive use of private and agency fostering than previously, and this was putting significant pressure on a budget that was already stretched. Another had found it had had to compete for agency fostering places with a neighbouring local authority keen to address its recent poor rating.

10.33 Many of the authorities visited had Resource Panels (or an equivalent name) which looked into the most appropriate forms of fostering or alternative accommodation for their looked after children, and as a corollary to attempt to maintain control over the costs of fostering. The point in the process where the Resource Panels are involved varies between authorities and it may also vary depending on the urgency of the case and where it is in the process towards proceedings. And, as in any organisation, decision taking does not always follow a consistently sequential process. As a consequence, in some authorities meetings about some, if not all, of the cases, which these Panels consider, take place before proceedings are initiated. And it was clear that in these authorities the Panel carried out a challenge function asking if the social workers had explored all possible options before agreeing to the proceedings taking place i.e. just as in some authorities the legal planning meeting acts as gatekeeper to proceedings in others the Resource Panel may do so. In both cases, the other options explored would include family placements and other routes which, in some cases, might not involve legal proceedings, including continuing to support the family and child in the community.

10.34 None of this is to suggest that budgetary issues played an explicit part in the decision whether or not to initiate proceedings, although budgetary issues were certainly an issue as to what type of accommodation should be planned. Many social workers interviewed said that most, if not all, of their recommendations to initiate proceedings were endorsed by senior management individually or through the mechanism of a Resource Panel or equivalent. However, occasionally a front line social worker said that, to their surprise, their recommendations to initiate proceedings had not been endorsed, that they had been asked to re-do steps which in their view they had already taken and that, since in the end proceedings had been initiated, this had led to unnecessary delay. They were not aware of the reasons

for this although some speculated that resource consideration might have played a part. One area manager said that they sometimes now try harder to put in packages of support in the community rather than take proceedings, although this will be partly determined by the availability of appropriate support.

Section 20

10.35 There has been some suggestion that authorities might use s20 arrangements as a means of avoiding the time and expense involved in going through court proceedings. The effect would be to keep children longer in the uncertainty of s20 placements which could be terminated by the parent at any time, without the legal certainty involved in care proceedings. If this was significant it could be expected that this would show in the relative proportions of s20 and s31 looked after children.

10.36 As discussed in section 6, data are collected nationally on the use of s20 in England and in Wales, derived from local authority returns. (The England figure for 2008/09 will not be available until later in September 2009.) However, these do not provide very great insight into how individual authorities use s20 in practice. Nevertheless, as also already noted, there was some indication from the relatively small number of authorities who provided the review with data that, for the majority, there was an increasing number of children accommodated under s20, both absolutely and as a proportion of all looked after children. In most cases there were more than double the number of s31 children in care compared to s20 children voluntarily accommodated, although in one authority there were almost as many children looked after under s20 as there were under s31.

10.37 In most of the authorities visited some s20 children were in the pre-proceedings stages of formal care proceedings, for example some new-born babies. One local authority also mentioned a case where, somewhat to the authority's surprise, the Court decided on the basis of the 'no order' principle to continue with a s20 placement during the course of proceedings rather than agree an interim care order. In these cases at least, there is no question of s20 being used as an alternative to proceedings, rather as part of them. There were some longer-term s20 arrangements for older children where it was thought that there was little chance of the arrangement breaking down. In these cases the local authorities considered that this arrangement was entirely appropriate. There were also situations when younger children had been accommodated under s20 for lengthy periods, but it was said that this was more due to delays in resolving the issues surrounding the child and uncertainty, than any desire to avoid costs. There was no sense that longer-term s20 arrangements were being deliberately sought as an alternative to child care proceedings. It was also suggested that the rather poor view by the judiciary of s20 arrangements might be because they only see the failures i.e. where what was thought to be a satisfactory arrangement has broken down, the child concerned is at risk of significant harm and proceedings are initiated.

10.38 However, I have been told of some cases where it is possible that the costs of proceedings, and the effort of doing so, have acted as a deterrent compared to continuing with the s20 voluntary arrangement. For example, I was told of a 15-year-old child with both severe learning difficulties and physical disabilities accommodated under s20 with the agreement of the sole parent. The foster carer concerned said that she believed strongly that the local authority should have parental responsibility as this would dilute the destructive and confused influence

of the child's mother and allow key decisions in the interests of the child be taken without her involvement. However, the local authority concerned was reluctant to initiate proceedings in the light of the age of the child and preferred to "let sleeping dogs lie". The foster carer could not say definitively that the fees of proceedings were a deterrent but she was strongly of the view that they were. This has not been pursued with the local authority concerned and there may well have been other good reasons for not taking proceedings but the case does illustrate where, at the margins, the costs and effort involved in initiating proceedings may act as a deterrent to doing so. In another comparable case of an older child, I was told of a disagreement within an authority where some thought the greater certainty of care proceedings was desirable but others thought it was not worth going to court given the expense involved and the relatively limited time the child would be in care. Irrespective of the child care issues in these cases, in these circumstances it is certainly cheaper and less effort for the authority to leave things as they are. Since the children are already being accommodated, the extra costs will principally be the costs of proceedings.

10.39 Another example was given by a senior lawyer in an authority who referred to cases of new born children accommodated under s20 with a view to adoption under a voluntary agreement with the parents. In most cases, the adoption proceeds in due course. However, under a voluntary agreement, the parents can withdraw their consent at any stage before the actual placement takes place. In pursuing the voluntary route rather than proceedings, I was told that the social worker has to make an assessment of the risks of consent being withdrawn and implying a later – delayed – need for proceedings. The lawyer's advice includes discussion of the fees involved in taking proceedings and, while not suggesting that this determines the route taken, it is pointed out that it is a factor to be taken into account in the decision. Under the voluntary route, the court fees for a placement order are £400 as opposed to a total of £4,825 for child care proceedings plus the £400 placement fee. I was told by another lawyer in a large local authority that they had seen an increase in placement orders by consent which may be an indication that the authority is now prepared to accept a higher risk of breakdown. Unfortunately, national data on this has not been collected for a long enough period to corroborate this.

10.40 The submission by the Solicitors in Local Government suggested that where proceedings were being contemplated for a child and there was another one on the way, proceedings might be delayed until the birth so that both children can be the subject of the same proceedings. In this way only one fee could be paid. In a subsequent visit to another local authority it was confirmed that this was exactly the action they had taken.

10.41 There was a further example in another local authority where, largely for budgetary reasons, plus a desire to reduce the number of children in care to nearer the average for their statistical neighbours following adverse comment in a recent Joint Area Review, there had been an attempt to use less resource intensive routes for child protection and safeguarding, including greater use of s20 arrangements and other supportive interventions. This had proved an unsatisfactory experience as many of these alternative arrangements had unravelled. The authority had therefore found that it had had to revert to taking proceedings as had been its previous practice.

10.42 Another authority also reported that its rates of issuing child care proceedings and numbers of looked after children had come under intense scrutiny at a late stage in its Joint Area Review, with the clear implication that these were going to be the determining factors in a less favourable assessment. The Director of Children's Services had therefore taken the inspectors through every single s31 case file over the previous year, inviting them to suggest which if any should not have been pursued. The inspectors had not been able to identify any which had been taken unnecessarily.

10.43 In another authority visited it was said that there had been a conscious effort to manage down the number proceedings and children in care. The origins of this appeared to lie in a concern as to the number of children in care compared to relevant comparators and the belief by incoming management that the authority had previously been excessively risk averse. Again, management stated that resource issues played no part in this change of policy. This had, however, led to some concern on the part of the front line social workers who were conscious of more of their proposals for proceedings being turned down or delayed without being sure of the reasons for this.

10.44 In one authority an Independent Reviewing Officer (IRO) expressed concern about the use of s20 generally, including in their own authority. The IRO suggested that, rather than initiate proceedings, it was easier for a social worker to persuade parents voluntarily to agree to the authority accommodating the child, with the threat of proceedings if they did not agree. It was felt that this was a particular risk with parents with learning difficulties where they could be bullied into agreeing. Having said that, the IRO agreed that the dividing line between persuasion and bullying is a fine one. In the same authority, one of the lawyers expressed concern at the fee levels and thought it could have some influence on the authority's readiness to take proceedings.

10.45 The situation of all looked after children is reviewed on a regular basis by a meeting of those involved in the child's care, chaired by an Independent Reviewing Officer, with a view to ensuring that there is an appropriate care plan and that it is being implemented. Thus children accommodated voluntarily or as a result of child care proceedings are subject to comparable oversight. Nevertheless, it was said, by people both within and outside local authorities, that they were concerned that voluntarily accommodated children were subject to drift and too many were simply being "parked" without long term solutions being found.

Section 8 kinship placements

10.46 Concerns have also been expressed, both before and during this review, about s8 residence orders where a family member applies to take responsibility for a child under private law, but with local authority encouragement and sometimes financial support. It is said that there has been a sharp increase in the number of such applications. This is borne out by the courts and legal aid data discussed in section 6 above.

10.47 It was generally acknowledged in the local authorities visited that there may have been an increase in kinship placements but that was only to be expected given the guidance in the PLO and the Volume 1 Guidance. And that this was only codifying what had already been good practice given the legislative requirements.[19] The guidance explicitly requires the local authority to explore fully all possible family options and states that residence orders and special

[19] See s23(6), Children Act 1989.

guardianship applications made by a relative may be more appropriate than a care order application made by the local authority. But, again, there are some indications that costs also play a part in considering these options.

10.48 Members of the judiciary expressed concern about a number of cases where children were to be accommodated through a s8 private law arrangement with grandparents but where the authority had not, in the judge's view, sufficiently assessed the continuing risks to the child from the parent(s). The local authority had therefore been directed to intervene and carry out an assessment under s7 or s37. Section 6 above discussed the steady increase since mid 2008 in the number of s37 directions, the more serious of the interventions since the possibility of a care order is envisaged. I understand that the Safeguarding Committee of Family Justice Council (made up of members of judiciary and other professionals working, or with an interest in the family justice system) is sufficiently concerned about what they call these "hybrid" proceedings to ask local FJCs to monitor the extent and nature of such applications and to do further work on them in the course of the coming year.

10.49 In one local authority there was discussion of a brutal case involving the murder of one parent by another and where the survivor was now in jail. The grandmother of the murdered partner had applied for a residence order for the child of the relationship. I was told explicitly by a lawyer in the local authority that in pursuing this option, and not taking care proceedings, budgets had been a consideration. It may, of course, also been the most appropriate solution but the point is that resource implications were a consideration at the time of deciding what to do.

10.50 I was told by a senior social worker in an authority that they would assist financially with s8 kinship placements to avoid initiating care proceedings. This was for a combination of reasons; the desirability of placing a child in the wider family, and to avoid the stigma associated with taking a child into care. It was also said that money was a factor and that differences in costs might tip the decision one way or the other, and that "costs might be a marginal factor in a small number of cases".

10.51 A local government solicitor interviewed said that when the PLO had been introduced local authorities had been told that options other than proceedings should be fully explored and that other appropriate family members should be looked for. In the solicitor's own local authority it had been stressed that the imperative to do so was now even greater because of the fees.

10.52 In another authority, a social worker interviewed described the instructions given on how to set up kinship placements. Instructions had been given on the language that should be used when discussing with a family member whether they might be able to care for a child. It appears that the choice of language could influence whether or not the authority would be liable for future costs and allowances. And they had been encouraged to use language which would minimise future liabilities. In much the same connection, I have been shown a draft *Policy Briefing on Kinship Care* by the Family Rights Group in which there are a number of examples quoted which suggest this is not an isolated incident. Unless a child is formally a looked after child, the local authority may provide services and financial support to the carers, but is not obliged to. In a number of the cases quoted the local authorities appear to have been at pains to avoid making payments to support kinship care arrangements. In some of these they have not been involved, but in others the local authority has had a hand in establishing the arrangements and the alternative would have been care proceedings. The inference is that resource issues are involved here.

10.53 I have also been told by a lawyer with lead responsibility in an authority for children's services that "deep down money is a deciding factor". Another lawyer in a different authority told me that "fees do play a part" and that money and the availability of social workers do play a part in determining the care option chosen, specifically with reference to s8 residence orders and special guardianship orders. Fees were said to be one factor in these decisions, but not the only factor. The FLBA submission to this review referred to similar kinship care cases where they believed fees had been a factor.

10.54 Similarly, I was told by a barrister working regularly for a number of London boroughs that she had been told, informally, by a number of the authorities she worked with regularly that their senior officers had indicated that the threshold for proceedings had in effect been raised by the increased fees. Social workers were asked to continue to work with the families to support them in the community. Another barrister told me something very similar to the effect that local authorities known to him had been under strong pressure from their finance departments not to issue care proceedings.

10.55 It should be stressed that the opinions expressed above were very much a minority view but they are evidence that resource issues do have some impact on the decision taking within some local authorities. It appears that the costs of proceedings could be an additional factor in deciding whether to leave a child – quite safely – accommodated under s20, but perhaps longer than is desirable. And fees and other court costs may be an added incentive to pursue a kinship placement. While kinship care is to be encouraged by the overall policy of keeping children within their wider family, in at least some cases the courts have thought the placement was not desirable and have had to intervene accordingly. In others, the local authorities seem to have taken steps to avoid court proceedings altogether and the provision of financial support.

Impact of the Public Law Outline

10.56 The intention behind the PLO was described in section 4 of this report and from discussions in local authorities, confirmed by the data discussed in section 6, it seems that its introduction led to a fall in applications and then a rise as both local authorities and the courts became more familiar with it.

10.57 More generally, some of the issues raised by local authorities in the course of this review are similar to the findings in the MoJ's commissioned research.[20] Many of the local authorities interviewed said that that the Public Law Outline, in conjunction with the revised guidance to the Children's Act 1989, had provided reinforcement to what should have already been good practice. But awareness of the PLO was not universal and in the course of the review a team member attended a training session for social workers in a particular authority where there was a striking lack of familiarity with the existence of the PLO and its approach. In addition, in some authorities the "full" PLO approach was now only used in a minority of care applications; the pre-proceedings letter was used selectively, where it was thought appropriate, and the assessments implied by the pre-proceedings checklist were not always conducted, depending in part upon experience of the local courts' approach when dealing with such assessments.

[20] *An early process evaluation of the Public Law Outline in family courts*, Patricia Jessiman, Peter Keogh and Julia Brophy, MoJ Research Series 10/09 July 2009

10.58 Social workers said that the letter before proceedings and the family group conferences had been very helpful in focusing the attention of the family involved on the issues involving the care of the child. The letter before proceedings had, on occasion, been in itself enough to change the behaviour of the family involved so that the case did not eventually have to go to court. Family group conferences had, on occasion, identified other family members who had then taken responsibility for a child, keeping the child within the extended family and removing the need to go to court. The emphasis on pre-proceedings work was also welcomed by some as they felt it made clear what was expected of them and ensured that they were fully prepared before going to court. Many felt, however, that the amount of pre-proceedings work plus the documentation they had to prepare in support of the application was very burdensome.

10.59 Many practitioners did not believe that the PLO had made any difference to timescales once the case reached court and thus had not delivered the improvement in overall timescales that was intended. Almost all those directly concerned with proceedings felt that the court was insufficiently robust in its case management, especially with regard to the use of experts, and that cases were being extended unnecessarily. The issues surrounding the use of experts were raised in almost all of the authorities.

10.60 There was a widespread view that assessments completed by social workers were not being recognised by the court and therefore further – and sometimes duplicated – assessments were commissioned during proceedings, adding delay. By way of example, one authority was told it would have to wait seven months for a psychological assessment to be filed with court. Considerable scepticism was expressed as to the need for many of the adult psychological assessments to which the courts were acceding. Some thought that judges were excessively averse to the risk of being appealed if requests for additional assessments were not being granted. Local authorities said that, with the combination of the increasing number of assessments being requested and a shortage of supply, it was now a "sellers market".

10.61 It seems that the combination of effort involved in preparing for proceedings and, once proceedings have started, the need for further and sometimes duplicate assessments could have the effect of deterring local authority social workers from initiating proceedings in the first place. The FLBA said in their submission to this review that "Informally social workers and local authority solicitors have told FLBA barristers that the costs of issuing proceedings and the increased burden of the PLO influenced them against issuing proceedings".

The costs of safeguarding

10.62 As indicated above, almost all steps that an authority may consider taking to protect a child have resource implications. Some of these are immediate e.g. court costs, of which court fees are one element, and some longer term e.g. the costs of fostering when a child is taken into care. The costs are also of different types: cash – payments to outsiders and outside organisations – and in-house costs, of which the most significant are staff costs. The key difference here is that staff costs are largely fixed in the short term and extra effort, for example, an extra care proceeding, can be accommodated by working longer hours or by doing less, or spreading out the work on something of lower priority. Short-term cash costs probably have the highest visibility of any of these cost types and changes in activity levels have an obvious impact on budgets. On the other hand, in the short run, variations in activity levels can be absorbed without changing staffing levels.

10.63 The following tables set out the cost implications of three representative child care case studies, the full details of which are described in Annex E. The case studies are based on real examples but the costs have been estimated for illustrative purposes for this review by three different local authorities (and an average taken since there were differences), CAFCASS and the Legal Services Commission. In the first case study, the proceedings were issued at birth but the mother concerned had had two other children who had been the subject of care proceedings and the case had many complexities which meant that it took just over a year to conclude. The second case study involves the chronic neglect of a sibling group of four children with two different fathers and which took 16 months from the time proceedings were commenced to the issuing of final care orders. Case study 3 represents a more straightforward case, where the matter was concluded at the First Appointment. In this example, a new born baby boy was placed with his grandparents who were already caring for his sister under previous proceedings.

