

Family Justice Review

Interim Report

March 2011

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i Foreword by David Norgrove, Chair of the Family Justice Review

Children are the priority of the family justice system. Children come into contact with the system mostly because of problems with adults, of fractured relationships, misery, anger, violence, abuse of drugs and alcohol, of being abused themselves or abusing others, or sometimes all of those things.

The daily work of those employed in family justice, trying to do the best for both children and adults, is difficult and stressful. I want first, on behalf of the panel, to pay tribute to their dedication. We have seen it in all the many people we have met in the past year. We also want to give warm thanks to all those who have written to us, met us to give evidence, and shown us what they do during our visits in the UK and overseas.

The legal framework of family justice in England and Wales is strong, thanks to the vision of those who constructed the Children Act 1989. Its principles are right, in particular the starting point that the welfare of children must be paramount. And we can be proud of much of what we have done in the past twenty years in terms of processes, institutions and people.

But family justice is now under huge strain. Cases take far too long and delays are likely to rise much more. Children can wait well over a year for their futures to be settled. This is shocking. And too many private law disputes end up in court.

Rising caseloads are only one cause of the problems. The system does not work coherently. Organisations plan together only spasmodically. There is distrust, with now a vicious circle of layers of checking and scrutiny that lead to work being done less well in the first place. There are few means of mutual learning and feedback. The lack of IT and management information is astonishing, with the result – among other things – that little is known about performance and what things cost. The system, in short, is not a system.

Our recommendations aim to tackle these issues, to bring greater coherence through organisational change and better management, making the system more able to cope with current and future pressures, to reduce duplication of scrutiny to the appropriate level, and to divert more issues away from court. We are aware that we will not satisfy everyone. Parents cannot always get what they want if the interests of children are to come first. But we are confident that the changes we propose would deliver substantial improvement.

We intend now to consult about our proposals, and will publish our final report in the autumn.

I want finally to thank my fellow members of the panel for their great commitment to our report alongside their other busy working lives, and Jodie Smith and the secretariat for their contribution, which has been both creative and thorough.

ii Family Justice Review – Executive Summary

The family justice system

1. Every year 500,000 children and adults are involved in the family justice system. They turn to it at times of great stress and conflict. The issues faced by the system are hugely difficult, emotional and important. It deals with the failure of families, of parenting and of relationships. It cannot heal those failures. But it must ensure it promotes the most positive or the least detrimental outcomes possible for all the children and families who need to use it, because the repercussions can have wide-ranging and continuing effects not just for them, but for society more generally.
2. The legal framework, contained largely in the Children Act 1989, sets out how public and private law cases should be resolved. The core principle is that the welfare of the child should be the paramount consideration in making decisions. The evidence we have received has overwhelmingly endorsed the continuing strength of the legal framework, and we share that view.
3. Public law decisions – often to remove a child or children from the care of their parents and place them in the care of local authorities – are rightly acknowledged as some of the toughest that can be made in any form of court, with heart-wrenching consequences for the children and the parents. Disputes within families – known as private law cases – are often driven by resentment and bitterness, with parties not speaking to each other and refusing to co-operate. In a significant number of these cases, serious child welfare and safeguarding concerns are raised, to a level that may well trigger investigation by local authorities. Without scrutiny, it is possible that these concerns may never have come to light.
4. In all cases, the rights of children need to be considered and upheld. These are defined and made explicit by the United Nations Convention on the Rights of the Child. Article 12 of the Convention makes it clear that children have the right to have their voices heard in decisions that affect their lives.
5. An effective family justice system is needed to support the making of these complex and important decisions. It must be one that:
 - provides children, as well as adults, with an opportunity to have their voices heard in the decisions that will be made;
 - provides proper safeguards to ensure vulnerable children and families are protected;
 - enables and encourages out of court resolution, when this is appropriate; and
 - ensures there is proportionate and skilfully managed court involvement.
6. We intend now to consult widely about the recommendations in this report ahead of our final report in the autumn. We are grateful for the support and advice we have received and continue to receive.

A system under strain

7. We have been impressed by the dedication and capability of those who work in the family justice system. Their work is hugely demanding and often highly stressful. Good working relationships in many areas have led to the development of innovative practice designed to improve the way the system operates. There is a strong legislative framework.
8. But, despite that dedication and capability, the system is not working. Cases now take a length of time that is little short of scandalous, some cases should not be in court at all and the costs are huge.
9. Delay really matters. All our understanding of child development shows the critical importance of a stable environment and of children's needs to develop firm attachments to caring adults. Yet our court processes lead to children living with uncertainty for months and years, with foster parents, in children's homes, or with one parent in unresolved conflict with the other. A baby can spend their first year or much longer living with foster parents, being shipped around town for contact with their parent or parents, while courts resolve their future. This represents a shocking failure, with damaging consequences for children and for society that will last for decades.
10. The number of children involved is rising rapidly. In public law, some 20,000 children were involved in applications in 2006 and almost 26,000 in 2009. In 1989 the average case was expected to take 12 weeks. The average case took 53 weeks in 2010 and, on current trends, the case length time is likely to rise significantly.¹ Increasing delays are not solely a matter of rising caseloads. The number of hearings is increasing, caseloads in Cafcass have increased to the point where it is hard for them to carry out work on all cases, and ever more expert assessments are being ordered.
11. In private law, many fail to resolve conflict independently and turn to court for judicial determination. Unfortunately, this often starts off a lengthy adversarial process with conflict potentially becoming more entrenched. Evidence shows such combative processes harm the children involved and may deepen the rifts that already exist between parents. The number of applications to court has increased steadily in recent years. In 2006 there were over 111,000 children involved in applications for private law orders. In 2009 this had increased to over 137,000. These figures point to an increasing reliance on court processes in the resolution of disputes between couples.
12. The family justice system is also expensive, both for individuals and the state. We have no accurate figures for this, as for so much else about family justice, but we have estimated the cost to government alone (excluding the no doubt significant private costs) as £1.5 billion in 2009-10, of which roughly £0.95 billion

¹ These data come from an internal case management system and do not form part of the national statistics produced by the Ministry of Justice, which can be found here: www.justice.gov.uk/publications/statistics.htm. As such this data set is not subject to the same levels of quality assurance.

is for public law and £0.55 billion for private. To put this into perspective, the total annual local authority spend on looked after children (including spend on children in need in Wales) in England and Wales is around £3.4 billion.

13. There is a wide range of issues to address.
 - Children and families do not understand what is happening to them. They can also feel that they are not listened to.
 - There are complicated and overlapping organisational structures, with a lack of clarity over who is responsible for what. There is no clear sense of leadership or accountability for issues resolution and improving performance.
 - Increasing pressure on processes and the people who work in the system, driven by increasing caseloads, has inflamed tensions and a lack of trust between individuals and organisations.
 - There is a lack of shared objectives and control. Decisions are taken in isolation, with insufficient regard to the impact they might have on others.
 - Morale amongst the workforce is often low. There are limited opportunities to engage in mutual learning, development and feedback. Much of the work is demanding and requires high levels of skill and commitment, but the status of some parts of the workforce may be an impediment to recruitment and retention.
 - There is an almost unbelievable lack of management information at a system-wide level, with little data on performance, flows, costs or efficiency available to support the operation of the system.
14. These are the symptoms of a situation that simply cannot be allowed to continue.
15. There have been at least seven reviews of family justice since 1989, with countless other piecemeal changes. Improvements have been made, yet we have identified much the same problems as those earlier reviews. The chief explanation, in our view, is that family justice does not operate as a coherent, managed system. In fact, in many ways, it is not a system at all.
16. The number of organisations and individuals involved in family justice is large. This makes the task more difficult but the need for effective and coherent working all the greater.
17. More money would not be the answer, even if it were available. Major reform is needed to ensure better outcomes, and make better use of the available resources. In this report we make recommendations for improvements to both public and private law processes. But these will not deliver or be sustained unless, crucially, the family justice system first of all becomes a coherent system.

A Family Justice Service

18. System management can seem remote from the very human issues of family justice but the development of a coherent, clearly articulated system, with a clear system owner, is fundamental.
19. There should be a **Family Justice Service**. The judiciary and the Service together will need to ensure that:
 - the interests of children and young people are at its heart and that it provides them, as well as adults, with an opportunity to have their voices heard in decision-making;
 - children and families understand what their options are, who is involved and what is happening;
 - the service is appropriately transparent and assures public confidence;
 - proper safeguards are provided to protect vulnerable children and families;
 - out of court resolution is enabled and encouraged, where this is appropriate;
 - there is proportionate and skilfully managed court involvement; and
 - resources are effectively allocated and managed across the system.

The child's voice

20. At its heart, the Family Justice Service needs to ensure the interests of children and young people are a determining factor in its operation. Children and young people must be given age appropriate information which explains what is happening.
21. The Family Justice Service should also have a role in ensuring the voice of children and young people is heard. **Children and young people should as early as possible in a case be offered a menu of options, to lay out the ways in which they could – if they wish – make their views known.**

System structure

22. **The Ministry of Justice should sponsor the Family Justice Service.** There will need to be close links at both Ministerial and official level to the Department for Education and the Welsh Assembly Government to reflect their wider roles and shared accountabilities in relation to children.
23. Family justice has been treated as the poor relation of criminal justice and is combined with civil justice in management structures. To the users of the system and arguably to society more widely it is more important than either of these. We will examine the types of safeguards necessary to **ensure the interests of the child are given priority in guiding the work of the Service.**

Leadership and management

24. The Family Justice Service will require strong management and governance through a **Family Justice Board**. This should include a balanced group of qualified people with, among others:
- representation of the interests of children;
 - the President of the Family Division;
 - the interests of appropriate government departments, including the Welsh Assembly Government; and
 - local authorities.
25. **The Family Justice Service should be led by a Chief Executive** with the skills and stature to lead a complex change programme, and to command respect among Ministers, judges, lawyers, local authority managers and social workers, as well as the Service's own staff. He or she should also sit on the Board.
26. While recognising the valuable work that has been done, **the current structure of overlapping bodies should be simplified**. This will include subsuming the work of the Family Justice Council, Local Family Justice Councils, Family Court Business Committees, the National Performance Partnership, Local Performance Improvement Groups and the President's Combined Development Board. **Local Family Justice Boards should also be established**, with consistent terms of reference and membership, at a sensible area-based working level. **They should work closely with local authorities and Local Safeguarding Children Boards**.
27. The judiciary, including magistrates, will be key partners in the operation of the Family Justice Service. Within the judiciary there also needs to be **a clearer structure for management of the family judiciary, by the judiciary**. This is essential to support consistency, improved performance and culture change. There should be **a dedicated post – a Senior Family Presiding Judge – to report to the President of the Family Division on the effectiveness of family work amongst the judiciary. Family Division Liaison Judges should be renamed Family Presiding Judges, working alongside Presiding Judges, reporting to the President of the Family Division and the Senior Family Presiding Judge on performance issues in their circuit**.
28. Those judges with leadership responsibilities should have **clearer management responsibilities. There should be stronger job descriptions, detailing clear expectations of those with leadership roles in respect of management responsibilities and expectations about inter-agency working**. Information on key indicators such as case numbers per judge, court and area; case lengths; numbers of adjournments and numbers of experts should support this approach to judicial management.
29. We have been told consistently about the importance of **judicial continuity**. We agree. If, as a child, you face the prospect of being removed from your home or, as a parent, risk your children being taken away from you, how can it be right that each time you go to court you appear before a different judge? Continuity

will also increase speed and efficiency, both by making sure that the judge knows he or she will take the consequences of earlier case management decisions and by giving familiarity with the case and confidence to the families.