Table 10.1: Case study 1 - Proceedings issued at birth

£	Local Authority	Legal Aid	Cafcass	Totals
Legal costs *in house* *external counsel*	11,300 *7,800* *3,500*	24,500	-	35,800
Court fees	4,800	-	-	4,800
Assessments	10,300	9,400	-	19,700
Guardian costs			4,300	4,300
Totals	26,400	33,900	4,300	64,600

Table 10.2: Case study 2 - Proceedings in respect of chronic neglect of sibling group

£	Local Authority	Legal Aid	Cafcass	Totals
Legal costs *in house* *external counsel*	13,600 *7,500* *6,100*	34,100		47,700
Court fees	4,800			4,800
Assessments	11,700	19,400		31,100
Guardian costs			11,400	11,400
Totals	30,100	53,500	11,400	95,000

Table 10.3 Case study 3 - Child placed with relative; proceedings concluded at First Appointment

£	Local Authority	Legal Aid	Cafcass	Totals
Legal costs	1,600	17,000		18,600
Court fees	2,200			2,200
Assessments	6,700			6,700
Guardian costs			600	600
Totals	10,500	17,000	600	28,100

10.64 The first two of the case studies, in particular, illustrate the complexity of many care proceedings, the large number of players involved – both as formal participants in the proceedings and around the edges, and also the uncertainties, which can continue until a very late stage of a case. Despite the complexity of these two case studies, court fees formed between a fifth and a quarter of the authority's cash costs (i.e. total costs less in-house legal costs). They were rather less than this in case study 3, as the s31 proceedings were withdrawn in favour of a residence order for the relative.

10.65 These costs are, with the exception of the in-house legal costs, cash costs only, and do not include any allowance for social work time. What is striking is:

- the remarkably high overall cost of proceedings in all three cases, both for a local authority and, in total for the State;
- the relative importance of the various costs incurred by an authority. In all three case studies, assessment costs are more significant than court fees;
- the significantly greater costs incurred by legal aid, driven by a combination of the number of parties plus assessment costs; and
- the relatively small difference in costs between case studies 1 and 2, for both an authority and legal aid, and rather surprisingly so given the number of children involved and the potential complexities.

10.66 While many care proceedings have the complexities illustrated by case studies 1 and 2, there are others which are more straightforward, although local authorities were at pains to point out that these were relatively rare. In these cases the overall costs are much lower, and thus the share of court fees relatively higher. A local authority costed a proceedings where a new born was placed with the maternal grandmother at a total cost to the authority of £4,500, of which half was the court fees. In another case an older child, who was already accommodated, was fostered under s31 proceedings which took only 4 months to conclude and cost the authority just over £8,000, with in house legal costs and disbursements of about £5,000, including the full £4,825 court fee. In these cases, the fees are a major part of the costs incurred.

10.67 Longer term, the major resource implication for an authority of any looked after child whether accommodated voluntarily or taken into care is the cost of accommodation. In the authorities visited, as illustrated in Table 9.1, accommodation costs were around half the total costs of safeguarding children and greater than the costs of social work teams. Table 10.4 below gives some idea of the resource implications that looking after children can have for local authorities in England. These figures show the average, per-child, weekly cost of each type of placement in the eleven local authorities visited as part of the review. They relate to the financial year 07/08 and are taken from the Unit Cost Summary table compiled by the Department of Health from returns made by local authorities.[21] If a child is placed with in-house foster carers at the median rate, he or she will cost the local authority nearly £20,000 per year (i.e. roughly the local authority's cash cost of proceedings as indicated in the case studies). A child placed in in-house residential care could cost an authority nearly £150,000 per year at the median rate.

[21] *Personal Social Services expenditure and unit costs: England 2007-08 Provisional Council Data*, Department of Health, October 2008

Table 10.4: Average costs of placements by local authorities

£	Lower quartile	Median	Upper quartile
In-house foster care	340	370	480
Independent foster agency	750	870	990
In-house residential care	1,780	2,800	3,100
Independent residential care	1,970	2,440	2,990

10.68 However, these cost ranges in the table are only broadly indicative of the amounts that are being paid by the local authority and cover a range of different payments some of which may be much lower than those indicated above. Within each authority, the allowances paid to in-house foster carers vary depending on the age of the child and the level of experience of the foster carer. For example, in one local authority visited, current payments to in-house foster carers are based on a basic maintenance allowance for each age group (0-4, 5-10, 11-15, 16 in school, 16 in employment or further education, and 17 in employment or further education), with five levels of accreditation fees on top of the allowance for more experienced and/or qualified foster carers. Therefore payments range from £107 per week for a child aged 0-4 placed with a foster carer with 'level one' accreditation, to £381 per week for a 17-year-old placed with a foster carer with 'level five' accreditation. Accreditation in this authority is determined by the professional development and qualifications of the fosterer, combined with the assessment by the supervising social worker.

10.69 In addition to in-house foster carers, some authorities have professional foster carer schemes, which pay higher rates for specialist, full-time care. For example, in one authority, the basic rate of fostering for a child aged 0-4 is £125 per week. For professional carers, a fee of £218 per week is added on top of this basic rate. These carers are employed by the authority and provide the full-time specialist care that otherwise may only be available through independent agencies.

10.70 The costs can, in some cases, therefore be lower than the costs outlined in the table above, e.g. where the child is young, has no special needs and the foster carer is not very experienced, but they can also be much higher. One authority gave an example of a child in a solo placement with two members of staff present at all times and no other children present that cost £5,000 per week (£260,000 per year). Joint funded placements with health services can be even more expensive. One authority said that there was the potential for a single child with significant health needs to cost them over half a million pounds per year, though this would be a very exceptional case.

10.71 There are also extra costs associated with foster care that are borne by the local authority with regard to in-house carers. These include costs associated with recruitment, training and approving of new foster carers and the staff costs of social workers supporting foster carers as well as one-off additional payments to fosterers for things such as children's birthdays, school uniform and holidays abroad. These extra costs are often included in the total price of the service provided by independent fostering agencies and so while, at first glance, using independents may seem like a much costlier option, this is not necessarily the case for the type of specialist care that they can provide.

10.72 The actual commitment by the authority will depend on the length of time the child is accommodated and, in the case of children in care, this will depend on a number of factors, including the age of the child and, thus, whether adoption is likely and, where adoption is not the route forward, whether the child is likely to be rehabilitated and may return to its parents. It should be emphasised that accommodation costs are incurred when a child is either accommodated under s20 or taken into care. If a child is likely to move from one status to the other, as is frequently the case, the additional resource implications are the cost and effort of the care proceedings.

10.73 There are comparable resource implications for the local authority of any of the alternative routes taken to safeguard a child, including family placements, although these will be lower than in care proceedings because of both the costs of the proceedings themselves and the longer-term accommodation costs. A local authority may pay allowances to special guardians or to kinship carers under residence orders. Several of the local authorities visited said that this was paid at a rate broadly equivalent to the basic fostering allowance described above and was, at least in theory, subject to the carer's means. However, these allowances are discretionary and, as the examples quoted earlier indicate, some authorities appear to take steps to avoid paying these. Of course, cases that proceed through the full care proceedings process may be more complex than some family placements, so care is needed in making comparisons. (And, indeed, placements with wider family members made under s8 residence orders may emerge from the care proceedings process.) But like-for-like it does seem as if the longer term costs for a local authority of a kinship placement are likely to be less than those of care proceedings.

10.74 The immediate costs of proceedings in kinship placements will also be less than in care proceedings. The court fee is £175 compared to £4,825, the legal fees are likely to be less as there will usually be fewer parties, and there may be less need for in depth assess-ments. Of course, the family placement may the best possible outcome for the child, and local authorities are encouraged to pursue this route. But the fact remains that there is also a financial incentive for them to do so and that the incentive has increased since court fees were increased. Similar considerations apply to special guardianships. Again, this may be the right solution for the child, but it is also likely to be a cheaper route and one which the fee increase has made relatively more so.

10.75 In the formal submissions to this review the point was made that the suspicion that the fee increase might have an impact was as important as any actual impact. I have been told of two examples where the belief that fees had prompted a local authority to encourage a special guardianship order rather than s31 proceedings had led to counterproductive behaviour:

- in one instance, the solicitors for the potential special guardian had advised her not to proceed as the authority had suggested, but to insist on s31 proceedings. This stance had been shared by the CAFCASS guardian. In the event an EPO followed by proceedings had been required; and
- in another authority, a decision to support a special guardianship application by a family member had been publicly criticised by one of the solicitors involved, who had alleged that the decision had been motivated by the authority's wish to avoid the fees involved in care proceedings. The authority had believed the allegation sufficiently serious to institute a review of the case. This has vindicated the original decision, and in particular the judgement of the social workers involved that the circumstances of the case did not warrant care proceedings.

10.76 Finally, I have been told more than once that, in order to avoid paying the £1,900 fee for a final hearing some local authorities have sought, successfully in some instances, to have an adjourned issues resolution hearing and settle the case there. They would not be doing so if the court fees played no part in their consideration. In this case, this device clearly does not affect the substance of the care proceedings but only the nomenclature used.

11. Impact of the Fee Increase

11.1 In the course of undertaking this review I have been told, more than once, that it would be impossible to fulfil the terms of reference and find clear evidence that court fees are a deterrent to local authorities initiating proceedings. This is because there has been a number of influences on behaviour – the PLO, fees and the publicity surrounding the Baby Peter case – the effects of which it would be difficult to disentangle. In addition, because the protection of children is a statutory responsibility of local authorities, I was told that no-one would admit that fees were an influence even if they were. In effect, they would be admitting a breach of statutory duty and the probability of someone doing so was greatly reduced by the public reaction to the Baby Peter case and what had happened to those involved.

11.2 It has certainly been difficult to interpret the data, and there are large gaps in what is collected which would have been helpful to this review (and, I suggest to policy evaluation generally in this area). And, unsurprisingly, no-one has said that court fees *per se* have been a deterrent in any specific case. Indeed many have told me, sometimes forcefully, that they are not. However, some others have told me that they think that budget pressures, in which fees are a factor, do have some influence, together with a number of other linked factors, the relative importance of which is, again, difficult to determine. In all of this, I have been struck by the difference in views between those working in the relevant area within local authorities and some of those, still within the child protection system, who are not. Some lawyers and judges are strongly of the view that the fees have had a deterrent influence. Some qualify this view, suggesting that there was a deterrent effect before the Baby Peter case was publicised, which had been overtaken by greater risk aversion thereafter. They speculated that the deterrent effect could return, once the impact of the Baby Peter case had diminished.

11.3 I have, thus, found it hard to find the clear evidence required by my terms of reference. But while it is difficult to say that there is clear evidence that fees are a deterrent to taking proceedings, it is equally difficult to say that they are not. Part of the reason for this is that the decision to take proceedings is not a simple one; it is not a question of taking proceedings or not taking them, but rather a series of decisions involving a range of options, sometimes over a long period of time, as to how best to look after a child in need or at risk of significant harm.

11.4 Everyone to whom I have spoken has agreed that the major area of uncertainty concerns chronic cases of children at long-term risk of neglect. Notwithstanding the failures identified in cases like that of Baby Peter, I have not heard concerns about emergency situations where it is clear that a child has been physically harmed and is at imminent risk of further harm. The court process is swift and responsive (and the fees were not changed for the granting of emergency protection orders). The majority of the chronic cases of neglect come from families who are well known to social services and have had an involvement with them, sometimes stretching over many years and more than one generation. Thus, there may be many points in the trajectory of a child or of the family where there are local authority interventions and where one of the options might be proceedings. The issue, therefore, is whether court fees have an influence on both the care options considered and the timing of when the options are exercised.

11.5 While those I have spoken to in local authorities have, in the main, told me that fees have no influence on their decision taking, others have said that resource issues do play a part. I believe that, at the margins, resource considerations, and thus fees, probably do. In addition, and quite separately from the reality of the decision-taking process, there is a widespread and unhelpful perception that they do.

11.6 My reasons for suggesting that fees do have an influence are based on a combination of the budgetary pressures in local authorities and the fact that different care options have rather different resource implications. I have no doubt those working in local authorities have as their prime objective the safety of the children that come to their attention or with whom they are already involved. But I suggest it is unrealistic to believe that resource issues play no part in the decision taking process.

11.7 Although there was a budgetary transfer to local authorities intended to compensate them for the fee increase, for some authorities it will have been less than the actual cost. In other cases the amount transferred found its way into reserves rather than Children's Services. And there was considerable uncertainty at the time which meant that, irrespective of the amounts actually transferred, many authorities in England did not know what they had received. It was reported to me that Children's Services are already under budgetary pressure through the rising cost of accommodating children, and from the costs of assessments resulting from a combination of the PLO, judicial practice and changes in the legal aid arrangements. More importantly, wherever the resource transfer was allocated and whatever the amount, the increased cost of fees now has to compete for resources with all aspects of safeguarding. Although the cost of fees are a relatively small part of the overall safeguarding budget they, and many of the other costs relating to proceedings, are an immediate cash cost. The other major costs of safeguarding are fixed, at least in the short term e.g. staff and accommodation costs. Local authorities are devoting considerable effort to reducing the unit costs of accommodation and also make staff cost savings by leaving posts vacant. The pressure to save cash – or, rather, not to incur it – by deferring proceedings for a little longer or by pursuing another route without the same cost implications must be considerable.

11.8 To take a child into care and deprive the parents of their parental rights is clearly an important decision and must be a very difficult one, particularly where the social workers have been working with and supporting the family for some considerable time. It is also a resource-intensive decision, involving both time to prepare for court and the cash costs of the proceedings themselves, as indicated in the case studies discussed in the previous section. One authority estimated that 20% of a social worker's time would normally be required for the year or so that proceedings may take. There are, of course, also long-term cost implications depending on how the child will be looked after and whether or not they are likely to be rehabilitated or adopted. But, since the majority of care proceedings involve an interim care order, when the child is likely to be taken into care as proceedings start, these longer-term costs start almost immediately.

11.9 Care proceedings are considerably more expensive than some of the other options for safeguarding children, in both the short term, and in some instances in the long term too. Costs can be avoided by working with families for a little longer or by continuing to keep a child under s20 and deferring the initiation of proceedings. There is some evidence for this from what I have been told – from both within local authorities and from outside them.

11.10 Kinship carers are encouraged by the PLO and the statutory guidance. They also require fewer resources, both manpower and cash, than s31 care proceedings, and in both the short and long term. This is so where the local authority is providing financial assistance – the court fees, legal costs and assessments required are all likely to basically less expensive, and so will any allowance paid once the order is granted. And it is clearly even more the case where no financial assistance has been or will be provided. I have described where there is evidence that some local authorities are taking steps to avoid some of these cases being treated as looked after children cases, thereby avoiding costs altogether.

11.11 The judiciary's anecdotal concern about the use of s8 family placements is confirmed by the rising volume of s37 directions arising from private law cases where the need for care proceedings is investigated. In some of these the local authority has already been involved. Of course, it is possible that these cases may be the result of poor social work and misjudgement (and it may be that, once investigated, it transpires that care proceedings would not be appropriate) but the combination of budgetary pressures, the relative costs of the legal and other steps required make it possible that, in some cases, resource issues played a part in determining the family placement route.

11.12 Although the cost increase was a considerable one, court fees are a relatively small proportion of the overall costs of safeguarding children and there are other costs involved in proceedings which are larger. However, they are still competing within the same resource pool, the flexibility of which is more constrained in the short term than it may appear. As importantly, there is evidence that authorities take the sums sufficiently seriously to seek to avoid paying them altogether; for example in disputes about designation where there is disagreement about which authority should take responsibility for a particular child. Equally, there is the rather bizarre example of where some authorities have attempted, apparently with success, to determine cases at an adjourned Issues Resolution Hearing to avoid paying the Final Hearing fee. The fees may be relatively small individually but these examples demonstrate that they are not treated as insignificant.

11.13 The justification for the fee increase was based on cost transparency and its impact on decision taking and the aim of putting the cost of court proceedings and alternative social work interventions on a comparable basis; in effect to level the playing field. This seems to have been mistaken on three grounds. First, the costs were wrongly calculated. As demonstrated in section 5, there was an error in estimating the number of cases in order to derive a unit cost. Had a more accurate figure been used, the unit cost and hence the court fees for care proceedings should have increased by around another 25% from £4,825 to just over £6,000. Second, the playing field is far from level, in that some of the alternative ways of looking after children are not fully priced. If a local authority encourages a family member to apply for a residence order, the costs may often be paid for principally through legal aid and thus, from the point of view of the local authority, subsidised. By increasing the court fees for public law cases paid for by a local authority, the playing field has been made less, rather than more, level. The third point is that the full costs incurred to the public purse by the decision to initiate public law care proceedings are much greater than those borne directly by the local authority. These include the costs of CAFASS/CAFCASS Cymru guardians plus the legal costs of all the parties, child, parents and sometimes other relatives, most of which are financed by legal aid. To establish a level playing field in total resource use terms would require a full costing of proceedings, compared with the costs of the alternatives, that is the costs of continuing to

support the family and the child in the community or the full costs of family placements. It is hard to see the rationale for introducing full cost pricing into one part of the system when the alternatives in the rest of the system are not priced on a comparable basis.

11.14 A number of responses to this review suggested that the combination of fees and the introduction of the PLO was a deterrent to initiating proceedings. The data indicate that it was the PLO, rather than increased fees, which led to the drop in applications in the first quarter of 2008/09.A similar effect was observed following the introduction of the *Protocol for Judicial Case Management in Public Law Children Act Cases* in late 2003. It has also been suggested that the PLO is a continuing deterrent. From my discussions in local authorities I believe that in some cases, again at the margin, this is likely. Where social work resources are tight, as they are in many places, it may well be the best option, provided the children are not at imminent risk of harm, to leave things as they are – in families with support or voluntarily accommodated under s20 – rather than undertake the major effort and cost required of s31 care proceedings.