30. We have seen courts where judicial continuity is achieved. If it is possible to achieve this in some courts, we must ensure it is possible in them all. The High Court will be an exception because of the difficulty in ensuring judicial availability in different areas of the country, but this should be limited as far as possible. Where judicial continuity could not be achieved, we would question the capacity of that court to hear family cases. This recommendation applies also to legal advisers and benches of magistrates. The result may be that more public law cases move over time to professional judges. This would in our view be entirely appropriate – the need for judicial continuity outweighs other considerations.
31. Judicial continuity will also promote the much **firmer case management** that is needed. Robust case management, by the judiciary, should be supported with consistent case progression support. **Legislation should also be considered, providing for stronger case management in respect of the conduct of both public and private law proceedings.**

Role of the Family Justice Service

32. The Family Justice Service is not the same thing as a family court service. The Service needs to deliver a proportionate and appropriate response to issues resolution. Where people can resolve their disputes without involving the court, the Family Justice Service should provide them with the information and tools to enable them to do so. The Service should also facilitate court involvement, which must be proportionate to the needs of the children and families involved.
33. The Family Justice Service should, as part of its responsibility for performance and delivery, agree priorities in consultation with its partners. Specifically, the Service should:
 - manage the budget of the consolidated functions (see paragraph 34), including monitoring their use of resources during the year and over time;
 - provide court social work functions;
 - ensure the child's voice is adequately heard;
 - procure publicly funded mediation and court ordered contact services in private law cases;
 - co-ordinate the professional relationships and workforce development needs between the key stakeholders;
 - co-ordinate learning, feedback and research across the system;
 - ensure there is robust, accurate, adequately comprehensive and reliable management information; and
 - manage a coherent estates strategy, in conjunction with key stakeholders.

34. **Budgets, including family legal aid, should, over time, be consolidated into the Family Justice Service. Decisions on spending should be taken at the most local level possible.** In time, this may include pooling as part of Community Budgets.
35. **Criteria should be established for the allocation of resources to the family judiciary and budgets should be set in terms of money, not in sitting days.**
36. It is government policy that public bodies should charge each other for the services they provide. In our view these charges do not make sense in family justice and might influence behaviour in a way that is detrimental to children's interests. They also waste money. **Charges to local authorities for public law applications and to Cafcass for police checks should be removed.**
37. Where disputes require the involvement of the court, the safety and welfare of children in the case is paramount, and Cafcass and Cafcass Cymru play a central role. Local agreements with the courts have promoted closer working relationships. To cement these, to recognise Cafcass' role as adviser to the court, and to ensure children's interests are consistently prioritised, **court social work services should form part of the Family Justice Service, subsuming the role currently performed by Cafcass.**
38. In Wales, these functions are a devolved responsibility of Welsh Ministers, performed by Cafcass Cymru. As a result, court social work services would not be absorbed into the service in Wales. However, the user should still experience the same level of service. This will rely upon **Cafcass Cymru working closely with the Family Justice Service**, the relationship being underpinned by service level agreements.
39. **The Family Justice Service should also be responsible for the provision of publicly funded mediation and support for contact**, which is currently split between Departments.
40. The system will only deliver change if there is **a competent and capable workforce**. During the next stage of our work we shall look in more detail at:
- workforce recruitment and supply;
 - the core skills all those in the system should have when initially trained; and
 - continuing professional development.
41. Specialisation amongst the judiciary and magistrates also has a clear part to play. We have been told that the practicality and the strain of family work make it wrong to insist on complete specialism. Nevertheless it is our view that both **judges and magistrates should be enabled and encouraged to specialise in family matters**. Careful thought needs to be given to the recruitment criteria for family judges and magistrates. Building on this, **the requirement to hear other types of work before being allowed to sit on family matters should be abolished. A requirement for appointment to the family judiciary should, in future, include willingness to specialise.**

42. We commend the work being done, by Professor Eileen Munro's Review and the Social Work Reform Board, to improve the quality of social work across England, and similar efforts through the Social Work Task Group in Wales.
43. There needs to be greater mutual awareness and recognition of the skills required in all the disciplines involved. There should be **inter-disciplinary induction for all those working in the system and a clearer framework for inter-disciplinary working for all those engaged in it. The Family Justice Service should co-ordinate the professional relationships and workforce development needs between key stakeholders**. This would ensure that an appropriate inter-disciplinary focus was developed and maintained. The changes we propose in this report will also need significant culture change to be effective.
44. Everyone in the system, including the judiciary, should **share lessons with a view to collective improvement in performance**. The Service should ensure there is a **focus on continuous learning** amongst the professionals involved in family justice, and that practice is able to adapt to changes in social trends, messages from research, demands on its services and user expectations. There should be **consistent quality standards for practice that build on local knowledge, are evidence based and replicable**. Compliance with practice guidelines should be reviewed regularly. There also needs to be a more **co-ordinated system-wide approach to research and evaluation**.
45. Adequately comprehensive and reliable management information is critical. Currently almost nothing is confidently known about performance, cost or efficiency. Paper to and within the courts flows in a way that barely reflects even the invention of computers. Individual IT systems in different agencies have different definitions (what constitutes a case for example) and do not talk to each other. **An IT system, with the ability to support the management of cases**, should be developed. In the short term, the current unsatisfactory IT systems should be adapted in a cost effective manner to get as much information as possible out of them. Robust performance information will need to be fed into the national and local boards, and the judiciary.
46. The court structure should be simplified. **A single family court** should be created, with a single point of entry, in place of the current three tiers of court. All levels of family judiciary (including magistrates) would sit in the family court and work would be allocated depending upon case complexity.
47. The Family Division of the High Court has an increasing number of cases with an international dimension. These cases may arise from the international movement of family members who are the subject of, or parties to, proceedings about children or money; some, however, arise because one or both parties choose to litigate their matrimonial dispute in the High Court of England and Wales. The panel has heard, and accepts, that where proceedings have an international element there is a continuing need for any resulting order to be seen by foreign jurisdictions to come from 'The High Court' rather than the new 'Family Court'. This is particularly so in relation to cases of international child abduction.

48. The **provision of facilities should also be more flexible, and include the use of modern technology and settings outside of the court estate for family hearings.** This should ensure that where cases do require judicial involvement the experience will be as family friendly as possible. **Hearings should be organised in the most appropriate location, routine hearings should use telephone or video technology and hearings that do not need to take place in a court room should be held in rooms that are family friendly,** as far as possible and appropriate.
49. **The establishment of the Family Justice Service also offers the opportunity to review the court estate to create, as far as possible, dedicated family court buildings.** This is likely to result in fewer buildings in fewer locations in major cities (the needs of rural areas may be different) but the greater scale would give advantages in terms of judicial continuity and speed, outweighing the disadvantages of longer travel times.

Public law

What do public law cases involve?

50. Our attention here is focused on applications made to take a child into care. These account for the majority of public law work and involve perhaps the most challenging issues that any part of the justice system has to tackle.
51. By the time that children become the subject of a care order application, they may already have experienced some of the most unacceptable kinds of human behaviour. They may have been subject to violence or sexual abuse, or have lived with people who abuse alcohol, or drugs, or both. They may be suffering from neglect, and emotionally and physically distressed. Their parents may well have faced many of these same things themselves as children. They may now be dealing with severe mental health problems and have significant physical and emotional needs. Relationships within the family may be complex, with a number of different parental figures. Violence or the threat of violence may be part of their daily lives. The problems they face will often be exacerbated by poverty, poor education, poor health and disability.
52. This is a relatively small group of people.
- There were just over 10 million children in England and Wales in 2009.
 - Some 394,000 children were classified as 'in need' as at 31 March 2010.
 - Around 70,000 children were looked after as at 31 March 2010.
53. Local authorities are under duties to put in place, where appropriate, support to safeguard and promote the wellbeing of children. Where the child is at or is likely to be at risk of significant harm there is a clear requirement to act promptly to keep the child safe. When a child is entrusted to the care of the local authority they must provide high quality care. A complex and extensive framework of duties, regulations and indicators govern their actions. They are also subject to extensive internal and external scrutiny.

54. In certain circumstances the proposed actions of the local authority require court scrutiny and authorisation. Essentially these involve the entrusting of primary responsibility for the care of a child to someone other than their birth parents. This may be the local authority (through the means of residential or foster care), care by friends or family, or by way of adoption or special guardianship. The parents do not usually consent to the proposed course of action.
55. Where a child is found to be suffering or likely to suffer significant harm the court may entrust that child's care to another. The court has to be satisfied that this action is in the child's best interests. The court will not reach that decision until it has considered the local authority's care plan for the child.
56. One of the defining characteristics of the public care system in England and Wales (in contrast to most jurisdictions overseas) is the emphasis it places on securing permanence for the child in its legal status, including permanently severing the link between child and birth family through adoption in cases where there is no parental consent. This emphasis on permanence is intended to secure stability and security for children, which is beneficial to them over the longer term. This approach has far reaching consequences for our system: it is clearly right that the courts, in making a care order, should give close scrutiny to a decision that might separate a child from his or her parents permanently.
57. The Children Act 1989 establishes mechanisms to strike a balance between the family's autonomy and the state's role in protecting children. Wherever possible and appropriate, children should be brought up by their own families. Care proceedings are to be brought only when necessary.
58. Clearly it is right that we should try to maintain the integrity of a birth family wherever possible. However, we also know that this is not always possible or in the best interests of children. Local authority care can and does provide a vital safety net for vulnerable children.

The delivery of the public law system

59. The public law system is under severe strain, as noted earlier. The time taken on average to resolve a public law case is now over a year. This figure is likely to rise in the near future.
60. Our starting point is that delay harms children. Long proceedings mean children are likely to spend longer in temporary care, are more likely to suffer placement disruption, and may miss opportunities for permanency. The longer they spend in temporary care, particularly at a young age, the more difficult it becomes to secure them a permanent and stable home. Long proceedings may mean children are subject to unsatisfactory arrangements for contact with their families. They may also delay the implementation of therapeutic and other support intended to address the harm they have suffered.
61. Not all cases can be resolved quickly. Some do need a long time to resolve the issues to reach a just solution in the best interests of the child. But these should be the exception and deliberate, not the norm and happenstance.

62. Delay has no single cause. These are very difficult cases and the stakes are high: the choice may be to remove children from their families or leave them in a home that may be unsafe. All parties involved want to make the right decision and to be confident that this has been done fairly.
63. We now have a culture, created by pressures from parents combined with decisions from the Court of Appeal (and perhaps part of a national trend), where the need for additional assessments and the use of multiple experts is routinely accepted. The increasing numbers of these coupled with the time taken to secure them – partly from the nature of the assessments and partly from a shortage of qualified experts – contributes to delay.
64. Judges have a natural tendency to look for certainty and support in making these difficult and emotionally demanding judgments, perhaps through a human desire to have the decision made unavoidable. This has been exacerbated by lack of trust in the judgement of local authority social workers, driven by concerns over the poor presentation of some assessments coming from often under-pressure staff. This increases the tendency to commission more reports and delay decisions. There is a hope that the combination of time and more expert advice will reconcile parents to accept a decision or at least to go along with it.
65. Cases involve dealing with a complex and shifting picture, in highly conflicted and fraught circumstances. Successful resolution requires strong judicial case management. This has not yet been achieved across the piece.
66. One significant result has been the ever longer and more detailed scrutiny of care plans. This, along with the numerous additional assessments, substitutes itself for, or duplicates, work which should have or has been carried out by local authorities. The consequence is a vicious circle both of mistrust and, now, of some work not being done by local authorities before a case comes to court because they know the court will order the work to be repeated.
67. This occurs in an environment where both resources and relationships are under pressure. Factors such as shortage of court capacity, delays in appointing guardians and the need to meet the various demands of both local authority and court processes create inefficiency. This is further exacerbated by wider failings in the system noted elsewhere.
68. The framework of the Children Act is still highly respected, but there is widespread lack of confidence in the way public law proceedings work. In our view respect for the paramountcy of the welfare of the child is being compromised.

The way forward

69. There is, nevertheless, much to be proud of in our system.
 - The decisions to take children into care are not made lightly or arbitrarily. They are carefully considered and are subject to independent and rigorous scrutiny.