11.15 The fee increase, I suggest, was a complicating factor in an already complex area and where many of the factors already act as a brake to initiating care proceedings, some of which, of course, are perfectly valid. Increased court fees add to this bias quite unnecessarily, as there appear to be no discernible benefits in return. For example, there is no evidence that the previously lower fees encouraged cases to be brought unnecessarily. It also appears that the new approach to funding care proceedings probably costs more to administer, which would hardly be justified even if the effect on child safeguarding was neutral. Finally, the focus on full costs and pricing has been interpreted by some that the Government's overriding objective is to reduce the volume of care proceedings. This could be unfortunate if it was thought that financial objectives were more important than safeguarding children.

11.16 This conclusion may seem unsurprising since, in a sense, it was shared by the MoJ when they justified the fee increase with the suggestion that unnecessary and premature proceedings might be deterred. However, it has been argued that, since court fees are a relatively small proportion of the costs of proceedings and a smaller proportion of the overall costs of taking children into care, they are unlikely to have an influence. I have argued above why I believe there can be a deterrent effect at the margin but, in summary, the impact of the fees is greater than the numbers might suggest because:

- the fees can be a significant proportion of the costs of some proceedings, as some of the more straightforward case studies indicated;
- they are an immediate cash cost, as opposed to staff and other costs incurred, for example, in support in the community, which are effectively fixed in the short run;
- in some cases it is only the costs of the proceedings that are the incremental costs i.e. where children are already accommodated under s20 there will be no additional costs of accommodation;
- the costs of alternatives like kinship placements are less expensive in both the short and long term; and
- finally, they have contributed to the budgetary pressure to which Children's Services are subject, a pressure which can only increase with the continued rise in child care proceedings and the probability of tighter constraints in public expenditure.

11.17 I am convinced that Children's Services Departments do not knowingly take decisions which compromise the safety of a child. However, I do believe that the fee increase, in combination with a number of other factors, can lead to some sub-optimal decisions being taken. In the light of this, and since there are no identifiable advantages in the present method of funding the costs of care proceedings, I recommend that the fees are abolished, with appropriate adjustments to MoJ and local government budgets.

11.18 In the course of this review, and coming to it with no previous experience of the field, I have been stuck by its complexity and how poorly understood it is, particularly by those from outside the field, but also by some of those within it. There is considerable complexity in the interplay of the needs of vulnerable children and their families with social work and the law and, within this, the links between public and private law. While there is plenty of guidance about how the major elements of the system work, there is little to explain how they relate to each other. This may go some way to explain the absence of data which, had it been available, would have made this review far more straightforward or, possibly, unnecessary

11.19 In the local authorities I have visited I have been shown data that they collect in a variety of forms much of which is needed for their internal management purposes. If some of this was collected in a standard form and aggregated nationally, matched with comprehensive court data on all relevant court orders it would be far easier to evaluate policy initiatives and assess the impact of changes in one part of the system on another. In particular, I am thinking about data on the children voluntarily accommodated under s 20 and the use of orders other than S31 care proceedings. I suggest that the MoJ, together with DCSF, DCLG, the Legal Services Commission and CAFCASS/CAFCASS Cymru, may wish to review data collected in this area.

11.20 All of the activity to safeguard children discussed in this report is financed and managed in the public sector, but in a number of different ways: 172 local authorities financed by local taxation and Central Government/Welsh Assembly Government grant, HMCS as part of the MoJ, CAFCASS by grant in aid from DCSF, and the legal and other costs of children, parents and other relatives through legal aid, financed through a grant in aid from MoJ to the Legal Services Commission. And, as illustrated by the costed case studies, the resources used in the decision taking process involved in care proceedings are very considerable, but they are far from transparent and hard to assess. Costing the case studies in this report was surprisingly difficult.

11.21 It is not at all clear to me that anyone has recently looked at the system as a whole from the points of view of both outcomes and resources used. One consequence is that policy initiatives do not appear always to take account of the system as a whole and those involved do not always look fully beyond their own institutional boundaries. It is clear that resource constraints in one part of the system may have serious knock-on effects on other parts in terms of process and costs and, possibly, outcomes. The former point can be illustrated by some of the misconceptions discussed in this report when the fee increase was considered and initiated. Other examples might include the introduction of the PLO. While welcomed by many practitioners in terms of greater rigour in examining the options for a child, it is at least uncertain whether it has yet had much impact on either the time in court or on the overall time from taking a decision to initiate proceedings to completing them. And while it may have achieved greater efficiencies in court, this seems to have been at the expense of extra effort and costs in local authorities. It is possible that it has also contributed to the perceived increase in the number of assessments required in proceedings with a consequential impact on costs. Another example

would be the acknowledged shortage of CAFCASS guardians which has, I understand, as a consequence of unavailability in the early stages of proceedings, made it difficult to reach early negotiated settlements, implying greater complexity – and presumably cost – at the later stages and a tendency for final hearings to be contested. This may be a partial explanation for the frequently heard concern by local authorities that care proceedings have become more adversarial.

11.22 Equally, it is said that the introduction of fixed fees for legal aid work in care proceedings has meant that some firms have withdrawn altogether from this work and some from work for parents and other family members. The result is said to be a reduction in both quantity and quality of representation. If this is true, then the impact may be manifest in both the efficiency in the way proceedings are conducted as well, possibly, on the outcomes for the child concerned. But it has also been suggested that the structure of the fees scheme (with an hourly rate which becomes the basis of payment once the value of work done is greater than twice the fixed fee) provides an incentive to some lawyers to prolong proceedings until the case 'escapes' and the hourly rate becomes available.

11.23 All of these issues point, in my view, to the need for a more fundamental examination of the resources used and outcomes achieved in the children's safeguarding and justice system than the present piecemeal approach allows.

Annex A: Terms of Reference

In May 2008 the Ministry of Justice increased court fees for Public Law Children Act Proceedings to reflect the full cost to Her Majesty's Courts Service, as part of a wider cost recovery strategy. Acknowledging an increase in costs to local authorities, the Ministry of Justice transferred the cost of the increase to the Department for Communities and Local Government who then transferred it to local authorities.

Lord Laming has expressed concern that court fees may present a psychological barrier that could influence a local authority's decision to commence care proceedings. He has recommended a review of the impact of court fees.

The Ministry of Justice has accepted this recommendation.

Objectives

- To establish whether or not court fees act as a deterrent when local authorities decide whether or not to commence care proceedings.

Deliverables

Report to Lord Chancellor and Secretary of State for Justice by 18 September 2009 containing:

- Robust evidence on the impact of court fees in a local authority's decision-making process. In particular;
  - how budgets are allocated / managed within any local authority area; and,
  - how and by whom decisions regarding care proceedings are made
- A conclusion as to whether or not there is clear evidence that fees are a deterrent to a local authority commencing care proceedings.

Annex B: List of Organisations Seen

Association of Directors of Children's Services

Association of District Judges

Association of Lawyers for Children

CAFCASS

Council of HM Circuit Judges

Department of Children, Schools and Families

Department of Communities and Local Government

Family Justice Council

Family Law Bar Association

Family Rights Group

Justices' Clerks Society

The Law Society

Local Government Association

The Magistrates' Association

Ministry of Justice

National Association of Guardians ad Litem and Reviewing Officers

NSPCC

OFSTED

President of the Family Division

Solicitors in Local Government Child Care Lawyers Group

Welsh Assembly Government

Annex C: Local Authorities Visited

English local authorities

Blackburn with Darwen

Brighton and Hove

Bristol

Coventry

East Sussex

Enfield

Gateshead

Greenwich

Leeds

Norfolk

Stoke-on-Trent

Welsh local authorities

Cardiff

Carmarthenshire

Annex D: Details of the Calculation of Formula Grant for English Local Authorities

D.1 Formula Grant is distributed among authorities taking account of:

- the relative costs to them of providing services – the *Relative Needs Amount*;
- their relative ability to raise council tax – the *Relative Resources Amount*; and
- a *Central Allocation* made essentially on a per capita basis.

DCLG Ministers determine by judgement the way in which the total amount of Revenue Support Grant and redistributed business rates that makes up Formula Grant is apportioned between these three. For 2008-09, Ministers decided 73.0% of Formula Grant would be distributed by the Relative Needs Amount and 53.6% by the Central Allocation, offset by assumed local authority contributions in the Relative Resource Amount totalling some -26.6% of Formula Grant.

Assessing relative needs

D.2 The main blocks of services that local authorities provide are organised into 6 groups according to the different types of authority that provides the service:-

(i) **'Upper-tier' services**, provided by county councils in areas with two tiers of local government and by unitary authorities (London Boroughs, metropolitan district councils and shire unitary councils) in the rest of the country:

- Children's Services
  - Youth and Community
  - Local Authority Central Education functions
  - Children's Social Care
- Adults' Personal Social Services
  - Older People's Personal Social Services
  - Younger Adults' Personal Social Services
- Highway Maintenance
- County-level Environmental, Protective and Cultural Services

(ii) Police Services

(iii) Fire Services

(iv) **'Lower-tier' services**, comprising district-level environmental, protective and cultural services provided by 'lower-tier' authorities, i.e. district councils in two-tier areas and unitary authorities elsewhere

(v) Mixed-tier services, largely comprising flood defence and coastal protection provided by both upper and lower tier authorities

(vi) Capital Financing

The service block relevant to child care fees is Children's Social Care, within the upper-tier services group.

D.3 The relative costs of providing services are reflected in a series of Relative Needs Formulae that cover these main blocks of services. These Formulae contain factors relating to the social, economic or demographic characteristics of each authority's area that have been shown to be related to the relative cost drivers of broad blocks of services. The formula for each specific service block is made up of a basic amount per member of the relevant client group (e.g. school-age children, older people or younger adults), plus additional top-ups to reflect local circumstances. The top-ups take account of a number of relevant local factors that have been identified as affect service costs.

D.4 Each formula is scaled so that the total of the relative needs when aggregated over all the authorities providing that service represents a fixed proportion of the overall resources to be allocated through the local government settlement. These proportions are chosen broadly to reflect the relative cost pressures in the different service areas, and their relative sizes are decided as part of the Comprehensive Spending Review. Table 10.1 below shows the proportions for the main blocks of services, including the Children's Social Care sub-block.

Table D.1: Proportions of overall resources allocated to main service blocks

Children's Services		18.7%
Youth and Community	1.4%	
Local Authority Central Education Functions	6.0%	
Children's Social Care	11.4%	
Adult Personal Social Services		27.0%
Social Services for Older People	16.9%	
Social Services for Younger Adults	10.1%	
Police		11.2%
Fire and Rescue		4.0%
Highway Maintenance		4.3%
Environmental, Protective and Cultural Services		27.4%
Capital Financing		7.3%
TOTAL		100.0%

Relative Needs Calculation for Children's Social Care

D.5 The Children's Social Care formula was developed by researchers from the University of York and was introduced in the 2006/07 Settlement. It consists of a basic amount per person aged 0-17 years, with top-ups for relative deprivation, fostering costs and area costs. The research for the deprivation top up analysed the cost of children's social services per child in each postcode district in 141 local authorities - almost every council which provides children's social care. Information on costs and service use for each child was taken from the 2003

Children in Need Survey, which contains information on every child seen by social services during a particular week in 2003 and is by far the largest source of information on children's social service activity in England. These costs were then analysed to identify the factors with a strong association with costs within each local authority.

D.6 DCLG argued in the Judicial Review that the Children's Social Care formula provides a good predictor of the pattern of costs incurred by local authorities on looking after children. Given that councils in England spent some £5.24 billion on children's social care in 2006-07, the Department believed it was reasonable to conclude that the distribution of £37 million of spending on fees for child care proceedings would follow a similar pattern to the distribution of overall spend on children's social care. To substantiate this for the Judicial Review proceedings, DCLG examined the numbers of children in care in each local authority area who had interim or final care orders, had been freed for adoption or had had a placement order granted. DCLG demonstrated that the numbers of such children in each authority were highly correlated with the Children's Social Care formula result for that authority, with a correlation coefficient of 0.84.[22]

Relative Needs Amount

D.7 DCLG calculates a total relative amount per head for each council providing the relevant group of services by adding together the relative needs formulae for each of the service blocks. DCLG then identify the minimum amount per head across all councils providing the group of services. The amount by which each council exceeds this minimum threshold is multiplied by the projected population for that council to give the council's total relative needs. The total Relative Needs Amount is distributed pro-rata to this total figure. The minimum amount per head is carried over to the calculation of the Central Allocation.

Relative Resources Amount

D.8 The Relative Resource Amount is a negative figure that recognises the differences in the amount of local income which individual councils have the potential to raise, so taking account of the fact that authorities that can raise more income locally require less support from Government to provide services.

D.9 The starting point for the calculation is each authority's council tax base (a measure of the number of properties equivalent to Band D for council tax in an area). The greater an authority's tax base the more income it can raise from a standard increase in band D council tax. In every area of England council services are supplied by more than one type of local authority. So in calculating formula grant, a share of the tax base is assumed for each type of authority services, i.e. upper tier, lower tier, police services and fire services.

D.10 For each of these four types of service, DCLG calculate the size of the tax base per head for each relevant authority. They identify the minimum tax base per head across all the relevant authorities. The amount by which each council exceeds this minimum threshold is then multiplied by the projected population for that council to give the council's total relative resources. The total Relative Resources Amount is then distributed pro-rata to this total figure, to arrive at each local authority's net assumed contribution from council tax receipts. The minimum threshold tax base per head is carried over to the calculation of the Central allocation.

[22] Zero would mean no correlation, and 1.0 would mean 100% positive correlation.

Central Allocation

D.11 The Government shares this out on a per capita basis. The per capita figure is the minimum amount per head already calculated for the Relative Needs Amount less the minimum threshold tax base per head calculated for the Relative Resources Amount.

Floor Damping

D.12 The Formula Grant for each authority as calculated by summing the Relative Needs Amount, the Relative Resource Amount and the Central Allocation described above would result in a very wide range of grant outcomes for local authorities, including some authorities losing very significant amounts of grant when compared to the previous year. In order to mitigate this, the Government guarantees that each council will get a certain minimum percentage grant increase from one year to the next, on a like-for-like basis. This minimum guarantee is known as 'the floor' (since no authority can receive less than the minimum grant increase for its group of authority). The level of the floor is set for each year by Ministerial judgement, and may be different for different groups of authorities. Table D.2 shows the floor increases for 2008-09, 2009-10 and 2010-11.

Table D.2: Floor increases for CSR07 years by authority type

Type of Authority	Floor		
	2008-09	2009-10	2010-11
Upper tier	2.0%	1.75%	1.5%
Police authorities	2.5%	2.5%	2.5%
Fire & rescue authorities	1.0%	0.5%	0.5%
Shire districts	1.0%	0.5%	0.5%

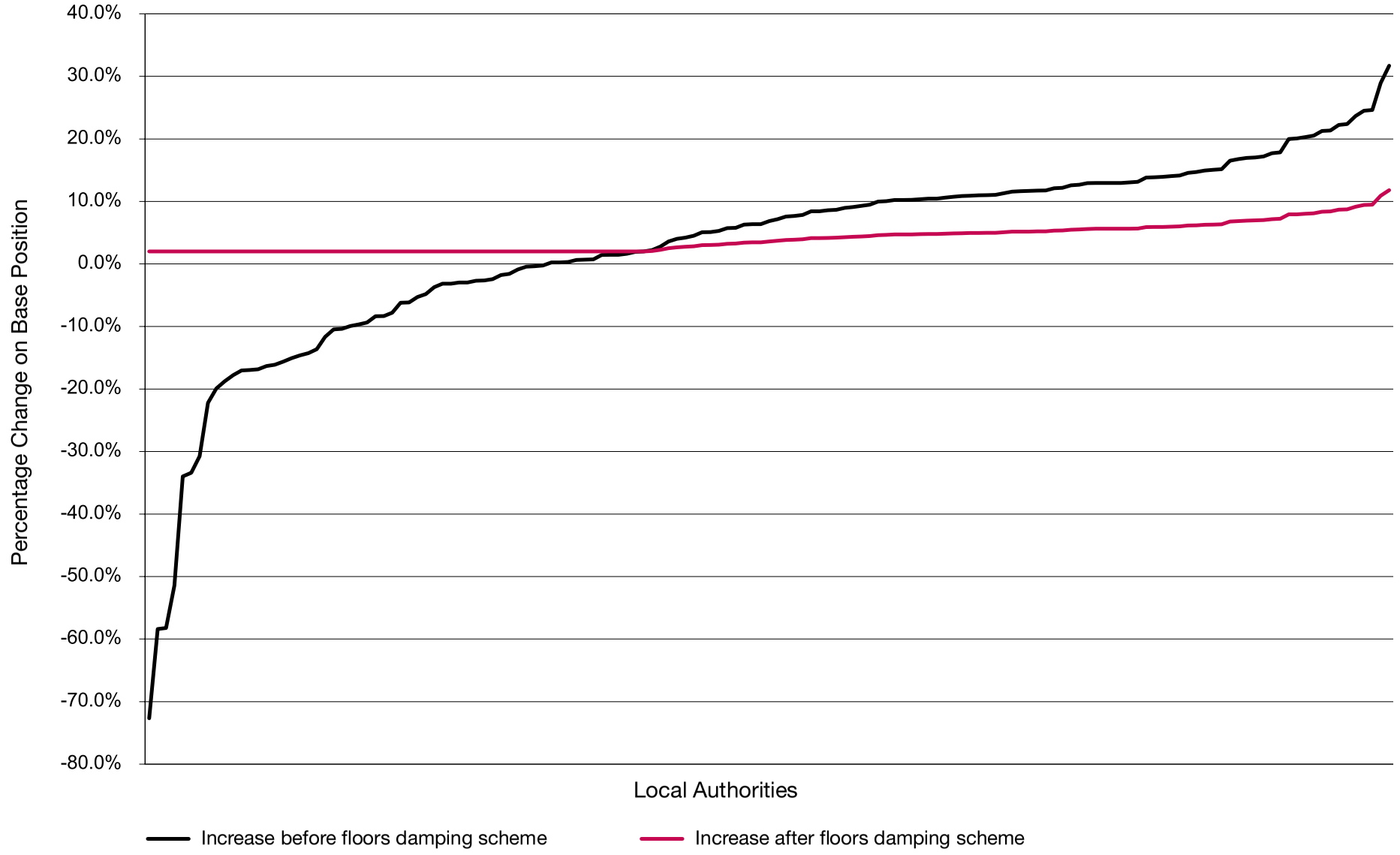
D.13 The floor mechanism means that if an authority's pre-floor grant calculation is below the floor for that group of authorities, an extra amount will be added to the authority's pre-floor grant calculation to bring the authority's final Formula Grant increase up to the floor.