- The protection of parents' rights and interests is a clear priority. They have access to significant support particularly from their legal representatives. Legal aid is and should continue to be available to them.
 - Although there are concerns about the way the child's voice is heard, their interests and rights are carefully protected through guardians and legal representation. This should continue to be available.
 - We seek decisive answers and the decisions of our courts are intended to offer children a sense of permanency that some in other jurisdictions envy.
 - There are strict and clear requirements on local authorities when children are in their care. Authorities are held to account for their delivery of or failure to deliver this care, through a variety of mechanisms.
 - Caring for children who have experienced or are likely to suffer significant harm is a complex task and local authorities do not always get it right. But for many local authority care can and does offer a safe environment that provides them with better life chances than if they were left in the harmful care of their birth families.
70. Yet it is clear that our systems need significant change. The panel has considered whether the courts should remain the central body for taking all care decisions, and in particular, whether a local panel system sharing responsibility with the courts as in Scotland, for example, might deliver speedier and more flexible justice. We have concluded that the courts in England and Wales should retain their current central role. However, delay must be tackled and responsibilities and processes need to change. This will in turn involve both cultural and system change.
71. Courts have to balance the rights of parents and the interests of children. Too often we believe adult rights are being asserted at the expense of children's best interests. We need to redress this. Secondly judges and the representatives of both adults and children need to recognise the limitations of the law.
72. Too much time is being spent trying to predict the child's future welfare needs through the examination of the detail of the care plan. Yet circumstances change over time and so do children, in ways that often cannot be foreseen when care order decisions are being made. Courts should focus on the fundamental question whether a care order is in the child's best interests. Other means are in place to assure the welfare needs of children who cannot live with their birth families once a care order is made.
73. We need to remove unnecessary duplication. This should release resource and reduce delay. There should be clear expectations within the law and within the system as to how long cases should take.
74. The judiciary remain central to the successful management of cases. We need to equip them to take firm control of a case and manage it efficiently, enabling them to take difficult decisions in challenging circumstances.

75. Change to the courts and judiciary alone will not be sufficient. We also need to improve the control and the quality of the advice and support offered to the court by local authorities, court welfare services and independent experts.
76. Processes need to be stripped back and made sufficiently flexible to bend to the needs of the particular case. These processes need to take account of and support the wider system of which they are part.

The role of courts

77. **Courts should refocus on the core issues of whether the child or children can safely remain with, or return to, the parents or, if not, to the care of family or friends**, as intended at the time of the Children Act 1989. In determining whether a care order is in the best interests of the child the court should substantially reduce its scrutiny of the detail of the care plan. Broadly speaking we would expect the court to be satisfied that the local authority is clear in its intent whether the care plan for the child is:
 - planned return of the child to their family;
 - plan to place (or explore placing) a child with family or friends as carers; or
 - permanent alternative care arrangements, including adoption.
78. The court should not examine detail such as:
 - whether residential or foster care is planned;
 - plans for sibling placements;
 - the therapeutic support for the child;
 - health and educational provision for the child; and
 - contingency planning.
79. There should be less court focus on quality assuring the detail of the local authority's plans for the child if and when the child is given into their care. This should remove unnecessary debate from the court process, shortening cases and eliminating duplication. We make this recommendation in light of the efforts now underway, through Professor Eileen Munro's Review, the Social Work Reform Board and the work of the Welsh Assembly Government to improve social work practice across England and Wales. Local authorities will of course continue to be expected to develop and implement high quality care plans for children.

Timetabling of cases

80. First, **we seek views on whether a time limit for the completion of care proceedings within six months should be provided for in legislation**. The length of time cases now take is at a level that is simply unacceptable. While there would be a small number of cases where exemptions would need to apply, it may be valuable to state clearly in law our expectations on the time cases should take.

81. Second, within this overall time limit, **cases must be managed strictly in accordance with the 'Timetable for the Child'** so that it draws on a full set of relevant issues including particularly the age of the child. We propose to redefine the concept and strengthen its position in law.

Case management

82. Further, **we need to enable effective and robust case control by the judiciary, supported by the Family Justice Service.** We propose measures intended to:
- confirm the central role of the judge as case manager;
 - simplify processes;
 - develop wider system reform that will facilitate effective case management; and
 - develop the skills and knowledge of judges so they will be better case managers.
83. Achievement of these aims will be supported by reforms suggested elsewhere in our report, in particular by measures to deliver judicial continuity and greater judicial specialisation, as well as improved IT and case management systems.
84. Judicial case management also needs support from court services through wider use of case progression activities. We intend also in the next stage to look at the implications of our recommendations for the Public Law Outline and we will consider how court processes can be made more flexible to reflect the needs of different types of cases.
85. To simplify care proceedings **the requirement to renew interim care orders after eight weeks and then every four weeks should be removed.** In its place we propose that the length and renewal requirements be at judicial discretion, perhaps subject to a six month maximum length before renewal is required. This would be subject to a right to apply to discharge the order in the event that circumstances change.
86. There is unnecessary duplication in the scrutiny of applications for placement orders without parental consent. **The requirement that local authority adoption panels should consider the suitability for adoption of a child whose case is to be before a court should be removed.**² The court already fulfils this function and to retain dual scrutiny simply hinders a child's route to a secure, loving and stable home.

Local authority contribution to the court process

87. In her final report, to be published in May, Professor Munro will set out more specific proposals intended to support local authority preparation for court.

² We assume that the responsibilities of the panel to approve prospective adopters and match children to adopters will remain.

These will look at the nature and type of assessments to improve the quality, particularly the analysis of the issues, presented to court. The consequence should be a reduced need to commission additional reports from others, and to give judges greater confidence in the decisions they make.

88. We have also heard positive reports of the success in some cases of the 'letter before proceedings' introduced by the Public Law Outline. However, research is needed properly to understand its effectiveness.

Use of experts

89. We need to reduce reliance on expert reports. **The criteria against which it is considered necessary for a judge to order expert reports should be made more explicit and strict.** We seek views during the consultation period on what the criteria should be and how they might be expressed.
90. **Independent Social Workers should only be employed to provide new information to the court that cannot otherwise be provided by the local authority or guardian. We also recommend that research be commissioned to examine the evidence base for residential parenting assessments** to help identify the circumstances in which such an assessment would be helpful, and where it would not.
91. These recommendations should help cut out unnecessary assessments. Furthermore, we believe that **the development of multi-disciplinary teams to provide expert reports to the courts has merit.** We seek views on this issue. **Judges should be responsible for instructing experts** as a fundamental part of their case management duties. **The Family Justice Service should oversee monitoring and ensuring the quality of experts.**
92. We shall explore at the next stage different approaches to court scrutiny of expert evidence that have been suggested to us.

Reform of the tandem model

93. A cornerstone of the public law system in England and Wales is the provision of a guardian and legal representative for the child in the court process, known as the tandem model. This is generally held in high regard. It is, however, under severe pressure due to rising workloads and ever longer cases. Some have challenged whether it can be sustained.
94. **The tandem model should be retained but a more proportionate approach is needed.** The core role of the guardian should be to represent and act as the child's voice in support of the court's welfare decision on whether a care order is in the child's best interests. There should be less focus on quality assuring the local authority's plans. The guardian should assist active judicial case management to deepen the court's understanding of how best to help a child within the shortest possible timescale. The core role of the solicitor should be to act as advocate for the child in court and to advise the court on legal matters. With the solicitor taking the lead in court hearings, a guardian need not always be present at court.

95. There may be a case for **the guardian to be involved pre-proceedings**. A pilot project, involving Cafcass and two local authorities, is underway. We will be monitoring the progress of this pilot before making final recommendations in this area.
96. We are also interested to explore the idea of an **'in-house' tandem model** – where guardian and child's solicitor have the same employer – to facilitate more proportionate working between the children's guardian and child's solicitor.
97. We have found that the IRO has low visibility in the court process. **There need to be effective links between the courts and IROs if judges are to be reassured that there will be continuing scrutiny of the child's care plan. The working relationship between the guardian and the IRO also needs to be stronger.**

Alternative approaches to dispute resolution

98. Our proposals are centred on a belief that court scrutiny of decisions to remove children from their parents is vital, albeit this needs significant improvement. However, the addressing of what are often difficult welfare decisions will always pose challenges within a legal environment. **There is scope further to develop and extend the use of alternatives to court in public law.** Family Group Conferences have a role to play and **the use of mediation in child protection issues should be explored.** A review is in progress of the Family Drug and Alcohol Court in the Inner London Family Proceedings Court, in which a judge leads a rehabilitation programme for substance abusers in care cases. **This model is showing considerable promise and potentially justifies a further roll out.**

Private law

What is private family law?

99. Where marriage has irrevocably broken down, couples seek to divorce and also need to resolve any outstanding financial issues. Where a separation involves children, arrangements need to be made for their care and decisions must be reached about parenting post-separation. These are difficult, emotive issues for anyone to resolve and often bring high tension and distress. The family justice system cannot be expected to fix all of these difficulties. Instead, for those unable to resolve an issue by any other means, it must focus on ensuring the process achieves the best outcomes possible, or the least detrimental, for those involved, especially children.
100. At the same time the state must ensure, when people seek assistance to resolve disputes around separation, that there are sufficient means to identify and protect those who are at risk. The issues in private law disputes – parents raise serious welfare concerns in over half of all contact cases – can mean that the threshold for public law intervention is met, or that immediate action must be taken to safeguard the child.

Issues with the current system

101. Parents can agree arrangements for children following separation with minimal involvement from the court – in fact a study has found the great majority (around 90%) do not go to court. For the other 10% court can become the arena for drawn out intractable disputes over contact and residency of children. Parental conflict damages children. Although courts focus on encouraging parties to reach agreement, parents' perceptions of 'having their day in court' and the adversarial system can exacerbate this conflict. Furthermore, we have heard concerns from both parents and others – such as grandparents – that the length of the case means that existing arrangements become entrenched and they lose all chance of meaningful contact with a child.
102. Using the system is complicated and costly, both emotionally and financially. People enter the system because they are either forced to or are unaware of other ways of finding a resolution.
103. We need to be realistic about the limitations of the state in dealing with these cases. Judges can provide resolution of issues, by virtue of a court order, and judicial determination in family relations is unavoidable in the most difficult cases, but it is a blunt instrument. The very process of achieving a determination may itself cause further harm to the individuals involved and the arrangements may not be successful in the long term.
104. There has been a move within the current private law system to recognise that cases can and often should be diverted away from the courts where it is safe to do so. The range of support available to allow separating families to resolve disputes outside court has developed over the years to include mediation, collaborative law and Separating Parents Information Programmes. These services can support parties to resolve issues themselves through discussion and negotiation that may be more sustainable and at lower cost than going to court. At present, though, many people are made aware of these alternatives only after they have entered the court system, by which time attitudes and behaviours may be entrenched and significant cost has already been incurred.

The way forward

105. The state cannot fix fractured relationships or create a balanced, inclusive family life after separation where this was not the case before separation. Court is generally not the best place to resolve these disputes. Where possible, disputes should be resolved independently or using dispute resolution services such as mediation, when it is safe to do so. Parents who choose to use the court system must understand it will not be a panacea. Courts will only make an order where this is in the best interests of a child. Further, where the court does make an order, this may well not be in line with one or both parents' expectations or wishes. People need to expect that court should be a last resort, not a first port of call.
106. Serious child protection concerns are raised or come to light in a significant proportion of private law cases. Where there are concerns for the child's safety or for a vulnerable adult, swift and decisive action must be taken to protect them.

We intend in the coming months to investigate further this overlap between public and private law.