D.14 As the overall Formula Grant to be paid to local authorities is fixed, it also has to meet the cost of providing the guaranteed floor. This is achieved by reducing the level of increase in grant for those authorities which are above the floor. For all of these authorities, that part of the pre-floor grant which was above the floor is scaled back by a common factor. Figure D.3 shows the effect of floor damping on the distribution of grant increases for upper-tier authorities.

Adjustments to Prior Year Baseline

D.15 As already explained, the floor guarantees a minimum increase for local authorities on a like-for-like basis. In order to make a like-for-like comparison, the grant figure for the preceding financial year (also known as the 'base year') is notionally adjusted where necessary to allow for any changes in function or finance. This notional adjustment to the base year is calculated for the individual authorities affected by the adjustment as well as in aggregate for local government as a whole.

Figure D.3: Effect of floor damping on distribution of grant increases for 'upper-tier' authorities in 2008/09



D.16 Changes in function typically involve local authorities taking on extra duties or responsibilities, or the transfer of these away from local government to another body. Changes in finance typically involve transfers into Formula Grant of funds previously distributed to local government via a specific grant route, or vice versa. (It is also worth noting that adjustments for floor purposes are not generally made for the majority of funding increases in Comprehensive Spending Reviews, as these reflect a broad assessment of spending pressures, efficiencies and affordability.) There are two main ways used to calculate the adjustment to the base:-

- Where an existing specific grant has been transferred into Formula Grant, allocations of that specific grant in the base year are used in calculating the amount of the adjustment.
- Where there was no previous specific grant, the adjustment for each authority is calculated by multiplying the England total for the adjustment by that authority's proportion of the England total for the relevant Relative Needs Formula. This was the methodology applied to the adjustment for child care proceedings court fees.

Formula Grant allocations

D.17 While the calculations outlined above are undoubtedly complex, the end results can be stated in fairly straight-forward terms. The combination of the relative needs and relative resources assessments establish an overall ranking of local authorities in terms of their position above or below the floor. But the final allocation is in effect just a straight cash increase on the prior year adjusted baseline for the authority, with the size of the increase depending upon the authority's position with respect to the relevant floor:

- For those whose pre-floor grant calculation is below the floor (so-called 'Floor Authorities'), the final allocation is their prior year adjusted baseline increased by the floor guarantee. So in 2008/09, floor authorities providing upper-tier services received a 2% increase.
- authorities above the floor receive increases greater than the floor guarantee (although less than the pre-floor grant increase) with those higher up the ranking getting a larger increase.

Table D.4 shows the 2008/09 pre-floor grant and final allocations for the English authorities that were visited as part of the review. Of these, authorities C, D and I were all Floor Authorities; the others all received a range of increases above the floor.

Table D.4: Key data from 2008/09 local government settlement for English local authorities visited by review team

Local Authority	Adjusted 2007-08 Baseline		Final 2008-09 Settlement			Notional element for Public Law Family Fees		Comparison of provisional and final settlements	
	Adjusted 2007-08 Formula Grant (£million)	Public Law Family Fees Adjustment (£million)	Formula Grant Before Floor Damping	Formula Grant After Floor Damping	Change on 2007-08 baseline (%)	Comparison with hypothetical settlement (£million)	Applying %increase to 2007-08 adjustment (£million)	Provisional 2008-09 Settlement (£million)	Movement to final settlement (£million)
A	67.128	0.153	83.663	73.481	9.46%	0.163	0.167	73.813	-0.332
B	91.026	0.299	95.681	93.781	3.03%	0.289	0.308	93.662	0.119
C	100.522	0.142	100.838	102.533	2.00%	0.145	0.145	102.388	0.145
D	103.725	0.169	86.030	105.800	2.00%	0.172	0.172	105.627	0.172
E	109.597	0.332	119.981	114.491	4.47%	0.339	0.347	114.507	-0.016
F	110.357	0.190	129.085	118.013	6.94%	0.204	0.203	118.359	-0.345
G	140.027	0.250	150.637	145.403	3.84%	0.266	0.259	145.461	-0.058
H	151.572	0.312	165.343	158.145	4.34%	0.324	0.326	158.245	-0.100
I	156.580	0.380	159.699	159.711	2.00%	0.387	0.387	159.460	0.251
J	196.756	0.433	240.499	213.821	8.67%	0.435	0.471	214.660	-0.839
K	284.560	0.457	296.021	292.154	2.67%	0.486	0.469	292.017	0.136

Annex E: Case Studies

Case Study 1 – Proceedings issued at birth

The local authority receives a referral in the latter stages of the mother's pregnancy. The mother did not seek ante natal care until she was at least six months pregnant. It is quickly established that she already has two other children who are no longer in her care. These children were the subject of care proceedings two years ago arising from concerns that they were being neglected emotionally and physically, the neglect arising from the mother's poor social functioning arising from her own deprived background, and a long standing drugs misuse problem. Those proceedings culminated with Residence Orders in favour of the children's father, who was to be assisted in his care of the children by his own mother.

The pre-birth assessment establishes that little has changed in the intervening period of time for the mother. She now appears to have had a substance misuse habit over a documented period of at least of eight years. All attempts to address this in the community have failed, although she indicates that given the opportunity of a fresh start she does wish to address her drug misuse, and arrangements are again made for her to attend a community based programme. Pre birth she misses most of the appointments and the urine testing that does take place reveals ongoing poly drug misuse. She now has a criminal record, and a number of offences pending. She has lost her housing due to rent arrears and is living in bed and breakfast accommodation.

The father is believed to be a man she met whilst street drinking. She was reluctant to confirm his identity, and enquiries have revealed that he has already been the subject of an historic child protection investigation relating to allegations that the children of his former partner were exposed to domestic violence between the couple approximately three years ago. When the social worker meets him he disputes paternity, and it is clear from his presentation that he is likely to have a drug or alcohol problem. He fails all subsequent appointments with the social worker prior to the birth of the child.

A decision is taken to issue proceedings at birth, and the mother and putative father are sent a letter to this effect under PLO procedures. The father declines to instruct solicitors prior to proceedings, as he indicates he will not participate in proceedings without DNA testing evidencing he is in fact the father. The mother instructs solicitors who advise pre birth that they will be seeking a range of assessments for their client in any subsequent proceedings, including the possibility of a residential detox programme.

The baby is born one month prematurely and suffers neonatal abstinence syndrome due to the mother's drug use during her pregnancy. Care proceedings are issued on the day of birth. The authority propose that the baby is placed in foster care upon discharge from hospital, this is unsuccessfully opposed by the mother at the first hearing, who seeks placement in a mother and baby foster placement in first instance.

Contact is ordered to take place with the mother five times a week. Once paternity is established via DNA testing, the father is offered contact once a week. All contact is provided in a supervised setting. On some occasions contact with the mother takes place in the foster home. Both parents are observed to be warm and affectionate with the baby, but both need prompting as to the baby's needs. Attendance at contact is inconsistent by both parents.

When in proceedings a cognitive functioning assessment establishes that the mother has a borderline learning disability. After an initial two month period of abstinence the Mother again begins to fail appointments with the community based addiction service, missing some drug and alcohol testing with them at a time when subsequent hair strand testing demonstrates she was using a mixture of prescription and illicit drugs. Supported by a recommendation from a psychiatrist with expertise in addiction, the mother applies for a residential assessment with the baby in a unit specialising in addressing addiction. The local authority agrees to fund an initial detoxification programme for the mother alone, but not anything further. That position is supported by the court. The mother then fails to attend the residential unit for detoxification on two separate occasions, and thereafter the authority refuse to fund any further attempts until and unless the Mother can demonstrate a real commitment by attending all her appointments in the community based programme. She fails to do this. A further report from the psychiatrist concludes that she will not be in a position to offer an appropriate level of parenting for the child within a reasonable timescale.

When DNA testing confirms paternity the father asks to care for the child. Subsequent testing establishes that the father is misusing alcohol, which impairs his cognitive functioning. Checks reveal recent convictions for a public order offence and assault. In his psychological assessment the father shows no insight into the impact of his lifestyle on his child or his experience of parenting the children of his former partner.

Following a Family Group Conference the maternal grandmother and a paternal aunt ask to be assessed as potential alternative carers for the child. The social worker conducts an initial viability assessment of both. She concludes that the maternal grandmother is unsuitable, given the mother's own poor experience of being parented. She recommends a fuller assessment of the aunt, but identifies concerns that the aunt has not previously parented, had been involved in a violent relationship in the past, and appears not to understand fully the authority's concerns in respect of her brother. A full assessment of the paternal aunt following the Form F format is conducted by the local authority 'Family and Friends' Team. That assessment concludes the aunt will not be able to meet the child's needs in the long term or manage the relationships within the birth family.

Following presentation to their Adoption Panel, the authority recommend to the Court that the child should be made the subject of a final Care Order with a view to adoption, and an application for a Placement Order is made. At this point the father stops attending contact. The paternal aunt is given leave to join the proceedings and applies for a residence order. An independent social work assessment of the aunt is ordered. By the time of the final hearing the threshold is agreed, but the mother is asking for further assessment, failing which she wants post adoption contact twice a year. She opposes placement with the paternal aunt, which is supported by the father. The child's Guardian supports the local authority plan. After a three day contested hearing, the Magistrates reject the application for a Residence Order by the paternal aunt, and make a final Care Order and Placement Order. The proceedings take just over a year to conclude.

During the care proceedings in addition to ongoing social work assessment the tests and assessments listed below are commissioned with the approval of the court:

- DNA testing , which confirms paternity
- Testing for alcohol and hair strand testing for a range of drugs on both parents
- A report from the community based drug rehabilitation project in respect of Mum's engagement with them
- The community based drugs rehabilitation programme continue to offer an ongoing programme of work with the Mother
- A report from the Consultant Neonatologist concerning the health of the child
- Psychological assessment in respect of the father
- Psychiatric report in respect of the Mother by psychiatrist with expertise in addiction
- Cognitive assessment of the father
- Cognitive assessment of the mother
- Viability assessment considering the Mother's suitability to enter a residential drug rehabilitation unit with a view to being joined by the baby
- Viability assessment by the social worker in respect of the maternal grandmother's request to be assessed as an alternative carer for the child
- Following a Family Group Conference an assessment of a paternal aunt by the 'Family and Friends' team of the local authority
- An independent social work assessment of the paternal aunt following her application for a Residence Order

£	Local Authority	Legal Aid	Cafcass	Totals
Legal costs	11,300	24,500		35,800
in house	*7,800*			
external counsel	*3,500*			
Court fees	4,800			4,800
Assessments	10,300	9,400		19,700
Guardian costs			4,300	4,300
Totals	26,400	33,900	4,300	64,600

Case study 2 – Planned proceedings in respect of chronic neglect of sibling group

The case concerns four children aged 12, 10, 4, and 9 months. They have two different fathers, and live with their mother and the father of the two youngest children. An older sibling, now 18 was placed in foster care under s20 when she was 15, and is now receiving the support of the Leaving Care Team.

The local authority have had involvement with the family for over 10 years, with the children being on and off the Child Protection Register. The concerns relate to both parents' periodic alcohol and drug misuse, a history of domestic violence with all of the mother's partners, possible physical abuse of the children, emotional abuse and neglect, failure to address the children's medical needs, failure to protect two of the children from sexual abuse, and inconsistent or no co-operation with professional agencies.

For the past eighteen months the children have been the subject of Child Protection Plans on the basis of neglect, and prior to that they were receiving the services of a number of family support teams. The four year old has now started school, with an attendance rate of approximately 60% in their first term. The health visitor has expressed concerns about the possibility of developmental delay in the nine month old, and there is some evidence of failure to thrive. The twelve year old is already known the police and the community anti-social behaviour team. The family are in arrears with their council housing rent, and the subject of a number of complaints from their neighbours. Children's Services have had to intervene with the Housing Department to prevent eviction proceedings being started.

At the first hearing the local authority seek the removal of all four children into foster care. No placements are available for all four, and it is proposed that the eldest two are placed in one placement and the two youngest in another. At the first hearing the mother offers to accept accommodation of the oldest two children under s20, but argues an Interim Care Order is not necessary. The children's father supports the children being accommodated, as he agrees he would be unable to care for them at the present time as he does not have suitable accommodation, although he seeks assessment in the longer term. The parents argue that with the older two children gone they will be better able to manage the younger two, and that there is no evidence that the younger children are at imminent risk of harm so as justify removal without a full hearing. The duty Guardian agrees this is a reasonable way forward, particularly as the Court is unable to offer a three day hearing for several months. The Court asks the authority to consider having Interim Care Orders on the two younger children with them remaining at home, which the authority declines. Interim Care Orders are made on the older children, with Interim Supervision Orders made upon the younger children with an extensive written agreement around a whole range of family support and indicating that the parents must and will co-operate with all professionals and assessments. Provision is made for the instruction of a number of independent experts, as detailed below.

During the proceedings at his first appointment with a dentist it emerges that the four year old has serious tooth decay and needs to have at least four teeth removed. Concerns remain about the youngest child's weight, and the parents fail to attend a number of appointments with a hospital paediatrician, but are always able to present an excuse as to why they did not attend relating to their own or the child's illness. The now five year old's school contacts the social worker to say that after an intial increase in his attendance there are problems again. The child

is often brought to school late, and sometimes his mother is late collecting him. On several occasions his oldest sister (the care leaver) is observed to collect him. He has been observed to be in an unkempt state and on one occasion the school had to change his clothes as they were soiled. On a number of occassions they have had to provide him with lunch. He is being aggressive with pupils and staff

When in care it is discovered that the ten year old has the wrong prescription for glasses, having attended no optician's appointments for a number of years. There are concerns that she appears to have no friends, and appears to be scared of her older brother who is notably aggressive to her. Whilst in care the school report an gradual improvement to her appearance, confidence and and demeanour. The twelve year old continues to display signs of aggression, culminating with an assault on the foster carer when she refuses to allow him out one evening. Consequently the placement breaks down. He moves to an alternative placement, and it is necessary to offer his new foster carer regular respite.

The local authority are concerned that the younger two children are continuing to be neglected although acknowledge that their care is probably not significantly worse than when proceedings where issued. Although a number of expert assessments have been commissioned in respect of the parents and children, two months into the proceedings only the cognitive assessments and core assessments have been completed. Testing for drugs and alcohol indicates that both the parents are regular users of cannabis, but the alcohol tests do not show anything, despite the father of the younger two admitting that he has a tendancy to binge drink over the weekends. Cognitive assessments of both fathers and the mother establish that the father of the oldest children has a mild learning disability. The psychologist conducting the assessments indicates that the Mother shows narcissistic traits which, in her view, require further assessment by a more specialist psychologist. Fourteen referrals are made before a psychologist is identified who can see the mother on a reasonable timescale.

A community-based local authority Family Centre conduct a programme of work and assessment with the family. The parents of the younger children are pleasant and co-operative with the workers from the family centre, in contrast to their hostile and complaining approach to the children's social worker. The work with the Family Centre appears to effect very little change in terms of the parenting of the children, as any improvements in care are not consistently maintained. However there is a difference in the observations of the state of the home and the parents interaction and care of the children between the social worker and the family support workers.

The local authority return the matter to court, seeking to renew their application for Interim Care Orders with a view to removal into care of the younger two children. A Guardian is appointed for the children the day before the hearing but is unable to assist the Court at the hearing given he has had no opportunity to make his own investigation. There is insufficient court time to hear the authority's application, but in any event the Court is mindful of the difference in assessments between the family support team and the social work team. The court adjourns the hearing for one month, and orders an independent social work assessment to focus on the parenting of the younger two children. The parents promise again to attend all appointments and co-operate with professionals, whilst at the same time rejecting all of the concerns of the authority. Leave is granted for a psychologist to assess the mother. No psychologist can be identified who can commence the work for a further 2 months.

Four months into the proceedings the children are seen for the first time by a Court appointed Guardian, who immediately expresses concern about the state of the youngest children's home when he conducts his first visit. He observes a number of cans of lager lying around, and has the impression that the father may be a heavier drinker than he acknowledges. During his visit he finds the four year old playing with an 18-rated play station game. He is not dressed properly and the parents give the impression of having only recently got up at midday. The baby, by now one year old, has only recently started to sit but from what the Guardian can see there are few if any age appropriate toys for her, and she remains strapped into her buggy for the whole visit, self-feeding from a bottle.

Enquiries of the child and adolescent pyschiatrist instructed in the proceedings enable the commencement of the assessment of the family to be brought forward by two weeks, and they are seen by the psychiatrist for the first time 20 weeks into the proceedings . At the time of the next hearing the Guardian indicates that until there is an interim report from the psychiatrist he is unable to make a recommendation as to the local authority's application for removal into foster care. By this time the medical reports have been filed setting out the medical issues for the children. There is concern that the baby is developmentally delayed, and that their weight is still lower than should be expected for children of this age, but an organic reason is not ruled out. The Court orders an independent paediatric assessment of the baby. Because of a combination of the availabilty of the Court, the psychiatrist and the Guardian, the earliest the Court can allocate a two day hearing is in two months time. A listing is made with provision for directions following the filing of the interim psychiatric report.