Principles and process

Parental responsibility

107. First and foremost, there are responsibilities that come with being a parent – to ensure that a child has the emotional, financial and practical support to thrive. These rights, duties, powers and responsibilities are recognised in the Children Act 1989 as parental responsibility (PR). PR does not disappear upon divorce or separation. The question arises, however, whether more should be said in legislation to strengthen the rights of children to a continuing relationship with both parents (and others, for example grandparents) after separation. We heard considerable evidence on this issue. On one side we heard the real distress of parents, usually fathers, who were now unable to see their children. On the other we heard from children's groups and took evidence in Sweden and Australia about the significant damage done to children when legislation creates expectations about a substantial sharing of time against the wishes of the parent with whom the child mostly lives.
108. This is a particularly emotive issue. If parents share parental care fully before separation they are more likely to do so successfully after separation. But, where the converse applies, legislation cannot change that fact. Achieving shared parenting in those cases where it is safe to do so is a matter of raising parental awareness at the earliest opportunity. The welfare of children must always come before the rights of parents. **No legislation should be introduced that creates or risks creating the perception that there is an assumed parental right to substantially shared or equal time for both parents.** But we do recommend that **there should be a statement in legislation to reinforce the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm.**
109. We have heard representations that **the requirement for grandparents to seek leave of the court** before making an application for contact should be removed but have concluded this **should remain**. But the importance of these and other relationships must be emphasised throughout the process of reaching Parenting Agreements (see paragraph 111 below).
110. From the outset of parenting, there needs to be a greater focus on, and awareness of, the importance of raising a child in a co-operative manner. We see value in **parents being given a short leaflet when they register the birth of their child, providing an introduction to the meaning of PR and what this means in practice.**

Parenting Agreements

111. Parents should be enabled and supported to come to a resolution and to construct a **Parenting Agreement**. This agreement would set out arrangements for the care of children post-separation, covering aspects such as education, health, finance and the arrangements for how the child is to spend time with

each parent. This is a difficult and potentially traumatising time for the children. There should be an expectation that children (having regard to their age and understanding) would participate directly in the formation of the agreement by having their views heard in a meaningful way. Children should feel consulted on decisions that will affect them, and be informed of the outcomes - especially where these are not in line with their wishes. Overall the aim of encouraging Parenting Agreements is to increase confidence and trust by focusing the parents on how their parental responsibility is to be discharged following separation, in their child's best interests, narrowing the scope of any dispute.

Changes to terms

112. **Residence and contact orders should no longer be available to parents who have PR for their child, but disputes over the division of a child's time between parents should instead be resolved by a specific issue order.** This is intended to reduce both the likelihood of long and unfocused hearings, and to move from a sense of a 'winner' in terms of 'awarding' residence and contact.
113. We plan to give further thought to how disputes should be resolved where fathers do not have PR. Our expectation is that a **father without PR who wishes the court to consider the child living with him (currently a residence order) should first apply for PR, and then negotiate for this to be included in the Parenting Agreement, or apply for a specific issue order. The full range of the four orders under section 8 of the Children Act 1989 should remain open to a father who does not have PR or to other non-parental relatives.**

The private law process

114. **An online information hub and helpline should be established** to offer support and advice in a single, easy-to-access point of reference at the beginning of the process of separation or divorce. This will help people to make informed decisions regarding how best to resolve the issues they face as part of their separation. The hub will also contain information to ensure that those who feel they are at risk can swiftly alert support services. It would collate:
- clear guidance about parents' responsibilities towards their children whether separated or not, including their roles and responsibilities as set out in legislation;
 - information and advice about services available to support families, whether separated or not;
 - information and advice to resolve family conflicts, including fact-sheets, case studies, peer experiences, DVD clips, modelling and interactive templates to help with Parenting Agreements;
 - advice about options for supported dispute resolution, which would highlight the benefits of alternative forms of dispute resolution, including mediation, and Separated Parents Information Programmes (PIPs);
 - information about court resolution, should alternative dispute resolution not be suitable, and costs of applications;

- support for couples to agree child maintenance arrangements;
 - guidance on the division of assets; and
 - what to do when there are serious child welfare concerns.
115. Where individuals feel, after they have accessed the hub, that they do need further help or the service of the court to resolve any outstanding issues, **it should be compulsory that they meet a mediator**, trained and accredited to a high professional standard, **who should:**
- assess the most appropriate intervention, including mediation and collaborative law, or whether the risks of domestic violence, imbalance between the parties or child protection issues require immediate referral to the family court; and
 - provide information on local dispute resolution services and how they could support parties to resolve disputes.
116. The process will allow for emergency applications to court but exemptions should be narrow.
117. Experience in Connecticut and Australia shows the importance and difficulty of this stage in assessing the risks of for example domestic violence. It is important at this point to be aware of the potential for risk, even when parties are seemingly in agreement, and to deal with safeguarding concerns appropriately.
118. Having been assessed, **parents should be required then to attend a Separated Parents Information Programme**, which should include a description of the relevant law, the court process and its likely costs. Experience shows that the programme can deter parents from court and bring them to agreement when they realise the effects on their children, the cost, and the fact that the judge will not necessarily condemn their former partner.
119. **Parents should thereafter, if necessary, attend mediation or another form of accredited dispute resolution**, for example collaborative law. The focus will be on providing support for the development of a Parenting Agreement. We would anticipate that only those cases where an exemption is raised by a professional based, for example, on welfare concerns, would proceed directly to the court process. Attendance at dispute resolution cannot be compulsory, unlike the assessment and the PIP, but the aim must be that this becomes normality. The mediator will need to be the case manager until it goes to court, if that turns out to be necessary.
120. **Mediators should at least meet the current requirements set by the Legal Services Commission. These standards should themselves be reviewed in the light of the new responsibilities being laid on mediators. Mediators who do not currently meet the LSC standards should be given a specified period in which to achieve them.**
121. Only in cases where parents are unable to agree about a specific aspect of a Parenting Agreement, or in those cases where an exemption is raised by a trained professional, will one or both of the parties be able to apply to court for a

determination on a **specific issue. Safeguarding checks should be completed at the point of entry into the court system.** At present they are completed by Cafcass post-receipt of information from HMCS. This should be a function of the Family Justice Service in future. These checks help to identify serious welfare concerns which should, as now, be referred to the local authority.