The interim report of the child and adolescent psychiatrist is filed 24 weeks into the proceedings. He identifies a range of difficulties for all of the children and only limited understanding by the parents of the degree to which they may be responsible for any of the children's difficulties as a result of their parenting. He identifies that the mother may be in need of therapeutic input as a result of her own neglectful and abusive experience of being parented, but does not wish to comment further without the psychological assessment. He recommends the input of CAMHS for the older children, and consideration of whether the now 5 year old may benefit from some play therapy to address some of his aggressive behaviour. He recommends the five year old is statemented. He is concerned as to whether the youngest child (now nearly 14 months) is displaying signs of insecure attachment to her parents.

The matter returns to court for directions. The Guardian indicates he does not wish to recommend the removal of the youngest children without the report of the psychologist. The authority reluctantly withdraw their application for Interim Care Orders in respect of the youngest children, with the caveat that it may be reinstated once the further assessments are in and if there are further examples of non co-operation from the parents. The parents agree to co-operate with all professional agencies. Arrangements are made for play therapy for the five year old but this cannot start for at least a further six weeks. A referral has been made to CAMHS but is is not clear when they will be able to start work with the older children given their waiting list.

The report of the psychologist is received 28 weeks into the proceedings. No formal diagnosis is made in relation to the mother, but the report identifies a number of areas where her pyschological functioning is significantly impaired as a rersult of her own experiences.

The drug and alcohol testing of the parents reveal the father of the younger children has been using cocaine as well as a number of prescription drugs. When the work with CAMHS starts the ten year old discloses witnessing domestic violence between her mother and both fathers, and talks of a bullying atmosphere in the home in which her older brother used to regularly assault both her and her younger brother.

The report of the independent social worker is delayed because of the parents of the younger children missing a number of appointments. The report is received 30 weeks into the proceedings, broadly confirming the concerns outlined in the social worker's core assessment, and indicating that without further significant input from Children's Services there is a significant risk of physical and emotional neglect to the younger children if they remain in their parents' care.

The child and adolescent psychiatrist is due to provide an addendum report by the time of the scheduled Issues Resolution Hearing, but the report is late and so the hearing is delayed. When the report arrives at 36 weeks it recommends that the older children remain in care, and indicates that this would reflect the wish of the ten year old girl. It recommends that a programme of treatment should be offered to the father to assist with a drink and alcohol issues, and that a programme of work should be found which assists the parents with the issues of domestic violence. It recommends that, on balance, the younger children should all be removed into foster care, and an attempt made to find an alternative family for the youngest two children together. It finds all the children to have insecure attachments and the parents to have no insight into their needs, and insufficient capacity to change on a reasonable timescale. At 37 weeks the report from the consultant paediatrician arrives, confirming no organic cause for the low weight and developmental issues of the now 17 month old child.

At 38 weeks the local authority file final evidence recommending final care orders in respect of all four children. The two oldest are to be placed separately in long-term foster place-ments. It is hoped that that the now 11 year old can remain in her existing foster placement. The oldest child will have to move to an alternative home when located, as his carers are unwilling to maintain care of him in the longer term given his ongoing challenging behaviour. The plan for the two younger children is to present them to the Adoption Panel for approval for adoption, but this cannot be done for three weeks until after the rescheduled Issues Resolution Hearing because of the late receipt of the reports commissioned.

At the Issues Resolution Hearing, 39 weeks into the proceedings, the father of the oldest two children agrees to care orders provided the local authority offer him more contact than they had planned. The parents of the two younger children indicate they are likely to agree Care Orders for the older two, but will oppose any such orders on the younger children. The advocates are unable to agree any meaningful threshold criteria as most of the local authority's case remains in dispute. The parents indicate they will fight every aspect of the authority's case, but cannot yet say which witnesses they require. They will argue they should be provided with the opportunity to have the treatment recommended by the psychiatrist before the case is disposed of. The Judge indicates that is an argument to be considered at the final hearing. They are ordered to file statements, a response to the threshold and confirm the witnesses required within two weeks, when there is to be a further directions.

At the next directions this has not been done because the parents missed all appointments with their solicitor. The court proceeds to list the matter for a six day hearing when a list of ten witnesses required emerges. The Guardian indicates his support for the local authority care plan. The parents complain they have only seen the Guardian three times in the whole of the proceedings.The Court orders CAMHS to provide a report on their work with the older children, and the play therapist to report. Provision is made for the disclosure of the health visitor records, and medical records relating to the children.

A combination of the availability of the witnesses and insufficient available court time means the final hearing has to be staggered over two months, with three days allocated in eight weeks and the further three days allocated four weeks after that. This means that the final hearing of the care proceedings concludes one year and a month from commencement. Four days into the final hearing the parents concede Care Orders should be granted on the three oldest children, but maintain that if caring for one baby with none of the behavioural problems of the five year old they would be able to offer a reasonable level of care. At the conclusion of the hearing the Court agrees the children should be removed into care but delays making final orders and hearing the Placement Order applications until the youngest children have spent at least three months in care and further information can be established about the prospects of them being adopted together and the plans for contact between the siblings and parents. It orders a further report from the child and adolescent psychiatrist as to the children's progress once removed into care.

The final care orders are made sixteen months after proceedings were commenced, and the Placement Orders approved after a further two-day hearing. By then the report of the psychiatrist confirms the social worker's view that the children appear to be thriving in care, and much of the five-and-a-half-year-old's aggressive behaviour has diminished. The Court hears evidence from the adoption team about the prospects of the children being adopted, and agreement is reached about increasing the amount of post-adoption contact proposed with the parents. It is accepted that because of the age and difficulties of the older child plus the need for on-going family contact it will be necessary to advertise the children nationally for prospective adopters as there are no adopters available for this sibling group within the local authority consortium's own resources. Identifiying adopters may therefore take some time. The younger children are now nearly six and two years old.

During the proceedings the following assessments and reports were provided:

- Core assessment of the social worker
- Report from the school
- Report from family centre workers
- Report from the Health Visitor
- Medical records for the children were obtained and filed
- Report from community paediatrician
- Report from independent consultant paediatrician
- Report from CAMHS on the older children

- Report from play therapist
- Report from the local authority adoption team
- Drug and alcohol testing on each parent over a period of 12 months
- Cognitive assessments of the mother
- Cognitive assessments of both fathers
- Psychological assessment of the mother
- Three child and adolescent psychiatric reports considering the whole family
- Independent social work report
- Report of the children's Guardian

£	Local Authority	Legal Aid	Cafcass	Totals
Legal costs	13,600	34,100		47,700
in house	*7,500*			
external counsel	*6,100*			
Court fees	4,800			4,800
Assessments	11,700	19,400		31,100
Guardian costs			11,400	11,400
Totals	30,100	53,500	11,400	95,000

Case Study 3 – Proceedings concluded at First Appointment: child placed with relative

This case concerns a baby boy who was born 6 weeks premature. His parents are both addicted to heroin. The baby's two year old sister was subject to care proceedings, which concluded with her being placed with her maternal grandparents under a Residence Order.

A pre-birth risk assessment was undertaken and this concluded that the parents' lifestyle and addiction problems would place the new baby at risk of suffering harm. A Child Protection Case Conference was convened and it was decided that the baby would need to be subject to a Child Protection Plan. A kinship assessment of the maternal grandparents concluded that they would be able to meet the baby's needs as well as his sister's.

The parents of the baby indicated that they wished to care for him, believing that their addiction problems were not out of control and that they were capable of meeting the baby's needs. The maternal grandparents indicated that they would not be willing to apply for a Residence Order or a Special Guardianship Order if the parents were opposed to this. However, they were willing for the baby to be placed with them if the local authority were minded to initiate care proceedings and sanction such a placement.

A legal strategy meeting was convened and it was agreed that an application for a Care Order should be made soon after the baby was born. The local authority duly submitted an application five days after the baby was born. The Interim Care Plan was for the baby to be placed with the maternal grandparents under an Interim Care Order once he was fit for discharge from hospital.

A First Appointment was arranged for day 10 of the baby's life. Three days before the First Appointment was scheduled the parents told the baby's social worker that they had reviewed their position and would support the maternal grandparents caring for him under a Residence Order. They had already spoken to the grandparents about this and said that the grandparents were talking to a solicitor and possibly intending to attend the First Appointment at court.

The social worker contacted the maternal grandparents and they confirmed that they had spoken to a solicitor and had instructed them to issue an application for a Residence Order. The solicitor had advised them to attend court on the day of the First Appointment.

The social worker discussed these developments with their team manager and the local authority solicitor who was dealing with the case. It was decided that it would be appropriate to continue with the First Appointment, with the possibility of the local authority withdrawing their application for a Care Order when everybody's position and their reasoning had been explored further.

On the day of the First Appointment there was considerable discussion between the parents, the grandparents, the social worker, the team manager, the Children's Guardian and the respective legal representatives. The parents were very clear that they now wished for the maternal grandparents to care for the baby on a permanent basis under a Residence Order. They explained that once the baby was born they very quickly realised that they would not be able to cope with looking after him and they therefore wanted him to be able to live with his sister and be looked after by the grandparents. The solicitor for the grandparents confirmed that he had lodged an application for a Residence Order, and the Court's legal advisor confirmed that the magistrates were willing to consider this alongside considering the local authority's application and possible withdrawal.

The social worker, the team manager and the Children's Guardian were all satisfied that the parents had made a genuine decision which was in the baby's best interests. They were also satisfied with the grandparents' contention that they were capable of meeting the baby's needs without any additional support from the local authority.

The magistrates proceeded to hear matters. They heard representations from the legal representatives of the local authority, the parents, the grandparents and the child's Solicitor, on behalf of the Guardian. The magistrates agreed to the withdrawal of the local authority's application for a Care Order and also made a Residence Order in favour of the maternal grandparents.

The baby was placed with the maternal grandparents when discharged from hospital at the age of four weeks.

The only costs for the local authority in relation to the proceedings were Legal Services' costs for representing the local authority and the application fee for the First Appointment. Other costs for the local authority in relation to the case, prior to the proceedings were:

- The social worker's time undertaking the pre-birth risk assessment;

- The social worker's time undertaking a kinship assessment of the maternal grandparents; and
- Costs associated with the convening of the Child Protection Case Conference (Chair, Social Worker, venue and administration).

£	Local Authority	Legal Aid	Cafcass	Totals
Legal costs	1,600	17,000		18,600
Court fees	2,200			2,200
Assessments	6,700			6,700
Guardian costs			600	600
Totals	10,500	17,000	600	28,100

Commentary on case study costings

In the above tables, the figures for local authority legal spend and assessments are the mean value of figures estimated by three local authorities on the basis of three actual cases written up by two of the local authorities. The figures for legal aid legal costs were provided by the Legal Services Commission and the guardian costs were provided by CAFCASS.

Assessment costs in the tables are split between legal aid and the local authority. When assessments undertaken at the direction of the Court, the Court directs who pays for them; by any of the parties singly, or split between any combination of the parties. As these decisions are at the discretion of the Court this can mean that there are significant differences in the way costs are allocated. For example, if the representative of one of the parties asks for a specific specialist assessment, the Court may order the assessment to be paid for by the party that requests it, or split equally between parties. On the other hand, if the assessment is one which the authority perhaps should have done as pre-proceedings work, then the Court can direct the authority alone to pay for that assessment. These differences can be affected by local practice. For example, one local authority told the review that the cost of cognitive assessments would usually be borne by the local authority, whereas another authority said the cost would usually be borne by the party who was being assessed, and therefore ultimately by legal aid.

In addition, not only are there many different types of assessment available to the Court, differing types of the same assessments can incur different costs. To take drug testing as an example, it is much cheaper to test for one type of drug, say heroin, than it is to test someone for multiple drug usage. Whether the authority and/or the Court decide that a person should be tested for singular or multiple drug use depends on the circumstances of the case and local practice.

Because these issues are determined locally, there does appear to be some scope for influencing how costs are allocated. A senior lawyer in one of the authorities visited said that that the authority had worked hard over the past few years, and had achieved some success in being clear to the judiciary about what costs were reasonable for them to bear and what costs they thought should be borne by the parties themselves.

As discussed elsewhere in this review, the cost of assessments can also vary depending on the availability of the relevant expert and the amount they charge for their services. A number of authorities said during the course of the review that there were too few experts and in this 'sellers market' the authority had very little control over costs incurred when the Court directed an assessment to be undertaken.

These local variations led the local authorities helping with costing to assume rather different splits of the assessment costs between the local authority and legal aid, although the overall totals used to calculate the figures in the above tables were roughly comparable.

In addition to the costs detailed in the table above (and not costed here), local authority costs will include social work time needed to progress the case in court. Case studies 1 and 2 have been estimated to account for 10-20% percent of the available paid hours of a full time allocated social worker over the course of the proceedings, together with regular input from a practice manager and team manager. The fostering and adoption team will also allocate social workers time to progress those aspects of each of the cases. The Adoption Panel will have to read documentation which, apparently, may run to several hundred pages, and is likely to allocate up to two hours for their deliberations before the case is considered by the Agency Decision maker. Additional social work support will be needed to cover every hour of supervised contact directed by the court.

With regard to lawyers, local authorities said that cases of this nature would be likely to represent approximately 5-10% of the available paid hours of a full time local authority lawyer, with considerable secretarial support, assuming Counsel is only used at contested hearings lasting more than a day.

Annex F: Formal Submissions

(i) Association of Directors of Children's Services

Introduction

The family courts and the care orders issued there are an essential component of the child protection system. The family courts are part of that "system", not external to it – in that judicial oversight of the process of care proceedings provides a legal framework in which the rest of that system operates. We are all in the business of keeping children safe and a high-quality service must be the priority for us all. Whether this quality is improved or harmed by transferring costs from one part of the system to another should be the focus of any inquiry into the impact of fees.

It is necessary to distinguish between the impact of the introduction of fees on decisions in individual cases – whether to, and then when, to bring a particular case to court and what other options are explored – and the impact on the system as a whole. While we do not believe that individual cases are being handled differently solely because of the introduction of fees, we do not believe that the system as a whole will benefit from these changes.

Quality in the case of care proceedings means the speed with which a case comes to and is concluded by the courts, assuming that the outcome will always be the same. This timescale is determined by the quality of the pre-court preparation done by local authorities, the supply of guardians to represent the interests of children and the relationship between CAFCASS, the local authority and the court.

In our view, the transfer of costs from central to local government has not done anything to improve the system's capacity to keep children safe and that it will not do so as it does not incentivise improvements to the system as a whole. In the short term, the funding mechanism, the distribution of funding among local authorities and its delivery via the Revenue Support Grant (RSG) all caused practical financial pressures in some authorities. In the longer term, local authorities do not have sufficient levers to influence the way the system as a whole works in order to reduce the costs that they face or improve the quality of court services.

Perceptions are as important as reality in this area and anything which promotes a direct link between actions concerned with the protection of vulnerable children and cost savings are not a helpful part of building confidence in the system. Public confidence must be a priority in the current context.

1. Current context and additional pressures

In answering the question of whether the introduction of fees has led to systemic delays in court proceedings, consideration of recent events and the current context is vital. There are a number of other factors that have led to pressures on the family court system in the last year.

The introduction of the Public Law Outline and the associated increase in pre-court activity undertaken by local authorities appears to have caused a dip in the numbers of applications for care proceedings immediately after its introduction in April 2008. It is difficult to distinguish between the impact of the extra work required and the additional costs in terms of fees. We believe the former was more significant in causing delays to individual cases and the resultant dip in applications.

Six months after the introduction of both fees and the use of the Public Law Outline, children's social services came under renewed scrutiny after the case of Baby Peter in Haringey came to the public's attention. Since then the numbers of children identified as at risk has increased and so therefore has the number of applications for care proceedings. This rise still continues six months after the case hit the headlines and may continue to do so.

Local authorities are struggling to recruit and retain experienced social workers, particularly in child protection. This problem has been made worse by recent events which have focussed attention on children's social services. The lack of experienced social workers with sufficient communication skills and confidence to take a full part in care proceedings will also have affected the quality and timeliness of applications by individual local authorities and for individual cases. We hope that this challenge will be addressed by the Social Work Task Force and the Select Committee inquiry into initial social work training and do not intend to go into these issues here.

The delays reported in bringing and completing care proceedings in the last year, therefore, are not solely or even mainly a result of the introduction of fees. Given the complexity of the factors involved, we do not believe it is possible to assess the real cause of these delays without substantial research.

While the financial pressures created by the introduction of court fees may not yet be apparent in some authorities, should this rise be sustained, it will soon become so. The current and future pressures on local authority budgets as a result of the recession, including reductions in income from central government grants and from council tax, will further reduce resources available to meet unfunded or under-funded services.

2. Considerations when initiating care proceedings

The factors for social workers to consider when determining the need for care proceedings are laid out in the statutory guidance "Working Together to Safeguard Children". The definition of being at "risk of significant harm" is clear and it is the aptness of this description to particular circumstances that will be the primary factor for consideration. Ideally we should be moving towards an approach where the decision to initiate care proceedings is made on a multi-disciplinary basis with significant input to the judgements supporting those decisions from partners in other agencies. Engaging partners is an important part of the preparations for court where the input from other disciplines is often crucial in presenting evidence of likely significant harm.

2.1 Financial considerations in individual cases

Clearly local authorities have a fixed income base from which to supply their services. An increase in the costs incurred, without increased income, will put pressure either directly on the service whose costs have increased, or indirectly on other services, if the service affected is statutory. We believe that the latter is true in the case of court proceedings. Decisions about care proceedings in individual cases can never be influenced by the costs involved in taking action and we believe that local authorities are not doing this – the needs of the child always come first. The costs of the court fees are negligible in comparison to the other costs associated with taking a child into care – the requirement to comply with the Public Law Outline, the staff time taken up with court preparation and appearances and, of course, the costs of placing a child in alternative care all have a significantly greater impact on the budgets allocated to care proceedings than the fees themselves.

2.2 Use of alternative care arrangements

The options for alternative forms of care that are considered for any child deemed to be at risk of significant harm are always dictated by the best interests of the child, and never by the financial situation of the authority leading the case. Legal proceedings must always be considered. The choices between kinship care, private fostering and more formal legal proceedings are driven by research into the impact that the different options have on outcomes, and in particular the potential impact on the stability of the placement. The Public Law Outline is clear that these options should be considered prior to initiating care proceedings.

2.3 Wider financial impact on Children's Services

The costs of the fees, however, do not disappear simply because they are not a factor in an individual decision. The costs are met through erosion of other services and, within children's social services, this almost inevitably means a reduction in early intervention and prevention. Such a reduction, conversely, may well lead to an increase in the number of care proceedings required in the future.

Local authorities have taken steps to ensure that the increased costs do not affect decisions about the level of need that must be met prior to intervention, with some confirming the decision to continue to offer support at the same threshold of need through the mechanism of Full Council. These authorities confirm, however, that this decision may lead to cuts elsewhere, particularly given the current financial situation.

3. The transfer fees from central to local government

3.1 The principle

We do not believe that the principle of "full cost recovery" for the cost of care proceedings has the potential to improve the system of child protection. The concept of shifting funds and fees within the system is contrary to the philosophy of Every Child Matters, in which child protection specifically and safeguarding more generally is "everybody's business". Moreover, we believe that local authorities fulfilling their statutory responsibilities to initiate care proceedings for those at risk should be seen as analogous to the role of the Crown Prosecution Service's role in criminal prosecutions. The CPS does not incur fees for bringing prosecutions and we do not believe that there would be public support for doing so.

Perceptions are as important as reality in this area and anything which promotes a direct link between actions concerned with the protection of vulnerable children and cost savings are not a helpful part of building confidence in the system. Public confidence must be a priority in the current context.

The original consultation on the introduction of fees implies that, by linking the level of fees to the stages of the Public Law Outline, local authorities would be encouraged to better prepare for court and thus reduce delays in the system. Moreover, the document argues that full-cost transfer "promotes the efficient allocation of resources, by providing paying authorities with a greater incentive to use services economically and efficiently ". We do not believe that these are the principles that should govern a local authority's approach to care proceedings.

We do not believe that local authorities have sufficient levers to influence the system to reduce delays in this way. Local authorities are in a position where they have almost no control over the efficiency of the administration of a system which they are required to purchase from a monopoly supplier. The local authority can only be accountable for its own actions and should not be placed in a position where the actions of others lead to costs on the local authority, nor should there be any sense, real or perceived, by which costs act as an incentive or disincentive to settle matters when this may not be in the best interests of the child.

In conclusion we do not accept the principles on which these fees are based as we do not believe they will serve the intended purpose. A different system-wide approach is needed to improve the processes and multi-agency interactions involved in initiating and completing care proceedings.

3.2 The implementation

The implementation of the transfer of responsibility for fees from central to local government was problematic in a number of ways. The failure to notify local authorities of the inclusion of the funding transfer in the Revenue Support Grant before its distribution, the lack of consultation on the principle of the transfer and a lack of transparency in the distribution of funding among local authorities all put pressure on local authority budgets in the first year in which authorities were liable for these fees. This confusion makes it more difficult to assess the potential impact of fees on budgets.

The lack of consultation on the principle of transferring fees was compounded by the lack of notification about the delivery mechanism of the funding meant to cover these costs. The Ministry of Justice Consultation of March 2008 consulted only on the level and methods of paying fees, while informing local authorities that the Revenue Support Grant received by authorities in April 2008 would include their funding allocation. The funding was not flagged as for a specific purpose, nor were Finance officers or Treasurers made aware of the intention for this funding. The result was many authorities saw the additional funding subsumed into general revenue funding, leaving little or no provision for the payment of fees.

The increase in the Revenue Support Grant did not equitably distribute resources because it does not take into account, as we noted in our response to the public consultation, the various trends across authorities which may then potentially influence practice. The amount of funding transferred takes no account of baseline activities in localities to which these costs relate.

An assessment needs to take place as to how the costs and projected expenditure are matched in each local authority area. Initial feedback from ADCS members is that the transfer and the costs are not matched and there is a potential funding gap for some local authorities which, because of the late information on this matter, left some local authorities unable to accommodate this in their budget setting for 2008/09.

4. Reducing costs and delays in the system

Just as we recognize that we, as leaders of children's services in local authorities, share our responsibility for keeping children safe with the judiciary and Family Court System, we also recognize our responsibility for attempting to reduce costs incurred by the judicial part of the child protection system. We would do so whether or not these costs were transferred to

local authorities – but clearly we now have a strong interest in proposing changes as to how the costs could be kept to a minimum and best practice promoted at all stages of the care proceedings process to reduce delays.

4.2 Status of legal advice

There is some concern that confusion over the status of legal advice from local authority lawyers is causing delays to the initiation of care proceedings when that advice contradicts the lead professional's view that a child is at risk of significant harm. While we do not believe that legal advice about the standard of evidence should, or in the majority of cases, does overshadow the views of professionals about the risk to the child, this appears to be a concern among front line social workers and managers. In order to provide these professionals with clear guidance on actions to take when legal advice is not to proceed with an application to the court, despite their professional concerns, there should be protocols for the management of the relationship of the social care service and their legal advisors. This helps to manage the relationship and many local authorities have Service Level Agreements (SLAs) covering this issue.

We recommend that this becomes standard practice. We believe that increased clarity in the relationship between lawyers and social workers would improve the speed with which care applications are made by local authorities and the quality of the pre-application preparation undertaken.

4.3 Use of Expert Witnesses

Local authorities identify the 'excessive' use of expert witnesses in Court proceedings as one factor that increases delays and costs. The courts and CAFCASS have a tendency to require second opinions from so-called "expert witnesses" to support the evidence of the social worker allocated to the case. We appreciate that this is, to some extent, due to the calibre of evidence given by social workers and that measures to address the quality of training may address this. However we do not believe that this is always the case and that expert witnesses are used in cases where the lead professional from a local authority could provide sufficient expertise. Courts steadily demanded more and more in terms of evidence as the process in court proceedings has become more adversarial. Because courts have less confidence in the quality of practice they are more inclined to seek additional expert opinion of various kinds. This adds to the cost and complexity of proceedings without necessarily adding value.

July 2009

(ii) Association of District Judges

In February 2008, the Association of Her Majesty's District Judges submitted a paper in response to the proposed substantial increase in court fees. I set out below the first two paragraphs which continue to represent the Association's position.

1. *The initial reaction of many to the proposed substantial increase in Public Law Family Fees, payable by Local Authorities, is likely to be one of hostility. Most users of the service no doubt feel that access to the courts (and the provision of the courts) should be a public service available as of right to all.*

2. *The proposed increase in public law family fees is predicated on the Government's established policy and strategy of full cost pricing. However, the Association has previously, and again now, voiced its continued opposition to such a policy. Whilst the worst excesses of a full cost policy might be ameliorated by a system of exemptions and remissions, the Association continues to challenge the underlying assumption that the users of the civil and family courts should pay for the service provided to them. Just as the provision of health, education and defence are core functions of any state, so should be the provision of an effective and efficient justice system. We furthermore question whether the full cost policy and strategy can be carried over completely to certain Family Work, for instance in relation to matrimonial injunctions where the court is concerned not with monetary remedies but with the protection of the vulnerable. In cases involving children the welfare of the children is, of course, paramount. It is the contention of the Association that the policy of full cost pricing sits uneasily with the social aspects of much of the work of the Family Courts.*

The paper also expressed the following concerns:

a) The scheme could operate as a considerable disincentive to the commencement of care proceedings,

b) Social workers might continue to monitor cases rather than issue care proceedings or push them into the private law application route.

c) These decisions should not be based upon monetary considerations.

After the introduction of the new fee regime, anecdotal evidence suggested a considerable downturn in care applications. More recently, there appears to have been a substantial increase in care cases issued. What the Association cannot say, however, is whether the initial apparent downturn was caused solely or partly by the increase in fees. The new PLO had only recently been introduced. The increase in care cases may be the result of the Baby P case and the surrounding publicity. There is the recent President's Direction on domestic violence and the increased awareness of the necessity for risk assessments, as evidenced by s.16A Children Act.

Our members are not privy to the decisions being taken within Town Halls, a fact which considerably handicaps us in assisting the present Review. We can appreciate the logic that, if the anticipated fees are included in the allocation of budgetary allowances, then the fee regime should not affect any decision to commence care proceedings. Although many of our members are sceptical about this proposition, the absence of any hard evidence makes us unable to be more specific.

We therefore believe that it is the Local Authorities themselves who should be able to provide for you with information as to their current policies and an indication as to whether the increase in court fees for care proceedings has had any influence on their decisions taken in this area.

There is, however, one further matter. The fees transferred from HMCS to the Department of Communities and Local Government amount to £40m a year. If the public law fees were to be rescinded, HMCS would lose immediately £3m of fee income. Any change, therefore, to the fee structure before April 2010 would have an immediate and dramatic effect upon HMCS' activities and to the administration of justice in both the Civil and Family jurisdictions. That would give rise to a legitimate ADJ concern. If, therefore, a decision is taken to remove from Local Authorities the requirement to pay these fees, it would be the Association's submission to delay the implementation of the same until the new financial year.

District Judge Buckley
Chairman of the Family Sub-committee of the Association of Her Majesty's District Judges

7 July 2009

(iii) Association of Lawyers for Children

1. As two of the members of our Executive Committee (both experienced local authority lawyers) made clear in their article published in May 2008, 'Increases to Court Fees' (*G Eddon & J Ward* – [2008] Fam Law 416) , the ALC predicted that the effects of the increased fees would be subtle and it would not be easy to find a smoking gun. That has proved to be the case.

2. Local Authorities were allocated a sum of money which they were told was intended to cover the cost of the additional court fees. The amount allocated to each authority did not, however reflect the actual or predicted case load for each authority. In fact, the recent surge in cases following the events of late 2008 would have invalidated any attempt to predict caseloads. For those local authorities that were expecting to face a shortfall from the outset, the effect will have been even more serious than expected.

3. We suspect that the Review will be unable to identify any cases where the Local Authority has explicitly decided not to start proceedings on the basis of fees alone. That would be unlawful, and nobody would be quite that naïve. The effect can however, we think, be found in the interplay between the various factors at work in the decision-making process.

4. The decision to start care proceedings is usually a result of extended involvement of the local authority and other agencies with the family. In some cases[23], the decision is as a result of a crisis, but in many cases there are chronic problems that will have been managed using a range of strategies that do not involve court proceedings. The decision that these strategies are not going to work is a difficult one and is shaped by a range of factors. In her 2007 book *Protecting Powers: Emergency Intervention for Children's Protection* (Wiley Publishing), Professor Judith Masson seeks to identify the factors that come into play when social workers decide to go to court. This is in the context of emergency protection orders, but we suggest that it provides a useful insight. It is not appropriate to try to list the factors that she identifies, but we draw attention to the comment at page 138:

> "Social Workers in the EPO study commented that lawyers lacked the capacity to deal with the sort of risks that social workers had to live with and therefore operated low thresholds. Lawyers gave a different reason for their approach: they felt it necessary to press for legal action to be taken because managers were reluctant to bring proceedings because of the expense."

5. Masson's research suggests that expense was a relevant factor for social work managers even in a situation where the court fee was minimal (the fee for an EPO is now £150 and was much less than that at the time of Masson's study) and the need for intervention appears to have been urgent. More recently, one of our members who is a local authority lawyer recalls receiving an email from a social work manager containing the (admittedly throw-away) line *"I can think of better ways to spend £4000"*.

[23] Masson et al ((2008) *Care Profiling Study*, Ministry of Justice Research Series 4/08, suggest that around 42% of cases are started in response to a crisis.

6. It is worth spending a moment on the issue of cost. It has been suggested during the debate about fees that the court fees, at a maximum of £4825, represent "a small proportion of the overall cost of child care proceedings" (Bridget Prentice, quoted in *The Times* 28 April 2008), which is suggested elsewhere to be £65,000 – £70,000. That is not a figure that will be recognised by local authority lawyers and social workers. As far as we are aware, no information has been released as to how that figure was arrived at. We suspect that it is based on a series of assumptions about the amount and cost of additional social worker and lawyer time that is spent on cases involving care proceedings. We consider that it is misleading and unhelpful. As anyone who has worked in a large organisation will be aware, unless the organisation has a highly-developed internal market (which most local authorities do not), decisions about spending are influenced by the distinction between visible and hidden costs. The manager with responsibility for deciding whether to commit to care proceedings will be far more aware of, and likely to be influenced by, visible costs such as:

- Court fees
- Counsel's fees
- Cost of experts (or the local authority's share of the cost of jointly instructed experts)

than by invisible costs such as social work or legal staff time. In fact, we suspect that few social work managers know how much an hour of social work time costs. This is because staffing establishments in the public sector are relatively fixed. If there is more work in a particular case, for example because care proceedings have been issued, that work will generally be done by legal and social work staff either working longer hours for no extra pay or prioritising that case at the expense of others. Additional staff are not bought in to cover the extra work. In contrast, the "visible" items referred to above are paid from a (finite) cash budget. Most local authorities will have placed the additional funding received from MoJ into that budget to cover the increased fees, but the budget is still finite; when it is spent, the budget holder needs either to restrict spending or submit a bid for extra money. Even if the budget is held centrally rather than by social work managers, it is still a factor in decision-making. Indeed, the quote from Masson above indicates that social work managers were conscious of cost, even if they were not the direct budget-holders.

7. Research published in *Community Care* ("Review may lead to tighter rules for councils applying for care proceedings", 1 June 2006) suggests a figure of around £6000, which matches our members' experience and, we suggest, reflects the visible cost of care proceedings. If that is correct, then the visible cost of proceedings has increased by more than two-thirds as a result of the new fees. It is also important to bear in mind that the costs of individual cases vary. In some cases, leading Counsel will be briefed and numerous experts instructed. In such cases, the court fee will indeed represent a small proportion of the overall visible cost. For each such case, however, there are many others, no less important to the families involved, that are resolved in the lower courts without the use of Counsel and with no, or limited, expert evidence. In such cases, the court fee now represents all or most of the visible cost of the proceedings. For example, in a typical care case in a Magistrates' Court, the local authority will incur the court fees of £4,825 and possibly a quarter share of a psychologist's fee (perhaps £1,000-£1,500). Therefore, the court fee is between 70 and 80% of the visible cost of the decision to issue proceedings.

8. As we explain elsewhere in this submission, the decision to start care proceedings is in practice highly subjective, so it is impossible to measure the influence exerted by any one factor. However, being a large 'visible' item, the increased court fee is, we suggest, a major element in the perceived cost of proceedings and one that local authorities cannot ignore.

9. We turn now to the use of private law proceedings. Local Authorities are increasingly looking to extended family members for alternative placements when children cannot remain with parents. The use of Family Group Conferences as a systematic way of indentifying such placements is now mainstream practice. In principle, this approach is highly desirable. However, there is a lot of pressure on social workers to pursue such kinship placements and there is often a clear expectation that they will be pursued wherever possible. In some cases, a kinship placement may be inappropriate, for example because of the carer's ill health or limited capacity to protect the child from the abuser. In other case, while a kinship placement is appropriate, the complex family dynamics mean that ongoing Local Authority input is needed to manage the situation. If, in such a case, the Local Authority encourages/funds the carer to apply for a private law order, then the requisite scrutiny of that placement on behalf of the child simply will not happen. The reality is that Cafcass will do very little in such cases. Indeed, any report that is required to satisfy the court as to the suitability of the arrangement will normally be commissioned from the very Local Authority that has made the placement (Children Act 1989, section 7). From the Local Authority's point of view, funding a private law application costs a fee of £175 as against the much larger fees for care proceedings.

10. There is no doubt that the number of cases where this is happening is increasing. We do not think that the court fees are the only driver of this, but we are confident that they are a factor. Members have given us examples of this. In one case, the social work manager has told one of our colleagues that they saw no point in paying those fees when the child is already in a "safe, stable placement". In that case, the child had been seriously injured (the carer was charged with an offence under section 18) and had been placed with father. The local authority was proposing to support the father to apply for a Residence Order. It was only some months later, following robust legal advice, that the local authority issued care proceedings. In another case, the child has suffered 31 injuries and was placed with grandparents. The local authority is encouraging the grandmother to apply for residence. In each case, these arrangement have kept the child safe in the short term, but fail to address the fact that the parents do not accept responsibility for the injuries and consider this to be a temporary arrangement.

11. We are aware that the MoJ is planning to put forward proposals to increase fees for private law applications to full-cost levels, but (given that many private law cases are resolved at the first appointment) we suspect that the fees will still be much lower than the fees for public law applications.

12. In terms of other drivers, one of them is the move towards solution focused therapy (such as the *Signs of Safety* programme), which encourages the family to define and find its own solution. The limitations of solution focused therapy in high-risk cases were identified in the most recent serious case review report into Baby P[24] and in Brandon et al's review of serious case reviews (p73).

[24] *Serious Case Review*: Baby Peter : Executive Summary, Haringey LSCB, February 2009

13. Another factor to consider is what Brandon et al have called the "start-again syndrome", where workers and managers, instead of attaching appropriate weight to the history of cases of chronic neglect, tend "to put aside knowledge of the past and focus on the present". They give as an example (p72):

> *"a new pregnancy or a new baby would be seen to present a fresh start. In one case the child's mother has already experienced the removal of three children because of neglect, but her history was not fully used in considering he and her partner's capacity to care for this child. Instead agencies were more focussed on supporting the mother and the family to "start again".*

14. Other examples quoted include the social worker leaving and a new worker starting afresh, or a worker going on long-term sick and the covering worker taking a short-term view of the case.

15. There are, we suggest, a series of drivers towards reduced use of care proceedings. Any decision to issue care proceedings, as opposed to private law or no proceedings, is the product of all these factors. Each local authority has its own threshold for intervention and its decision makers have their own values. Indeed, Masson[26] identifies that decision-making is highly subjective and advocates the creation of a research-based assessment tool to help social workers decide on the need for proceedings.

16. We are concerned about the safeguards for children where private law proceedings are used. For example, those who are old enough can recall that children's guardians were originally introduced following a public inquiry report (the Maria Colwell report) in relation to a child who was returned home from care and whose Care Order was subsequently discharged by agreement between the Local Authority and the parents, without anybody scrutinising the case on behalf of the child. The guardian's role only later expanded to include fresh applications for Care Orders. The move towards the use of private orders instead of care proceedings effectively puts us back into the situation before that happened. The original public inquiry identified the need for independent guardians. The parents and the carers, supported by the local authority, are able to put arrangements before the court without the court having the benefit of any scrutiny on behalf of the child, as would always be the case in care proceedings.

17. Another concern relates to the support that is offered to kinship carers where there is no care order in force. This point was made by the Family Justice Council in its response to the original consultation (at p3):

> *"Recent research already confirms that many family and friends carers, who are often significantly more impoverished, more likely to be living in overcrowded accommodation, in worse health and are older than unrelated foster carers, receive neither financial nor practical support. For example, such carers are significantly more likely to be left alone to manage contact arrangements despite the considerable strain it can place on such placements to the potential detriment of the child." (Farmer E and Moyers S (2008 forthcoming) Kinship Care: Fostering Effective Family and Friends Placements, Jessica Kingsley).*

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[25] Brandon et al (2008) Analysing child deaths and serious injury through abuse and neglect: what can we learn? DCSF Research Report DCSF-RR023. This was a review of 161 serious case reviews following death or serious injury to children.

[26] 2007 p206, again writing about Emergency Protection Orders, but we say that the same principles apply to care proceedings

18. We are also concerned that there are no threshold criteria for the making of private law orders. An application for a residence order by a relative, at the behest of the local authority, is no less an intervention by the state than would occur if the local authority issued care proceedings, but the essential safeguard against unwarranted intervention is absent. We remind the Review of the case of Nottinghamshire County Council v P [1993] 2 FLR 134, where an attempt by a local authority to use section 8 of the Children Act instead of care proceedings was severely criticised by the Court of Appeal. That was an application by the local authority itself, as opposed to an application made by a relative at the request of the local authority, but we submit that the effect is the same.

19. Finally, we make some more general points. Masson's research into care proceedings[27], involved a study of around 400 cases, but did not identify any case where it was clear that care proceedings had been started unnecessarily. This was reinforced by the evidence quoted in the Family Justice Council's response (at para 12):

> *"At a recent JSB training event, over 50 judges, mainly from the Circuit Bench, and mainly very experienced in trying public law cases on a day to day basis were asked two questions:*
>
> - *Do **any** of you have **any** experience of care cases being brought prematurely or unnecessarily? **Not a single judge had such experience**.*
> - *Do you have experience of cases regularly coming before you which have been inappropriately delayed by poor decision making by local authorities? **Every single judge had such experience**. Some commented upon cases where delays had run into years."*

To the extent, therefore, that the MoJ has introduced these fees with the intention of reducing the use of proceedings, research that the Ministry itself has commissioned, together with the views of experienced judges, suggests that such a course would be dangerous.

20. As we hope that we have made clear, we believe that child protection and care proceedings are a highly complex system. There has been research into different parts of the system, but this has not produced an overview of how all parts of the system work together. For example, we consider that the pre-proceedings requirements of the Public Law Outline, even if they reduce the length of court proceedings, will not reduce the overall length of time that the child spends "in the system" i.e. from child protection referral to final court order. This is because those who shaped the requirements did not understand the way in which work in prioritised within social care teams, with court work tending to take priority over preventive work. The fee increases have added a further driver to a system that is not fully understood. That is inherently risky. The Social Care Institute for Excellence has recently published a report advocating a "systems" approach to serious case reviews following child deaths. The systems approach tries to analyse how the various parts of a complex system interact, rather than focusing on mistakes made by individuals. We suggest that, in the same way as the authors of serious case reviews are said not to try to understand how the child protection system works as a whole, rather than focusing on the acts of individuals, the MOJ has not tried to understand how care proceedings

[27] Masson et al ((2008) *Care Profiling Study*, Ministry of Justice Research Series 4/08) p34. There was one case out of 400 where the court found that the threshold criteria had not been proved, but the researchers do not conclude that the proceedings were unnecessary.

and everything around them functions as a system. An appropriate response to Lord Laming's recommendation would be for the MoJ to take a step back, suspend the fees and undertake that kind of systems-based research to understand what the drivers are that push or inhibit the commencement of proceedings in non-urgent cases.

21. Returning to the question of decision making, we note from recent material published by Cafcass that there has been a wide variation in how individual Local Authorities have responded to recent events. Some Local Authorities have seen a marked increase in applications for Care Orders. Other local authorities have remained static or, we are told, have seen falls. This followed a nationwide reduction following implementation of the PLO. For some authorities, the introduction of the PLO and the increased fees also coincided with the implementation of the Integrated Children's System (ICS), which we are told has forced workers to spend far more time on administration and recording. The number of applications dropped dramatically following April 2008. It is impossible to disaggregate the effect of those three factors in causing the reduction. What we did perceive however was that, following the Baby P publicity, there was a definite sense that managers were realising that they had been living with high levels of risk, which they were no longer prepared to do. We are also aware of cases where, following a change of manager or social worker, the new incumbent has reassessed the case and has been unwilling to continue to live with such levels of risk. This has produced a number of cases in which the level of intervention has moved very quickly from "child in need" into emergency or urgent court proceedings. There is no reason to believe that the resulting proceedings have been started inappropriately, so the implication is that cases, which should have been placed before the court in order to safeguard the child concerned, were not. To the extent that the fees were a factor in the decision not to start proceedings earlier, they have been placing children at risk.

22. In our submissions, we have acknowledged that there is unlikely to be a "smoking gun", ie direct evidence that decisions have been explicitly based upon the increased cost of proceedings. We would however like to remind the Review that, whatever the terms of reference set by the Minstry of Justice, Lord Laming's recommendation was that:

> *"The Ministry of Justice should appoint an independent person to undertake a review of the impact of court fees in the coming months. In the absence of incontrovertible evidence that the fees had not acted as a deterrent, they should then be abolished from 2010/11 onwards."*

23. We say that the evidence currently does not exist to justify a conclusion that the fees have not acted as a deterrent. Indeed, there is some evidence that they have.

31 July 2009

(iv) CAFCASS

Thank you for offering Cafcass the opportunity to respond formally to your letter dated 8 June 2009.

In addition, I have met with you for individual feedback, and also as part of your meeting with the Family Justice Council, Children in Safeguarding proceedings sub-committee. Finally, Cafcass has provided you with the data relating to s.31 care order applications by local authority, for the years 2007/08 and 2008/09. This letter therefore only seeks to provide a brief overview of Cafcass' position in relation to the matters covered by your enquiry.

Cafcass understands that suggestions were made to Lord Laming, that the downturn in applications during the first half of 08/09 was a direct result of the increased fees. We do not believe that this is the case, but rather that a number of anticipated factors – predominantly the introduction of the Public Law Outline (PLO) – led to this downturn. For a more detailed consideration of these various factors, please see our response to Lord Laming's questions dated Dec 2008, now on the Cafcass website www.cafcass.gov.uk. In this submission we set out our position, basing this on our experiences of similar previous trends, our own data, our involvement in the development and implementation of the PLO and discussions with local authorities and their lawyers.

Impact of the PLO

A complication, in trying to understand whether the increase in fees had acted as a disincentive to initiate proceedings, is that the Public Law Outline (PLO) came into operation on the same day. Launching major policies simultaneously proved problematic in public relation terms, and influenced the direction of debate unhelpfully. The PLO introduced a pre proceedings gate-keeping regime to ensure local authorities cases are better assessed, that

children and families are offered services to reduce the need for proceedings wherever appropriate and safe and where proceedings are then required, cases are better prepared prior to an application being made. It was expected that the need to implement a new system would reduce the number of applications in the short term and indeed might lead to longer-term reductions by improving access to preventative services in those authorities who had previously had unexplained high application rates when compared with similar authorities. A similar trend – of a short-term downturn in applications – was observed following the introduction of the Children Act 1989 in October 1991 and of the Protocol for Judicial Case Management in Public Law in late 2003. This was likely to combine with changes to local authority practice as a result of the PLO in diverting families from the court process while providing varying levels of support and monitoring, resulting in fewer applications.

We note that the number of applications, compared with April-June 2008, rose during the period July to October 2008. Cafcass received an average of 486 new section 31 applications per month during this four-month period. Compared however with the previous year this represented a 9% decrease. It was however, a substantial increase on the period April to June 2008 and suggests that the drop in care applications was indeed transitory and, in the main, limited to the April-June 2008 period.

The 'Baby Peter effect'

The upward trend, which had begun to emerge in the July to October period continued in November 2008 with a 9.7% increase. This accelerated dramatically in December 2008 with a 70.5% increase, the highest care demand ever recorded in Cafcass. This was, we believe, substantially attributable to the 'Baby Peter effect'. Cafcass is currently undertaking research into those cases initiated by Local Authority application in the period 9-30 November 2008, in an attempt to understand more about the nature of those cases. This research should report in mid-autumn this year, too late for your current review.

Applications from local authorities have continued to rise very considerably and steeply in each month so far in 2009, including June. The cumulative totals are large and the family justice system is struggling to meet the demand. In relation to fees, this means some local authorities are spending much more on this – although applications from others are still down, meaning the precise causes are difficult to separate out.

[The CAFCASS submission includes at this point a graph of the data shown in Figure 6.3 of this report.]

Further analysis of factors

For many years, we have seen that the numbers of applications rise and fall, sometimes dramatically, but always within the context of a fairly stable underlying long-term set of trends. Establishing precisely why a particular rise or fall happens is not an easy task but Cafcass does not believe the introduction of increased fees has been a major factor. We believe the process of familiarisation with the PLO and more latterly the impact of publicity surrounding the Baby Peter case, have been more influential. Moreover:

- The fees represent a very small cost relative to the costs associated with social work assessments, preparation of documentation for court, legal fees etc.
- Our discussions with Directors of Children's Services and local authority lawyers tell us that they remain adamant that the increased costs have not prevented their initiation of proceedings.
- The downturn in applications may in part be a reflection of the use of positive practices within local authorities e.g. the use of s20 accommodation, safe written agreements, family group conferences, the implementation of the 'Letter Before Proceedings' (as set out in the revised Children Act Volume 1 'Court Orders' guidance) etc.
- The rate of applications is very variable when assessed at the level of individual local authorities. This suggests that local factors are in operation rather than any national driver such as the fees increase.
- Information from social workers and Independent Reviewing Officers suggests that a far more important area, for exploring the impact of cost considerations on children's well-being, relates to the selection of placements for looked after children. This is not part of your direct remit but is one in which there are serious concerns raised in some cases.

The Care Proceedings Programme (incorporating the PLO) Implementation Steering Group commissioned research on the impact of the PLO with provisional results expected in April 2009. This research is now available for you to consider as part of your review.

Please do contact Cafcass again if we can provide any further information

Yours sincerely

Elizabeth Hall,
Cafcass Head of Safeguarding

8 July 2008

(v) Family Law Bar Association

1. This document should be read together with the FLBA's response to the Ministry of Justice's consultation process on the fee proposals in late 2007. The FLBA opposed the introduction of increased fees. The points made there by the FLBA will not all be repeated here.

2. The FLBA remain opposed to increased fees.

Terms of Reference

3. The first preliminary observation the FLBA make is in relation to the terms of reference. This Review arises from Recommendation 58 of Lord Laming's Review dated 12.3.09 which stated: "The Ministry of Justice should appoint an independent person to undertake a review of the impact of court fees in the coming months. In the absence of incontrovertible evidence that the fees had not acted as a deterrent, they should then be abolished from 2010/11 onwards."

4. On the 12 March 2009 the Government - through the Minister Mr Ed Balls - stated: "It is our first duty in government and as a society to do all we can to keep our children safe. And it is our responsibility to act decisively – as we have done in recent months, as we are doing today in Doncaster, and as we will do as we implement all of Lord Laming's recommendations."

5. However the Ministry of Justice's terms of reference for this Review state that the Review is to deliver: "A conclusion as to whether or not there is clear evidence that fees are a deterrent to a local authority commencing care proceedings."

6. These terms of reference are significantly different to Lord Laming's recommendation. Whereas he recommended that the fees should be abolished unless there was incontrovertible evidence that they had not acted as a deterrent i.e. working on the presumption that they had, the Ministry of Justice asks for a conclusion as to whether or not there is clear evidence that the fees act as a deterrent. This significant change to the terms of reference a) removes Lord Laming's presumption and b) replaces his 'incontrovertible evidence' with a lower standard of just 'clear' evidence.

7. The FLBA's position is that the terms of reference for this Review should not have been changed and that Lord Laming's 'presumption' that the increased fees were a deterrent in the absence of incontrovertible evidence was deliberate and soundly based.

8. In light of Lord Laming's clear recommendation and the Minister's statement to implement all of his recommendations, the FLBA therefore consider that the fees should be abolished unless there is incontrovertible evidence that the fees were not acting as a deterrent.

Need for presumption

9. The second preliminary observation the FLBA make is that there are sound bases for Lord Laming's presumption; namely:

a. local authorities are unlikely formally to admit or acknowledge that increased fees have acted as a deterrent;

b. the difficulty in obtaining hard and reliable evidence as to the effect of the increased fees;

c. external factors such as the introduction of the Public Law Outline and the case of Baby P mask or skew the statistics.

10. Local authority social workers and solicitors are unlikely to admit or acknowledge that the increased fees have acted as a deterrent to the issuing of care proceedings because to do so would be tantamount to admitting a breach of their statutory duties. This is probably why Lord Laming recommended that the Review should assume that the increase had acted as a deterrent because it would be difficult to obtain reliable evidence to suggest it had not and because it was a matter of common sense that such a huge increase would be a deterrent where there were general funding pressures. This reluctance by authorities to acknowledge that the increase has acted a deterrent is likely to be even more pronounced in light of the Baby P case.

11. The Baby P case has led to a significant increase in the number of proceedings issued. Prior to it proceedings were down. Any Review will therefore have to treat the statistics with a great deal of caution. This is probably another reason why Lord Laming recommended that the Review should assume that the increase had acted as a deterrent because it would be difficult to obtain reliable evidence to suggest it had not.

12. The third preliminary observation to make is that in the main family barristers only have direct experiences of cases that come to court and so are less able to comment on those which do not or should have.

***

13. This Review asks whether the FLBA consider that there is any evidence that the current fee regime has led to:

a. Serious budgetary pressures within local authorities;

b. Child care proceedings being deferred longer than desirable; and

c. Courses of action other than care proceedings being encouraged e.g. private law proceedings under section 8 or voluntary proceedings under section 20.

Serious budgetary pressures

14. The FLBA consider that the current fee regime is bound to have led to serious budgetary pressure within local authorities. Firstly, the fee regime was devised and introduced before the current economic downturn and therefore did not take into account that serious adverse effects of that on local authority finances. Secondly, the system of financing local authorities to pay for the increased fees is based on an average of the cost of previous years' applications for care proceedings. It did not take into account an extraordinary event like Baby P which has led to a significant increase in the number of proceedings issued. One London local authority reports to us that whereas it issued an average of 20 sets of care proceedings before Baby P, this year it is likely to issue 34 and the increased cost of that has not been budgeted for by the central government grant which was based on the cost of previous averages. These two facts – economic downturn and the Baby P effect - are bound to have caused local authorities serious budgetary pressures.

15. As previously stated in our original response it is also a real concern that because the issue fee element of the local authority's budget is not 'ring fenced' it can be spent on other things. By way of example, four issue fees would pay for a family support worker or a contact supervisor; eight would pay for an inner city social worker. In the current economic crisis with funding generally being cut there must be a real pressure on those controlling local authority budgets to spend the money on other things.

Proceedings being deferred

16. Informally social workers and local authority solicitors have told FLBA barristers that the costs of issuing proceedings and the increased burdens of the Public Law Outline influenced them against issuing proceedings. Again they are unlikely to admit this formally.

17. The significant increase in the number of care proceedings issued after the Baby P case suggests that there were cases which should or could have been issued earlier.

Other courses of action

18. Local authorities seem far more willing to facilitate placements with members of the extended family under either section 8 orders or special guardianship orders. The bar to approving such arrangements seems to have lowered. In one local authority in particular, members report that the number of private law cases where the local authority were heavily involved but resisting any statutory involvement has increased significantly.

19. In one case reported by our membership where there had already been significant delay, the local authority refused to issue care proceedings where the threshold had been met on the grounds that an aunt with whom the child had been placed would be issuing special guardianship. Whereas previously the local authority would have issued care proceedings so as to have taken charge of the proceedings and 'held the ring' pending the resolution of the family placement, the cost of issuing probably deterred them.

20. In another a father applied for contact in private law proceedings. The mother agreed to the children being accommodated due to her issues with alcohol. The children were placed with a maternal aunt. The local authority assessed the mother and supervised the children's contact. There were no care proceedings and the private law proceedings were extremely cumbersome as the aunt had not yet become a party and the authority were not legally represented.

21. In a third the father was told he could not object to a section 20 agreement when he clearly could and where he had suitable accommodation and there was no or little problem with his ability to care for the child. The local authority placed the child with maternal grandparents whilst subjecting the father to 'assessments' which were negative. The father could find no solicitor in Hertfordshire to accept a publicly funded client and, after a number of months, he ended with solicitors in Camden. By then, the baby had been with the grandparents for 6 months. The father's solicitors told the local authority that it was and had for some time been an unlawful accommodation and requested a staged return. Suddenly the father's contact was stopped and the grandparents issued a special guardianship application funded by the local authority, a much cheaper course than issuing care proceedings. In the subsequent court hearings, the authority were criticised heavily by the judge and the father was positively assessed and is likely to recover his daughter.

Other concerns

22. FLBA members have also reported that local authorities are more reluctant than previously to accept designation pursuant to section 31(8) of the Children Act 1989 directly because of the continuing costs of increased fees during proceedings and this had led to delay.

23. One member has reported a case where the local authority issued section 31 proceedings but although it was clear to all including the court that not even the interim section 38 test was established; the bench was reluctant to dismiss the application because they did not want the local authority to lose the issue fee! This is an extreme example of how money is driving the planning for children.

Conclusion

24. The FLBA's view is that the increased fees have acted as a deterrent and should be abolished.

25. It should be remembered that where care proceedings are not issued children have no separate legal representation and no guardian. Wrong decisions can be made with no independent consideration of what is best for the child.

26. The FLBA's view is that Lord Laming's formula that "in the absence of incontrovertible evidence that the fees had not acted as a deterrent, they should then be abolished" should be applied to this Review.

Alex Verdan QC
Martha Cover

6 July 2009

(vi) Justices' Clerks Society

The Society is grateful for the opportunity to comment on the above. It is asked for observations about the current fee regime and, in particular, whether there is any evidence that the current fee regime has led to

1. Serious budgetary pressures within local authorities;
2. Child Care Proceedings delayed longer than desirable;
3. Courses of action other than care proceedings being encouraged – e.g., private law proceedings under Section 8 or voluntary arrangements under Section 20.

Views were sought from a network of Society members who take a lead for family work within their areas.

Some reported a significant increase in applications for care proceedings.

Others also noted an increase in applications for special guardianship orders and residence orders from wider family members where there had previously been local authority involvement and which had the support of that authority. Indeed the Volume 1 Guidance states that:

> The Local Authority should ensure…that it considers the capacity and willingness of the wider family to provide care for the child on a short or longer term basis. The Local Authority should also bear in mind that the court has a duty to make no order unless it considers that doing so would be better for the child. It is possible that proceedings may be avoided altogether or that a different application, such as for a special guardianship or residence order, made by a relative, made by a relative, may be more appropriate than a care order application by the Local Authority.

Social work professionals may be assisted by further guidance as to when an order should be sought, notwithstanding the fact that wider family members are willing to care for a child.

In conclusion, the Society does not have any evidence that the current fee regime has led to serious budgetary pressures, to proceedings being delayed or the encouragement of courses of action other than care proceedings.

August 2009

(vii) The Law Society

I write in response to your letter dated 8 June 2009 asking for a written submission in response to your review of court fees in child care proceedings. We were grateful to you for meeting the Chairs of the Family Law Committee and Children's Law Sub-Committee on 4 June 2009 at the Law Society.

While we have no direct knowledge of a Local Authority stating they would not issue proceedings based on fee issues, we believe there is clear evidence and noticeable trends listed below, which may be a result of the current fee regime being implemented and which we consider to be damaging to the interests of children:

- Potential conflicts between Local Authorities as to the issuing of proceedings and fees as a result of boundary disputes between them. These cause delay in the issue of proceedings.
- A significant increase in residence orders and special guardianship applications. Under both these orders the Local Authority is under no duty to monitor the placement of the child.
- An increase in use of section 37 orders made by Courts in private law proceedings inferring that Local Authorities are waiting for the Courts to direct them to investigate a child's circumstances and consider applying for a care or supervision order before action is taken.
- An increase in Placement Order applications (costing approximately £400) as opposed to applying for care orders (£2,225). This suggests that Local Authorities are avoiding making care order applications at the first instance and are considering alternate routes for dealing with the welfare of the child.
- Instances of, where a baby is due to be born, the Local Authority waiting for the birth of that child, so that proceedings in respect of the new born are consolidated in with those of other siblings to save on court fees. This could clearly cause significant danger and delay to children who may need to be taken into care.

All of these are potentially detrimental to the welfare of children. It is obviously not possible to prove that they are brought with the intention of avoiding fees, but the cumulative effect and the timing of the increase does suggest that there is a link.

I hope you take these issues into account when reaching your conclusions.

Yours sincerely

Mark Stobbs
Director, Legal Policy

20 July 2009

(viii) The Magistrates' Association

The Magistrates' Association is concerned about the possible impact of the large rise in fees for public law applications imposed last year. In particular we are worried that some local authorities in some cases might delay making applications or seek other courses of action, especially where cases are on the border line.

Reports from members have indicated that there appeared to be an increase in the number of instances where children were accommodated voluntarily under s20 of the Children Act pending decisions on whether local authorities were going to apply for care orders. In some cases this is the most appropriate course of action but we could not find a reason for the apparent increase.

However, it became difficult to assess what effect the increase in application fees had on the numbers of applications because of other developments, in particular, the introduction of the Public Law Outline. The number of public law applications appeared to fall in the run up to and following introduction of the PLO. But as a result of the Baby P case in late 2008 there was a surge of new applications. This case appeared to have changed the approach of local authorities to filing applications in court. It remains to be seen at what level applications will settle down.

Initial information from local authorities was that they were not aware of any additional funding for these higher fees being allocated as part of their budget settlement from central government, though government said that extra money for these fees had been provided. In addition we heard of some instances where local authorities were not paying the fees to courts, but subsequently this seems to have been largely resolved.

These changes of circumstance therefore make it difficult to be sure what impact the higher fees have had but it does not change our underlying concerns about the possible impact of higher fees on public law applications.

We have received the following comments from an assistant justices' clerk:

> *"Higher fees become payable at the IRH and Final Hearing Stage. Much administrative time is spent in chasing these fees by an office already short staffed and overworked and so time is diverted from normal court work. I am concerned that additional fees become payable as a case progresses and feel this penalises Local Authorities for a particularly complex case. The implication behind this must be that the LA is delaying the cases by failing to reach agreement at an early stage. This is a concern, because in my experience, especially under the PLO cases that reach Court are becoming more complex and take longer."*

July 2009

(ix) NSPCC

In our meeting in May we agreed to undertake an exercise with our project staff to try to identify evidence to inform your review. I am attaching a note of the findings. The response was interesting, although low. It is attached here.

When we met, you said you had read the NSPCC response to Public Law Family Fees Consultation Paper (CP32/07). It stands.

In our meeting Andrew Flanagan and I made a number of points. We think three should be repeated here:

1. Our view is that consideration of the impact of rising court fees is best done in conjunction with the consideration of impact of the public law outline, cuts in local authority budgets, and intense public and media scrutiny of child abuse decisions. Even if rising court fees were irrelevant to local decision-making, and we do not think they are, the increased number of care proceedings in the last twelve months suggests that local decision-making is vulnerable to external pressures from the public and media. It needs review, and we hope your study will shed some light on what is happening more generally than on the matter of the impact of rising fees.

2. We commend the principled approach flagged by Judge Crichton in the Law Society Gazette (17.4.08): 'Why on earth would we say that a fee should be paid for protecting vulnerable children any more than we would say a fee should be paid for bringing a criminal to justice? It is nonsense.'

3. Lord Laming in his progress report sets the bar for scrapping court fees for care proceedings very low. In the interests of the most vulnerable children, we hope you recommend scrapping them.

If you would like any further information please do let me know.

Yours

Phillip Noyes
Director of Public Policy

12 July 2009

NSPCC Internal Survey on the impact of court fees on care proceedings June 2009

Introduction

In 2008 we conducted an internal survey of NSPCC Assistant Directors and Children's Services Managers working in our Services for Children and Young People (SCYP). We asked staff for their views on whether the increase in court fees had lead to a decrease in the number of care proceedings. It was felt that, at that point, it was too early to tell and that the decrease may have been due to changes to the Public Law Outline. It was agreed to revisit the issue in a year's time.

In June 2009, following the Baby Peter case; the Laming review of Child Protection and the subsequent government action plan, which includes a Ministry of Justice review of court fees, we again contacted our staff to gauge their views.

We asked our assistant directors and children's services managers and received 3 responses where they felt they were able to comment. The questions asked, and the responses received, can be found below:

Responses

1) In your experience, to what extent, if at all, do budgetary issues within local authorities play a part in the decision taking leading to child care proceedings?

One respondent stated *"for a period of time at least there was a very substantial falling off in numbers of applications for Care Orders. This trend may have been counter-acted by an increase in applications as a result of local authorities assuming a defensive strategy in the wake of the baby P case and concerns about children being left in dangerous or vulnerable circumstances as a result of delay or inaction in obtaining protective orders. We assume that the increase in fees has had a deleterious impact and that this is likely to increase when (as appears inevitable) budget cuts are brought in for statutory agencies in the next 2-3 years. This is likely to mean that more children will be at risk."*

Another said (based on discussion with colleagues at LSCBs) that *"the problem with fees was not the sum of money itself (although it did really exercise some LAs initially) but that it acted as a deterrent to issuing proceedings - conveying a sense that the fee would reduce the overall number as they'd been issued too readily/flippantly in the past (which I don't think is the case at all). Indirectly there is a sense that it raised thresholds for a while (until Baby Peter was publicised), along with the public law outline requiring more assessment work to have been undertaken and written up prior to the issue of proceedings."*

2) Do you have any evidence that:
   (a) budgets have been more of an issue in the last 12 months and
   (b) whether the increase in court fees has contributed to this?

"We have not collected specific information but based on what social work and other professionals seeking to refer children here tell us budgets are shrinking and only the most serious cases will met the new criteria so that those who would benefit from earlier intervention are not receiving it."

"The discussions held at the LSCB would suggest that this is the case."

3) Where budgetary pressures have played a part in a case with which you are familiar, what was the effect in terms of the option taken to address the risk to the child?

"We have had cases where a referral for assessment reports that would have been used to support an application for a care order were not funded because of the costs were higher that the court was willing to authorise. This left children in a risky setting, they continued to harm one another and now they are having to take action including a second referral here at additional financial let alone emotional and physical cost."

4) Are you aware of childcare lawyers withdrawing from this type of work and if so is it because of the change in legal aid funding?

"Yes. At least one eminent firm of specialist child lawyers has closed down citing the reduction in court fees as the reason."

(x) Ofsted

I write in response to your consultation on the impact of court fees. This response builds on the useful meeting that was held between you and my colleagues on 15 May 2009.

As was indicated at that time, although Ofsted is aware that there is a perception that the recent fee increase has caused some difficulties to local councils, we do not agree that a link between court fees and decisions to commence court proceedings is proven. My colleagues offered as evidence of this the sharp rise in referrals to the courts since the events in Haringey in November 2008. Furthermore, through our inspections, we have seen no clear evidence that court fees act as a deterrent for local authorities in instigating legal proceedings to safeguard children.

From the evident increase in referrals since that time, it is clear that councils will refer to the courts cases where they believe that serious risks to the safety of children warrant this action. Ofsted is of the view that there are other more serious factors which may cause delay. These include delays in care planning and local authority decision making, the impact of shortages in placements available to meet the diverse needs of looked after children and delays in the court process including allocation of guardians.

Ofsted also offered to provide you with any additional information that was available from our Joint Area Reviews (JARs), which might inform your study. I attach a grid[28] showing where delays have been mentioned in a number of JAR reports as factors affecting the performance of care arrangements for looked after children.

Yours sincerely

Roger Shippam, HMI
Director, Children

4 August 2009

[28] Omitted from this report.

(xi) Solicitors in Local Government Child Care Lawyers Group

1. We opposed the introduction of the fees for public law Children Act proceedings in 2008. Two of the Group members come from local authorities which took part in the judicial review of the decision to introduce the fees. We supported the judicial review and the representations made within those proceedings by interested bodies, most notably the NSPCC and the Family Law Bar Association (FLBA).

2. The main reasons for our opposition were :-

- The sheer scale of the increases. The fees in a case of a care order application rose from £150 to anything between £4825 and £5375
- The fees were promoted as a deterrent to the inappropriate commencement of proceedings when there was no evidence that care proceedings were being commenced inappropriately
- The new fees regime produced some iniquities, which are detailed below.

3. In re-stating our opposition, I would suggest that it is very unlikely that any local authority could point to a case and state that it was not the subject of care proceedings solely as a result of the fees. There are also other competing factors which will have had a bearing on any decision to institute proceedings. In the first year of operation of the fees, the introduction of the Public Law Outline (PLO) was a significant factor. Towards the end of 2008, the death of Baby P also had a significant impact upon decisions to commence proceedings. However, the existence of such high fees must permeate thinking when decisions are made and must therefore inevitably raise, at least the suspicion, that such financial considerations have played a part in decision making.

4. Care proceedings involve some of society's most vulnerable children and are often complex and lengthy. Unnecessary obstacles should not be put in the way of commencing them. The high level of these fees could deter. The Law Society noted that in 2004, the Lord Chancellor considered that the issues at stake in Children Act applications warranted an element of public subsidy. One local authority lawyer has stated that bringing care proceedings is a public duty analogous with bringing prosecutions where no fees are levied. We do not therefore support the principle of full cost recovery in these cases and consider that it is flawed in its application to care cases.

5. The fees were presented as a means of removing incentives to pursue court proceedings. There was no evidence base at the time that inappropriate use of the courts was a real issue. In fact, local authorities were more often criticised for not having gone to court earlier. Recent research from Professor Judith Masson of the University of Bristol indicates that there is no evidence that local authorities have brought care proceedings without good reason.[29]

6. There are risks that local authorities are perceived to be taking decisions for financial reasons, rather than 'welfare ones'.

[29] Masson et al ((2008) *Care Profiling Study*, Ministry of Justice Research Series 4/08.

7. There are risks (or at the very least, suspicions) that compromises are reached that are influenced more by financial considerations than the interests of children. These could occur either before the commencement of proceedings or during the course of a case.

8. It may be that section 20 of the 1989 Act or an emergency protection order are used in the hope that a 'holding position' can be achieved without the need to make a care application. I know of one case where a 15 year old girl was accommodated under section 20 around two weeks prior to her sixteenth birthday. It was hoped that her parents would not insist upon her return until she was 16 by which time the girl herself could ask to be accommodated, parental consent would no longer be required and care proceedings could be avoided. The scrutiny of the case by a court might well have been beneficial, but it did not happen.

9. Historically, it appears that greater drift occurs in the cases of children accommodated under section 20. If the existence of the fees leads to more children being so accommodated, then that risk of drift and delay will be exacerbated with potentially poorer outcomes for the children concerned.

10. Kinship placements are often considered via private law. This does not generally involve such an in depth and holistic inquiry into a child's circumstances e.g there is usually no solicitor for the child. But it may prove less expensive for local authorities to fund a relative's legal fees than issuing care proceedings. The same is true of applications for special guardianship orders (SGO's). A local authority child care lawyer from Thurrock has expressed the view that, where it is expected that the outcome of care proceedings may be a family placement, it is certainly more cost effective to fund the special guardianship application or other private law remedies instead of issuing care proceedings. However, there are concerns that the assessment process for special guardianship or residence is not as thorough as for adoption or fostering. Also the courts are not allowing adequate time for placements to be properly tested before granting SGO's. The SGO application is pursued at too early a stage within care proceedings at the instigation of all parties. I attach for your consideration the fuller view of the Thurrock lawyer on this subject.

11. It is also possible that the fees could influence the commencement of proceedings in order to 'give parents another chance'. This could unnecessarily perpetuate neglect.

12. Similarly a desire to avoid incurring the fees could act as an incentive to local authorities delaying the commencement of proceedings whilst casting around for alternative options.

13. If it is known that a baby is to be born to parents of children who are to be made the subjects of care proceedings, there may be a temptation for local authorities to delay issue of proceedings until the baby is born thus avoiding two issue fees. This could lead to delay.

14. Where two local authorities are in dispute over who should issue (the 'designated local authority' argument), the existence of the fees may result in increased wrangling and less inclination to resolve the issue. Again, delay could result.

15. In relation to relinquished babies, a local authority may decide just to issue a placement application thus avoiding the issue fee for care proceedings (£400 v £4825). This can cause delay if, further down the line, the parents withdraw their consent and care proceedings have to be issued.

16. The structure of the fees was designed to encourage some cases to be 'fast tracked' and a rebate on the initial issue fee could then be obtained. In my own authority, we have not had one such case and I know of no others from my contacts with other local authority lawyers. A number of authorities e.g Cheshire West and Chester, Essex and Leicester, report that once in the court arena, there is no indication of any reduction in the length of time it takes to conclude a case.

17. The fees regime has thrown up a number of anomalies. Here are two examples :-

- If a baby is born during the course of proceedings and a local authority decides to issue, it has to pay a further fee. In most cases, the new proceedings will be consolidated with the existing proceedings. Why should the local authority pay two fees when there will be little or no extra cost to the court?

- Where the LA decides that adoption should be the plan for a child, it will be required to issue a placement application. This has an additional fee of £400 yet it will usually be heard at the same time as the care application. Why therefore the 'extra' fee?

18. The local authority funds spent on fees could be better spent on preventative work.

19. Like many others, my local authority (Luton Borough Council) did not, overall, receive extra funds and the cost of the fees was only covered by a last minute growth bid to the authority's budget. Birmingham City Council have also reported that no additional funds were received to cover the fees, they have experienced a significant increase in the numbers of proceedings and the funds to pay from them have had to come directly from social services budgets.

20. There have also been some additional administrative costs for local authorities e.g for cheque requisitions. Please note the experience of Thurrock on this point (see attached email). The promised court accounts (see the original fees consultation paper) have not materialised and it appears that the fees have been introduced without any administrative structure in place within Her Majesty's Court Service.

21. It is considered that the Laming test (the need for 'incontrovertible evidence that the fees were not acting as a deterrent' – see Laming report paras 8.9 – 8.11) is not satisfied. Whilst the suspicion exists that financial considerations are a factor in decision making, I would submit that it cannot be said that fees are not a relevant consideration in the equation. There is only one way to remove that suspicion and that is for these fees to be abolished.

Graham Cole
Chair
SLG Child Care Lawyers Group

4 August 2009

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