122. The panel has received universally positive accounts of the operation of the President's Private Law Programme, with its emphasis upon the First Hearing Dispute Resolution Appointment (FHDRA) at which the judge and a Cafcass officer intervene in order to resolve issues at that early stage. **We do not recommend any alterations in the FHDRA process.**
123. Where further court involvement is required after the FHDRA, **a 'track' system ('simple' or 'complex') to match the level of complexity of the case will apply.** The court will allocate the case to the 'simple' or 'complex' track and will also confirm the level of judiciary at which the case should proceed. With an appropriate track identified, the focus should then be on the resolution of, or determination of, the specific issue.
124. Where cases are on the complex track, we recommend that the judge who is allocated to hear the case at that second hearing be the judge for that case throughout.
125. Judges will retain the power to order parties to attend a mediation information session and **may make cost orders where it is felt that one party has behaved unreasonably.**
126. **Where an order is breached, the case should go straight back to the court, to the same judge. It should be heard within a fixed number of days, with the dispute resolved at a single hearing. If an order is breached after 12 months, the parties should be expected to return to Dispute Resolution Services before returning to court to seek enforcement.**
127. The panel was asked to consider a further issue, touched on in the recent DWP Green Paper, *Strengthening families, promoting parental responsibility: the future of child maintenance*, whether contact and maintenance should be linked. This is an emotive issue and we are grateful to those who have provided us with excellent submissions in a short time. We firmly believe, in the interests of the child, that there should be no automatic link between contact and maintenance. However, when contact is continually frustrated and it is in the child's best interests, we think there is a case for providing **an additional enforcement mechanism for the courts to alter or suspend the payment of maintenance via the Child Maintenance Enforcement Commission.**

Ancillary relief

128. Those in dispute about money or property **should access the information hub and be assessed for mediation** in the same way as set out above.
129. Changes to the substance of the law in relation to ancillary relief are outside the scope of this Review. But the panel heard suggestions that legislative change to

establish a codified framework could reduce the need for judicial determination.
The panel believes government should explore this further.

Divorce processes

130. **The process for initiating divorce will begin with the hub and should be dealt with administratively in the Family Justice Service, unless the divorce is disputed.**
131. **The panel proposes removing the current two-stage process of decree nisi and decree absolute, replacing this with a single notice of divorce.**

Fees

132. **Fees in private law should in principle reflect the full cost of services.** However, this will depend on achieving a better understanding of costs, affordability and an appropriate remissions policy.

Financial Implications

133. It is not possible to cost our proposals in the absence of information about the costs of the current system, but we believe that by removing duplication, refocusing the court's attention and encouraging other methods of dispute resolution costs will be reduced. We will continue to work on this in the coming months.

Implementation

134. These recommendations have the potential for fundamental change to the family justice system in England and Wales. They are not straightforward. Time and effective planning will be needed to ensure successful implementation. Some recommendations will need primary legislation; others can be implemented quite quickly. A phased approach within a timetable for change will be important, as will clear direction and leadership, mirroring that required in the Family Justice Service, and recognising the fragility of the current system, the pressures on it, and the scale of change that needs to be achieved.

iii Family Justice Review – List of recommendations

- We strongly endorse the continuing value of the framework and core principles of the Children Act 1989. (Paragraph 2.21)

A Family Justice Service

- There should be a Family Justice Service. (Paragraph 3.2)
- The Family Justice Service should ensure that the interests of children and young people are at the heart of its operation. (Paragraph 3.4)
- Children and young people should be given age appropriate information which explains what is happening when they are included in disputes being dealt with by the Family Justice Service. (Paragraph 3.7)
- Children and young people should as early as possible in a case be supported to be able to make their views known and older children should be offered a menu of options, to lay out the ways in which they could – if they wish – do this. (Paragraph 3.12)
- The Ministry of Justice should sponsor the Family Justice Service. There will need to be close links at both Ministerial and official level with the Department for Education and Welsh Assembly Government. (Paragraph 3.27)
- Safeguards should be built in to ensure the interests of the child are given priority in guiding the work of the Family Justice Service. (Paragraph 3.28)
- The Service should be led through a Family Justice Board and a Chief Executive. (Paragraph 3.36)
- The current range of groups and meeting arrangements should be streamlined through the creation of the Family Justice Service to subsume the work currently performed by the Family Justice Council, Local Family Justice Councils, Family Court Business Committees, the National Performance Partnership, Local Performance Improvement Groups and the President’s Combined Development Board. (Paragraph 3.43)
- Local Family Justice Boards should be established, with consistent terms of reference and membership. They should work closely with Local Safeguarding Children Boards. (Paragraph 3.43)
- A dedicated post – a Senior Family Presiding Judge – should report to the President of the Family Division and the Senior Presiding Judge on the effectiveness of family work amongst the judiciary. (Paragraph 3.53)
- Family Division Liaison Judges should be renamed Family Presiding Judges, reporting to the Senior Family Presiding Judge on performance issues in their circuit. (Paragraph 3.53)
- Judges with leadership responsibilities should have clearer management responsibilities. There should be stronger job descriptions, detailing clear expectations of management responsibilities and inter-agency working. (Paragraph 3.54)

- Information on key indicators such as case numbers per judge, court and area, case lengths, numbers of adjournments and number of experts should support this approach to judicial case management. (Paragraph 3.55)
- There should be judicial continuity in all family cases. The High Court will be an exception but this should be limited as far as possible. This recommendation applies also to legal advisers and benches of magistrates. (Paragraph 3.60)
- Robust case management by the judiciary should be supported with consistent case progression resource. (Paragraph 3.63)
- Legislation should be considered to provide for stronger case management provision in respect of the conduct of both public and private law proceedings. (Paragraph 3.65)
- Criteria should be established for the allocation of resource to the family judiciary and budgets should be set in terms of money, not in sitting days. (Paragraph 3.75)
- Budgets, including family legal aid, should, over time, be consolidated into the Family Justice Service. Decisions on spending should also be taken at the most local level possible. (Paragraph 3.76)
- Charges to local authorities for public law applications and to Cafcass for police checks should be removed. (Paragraph 3.86)
- Court social work services should form part of the Family Justice Service, subsuming the role currently performed by Cafcass. These functions will continue to be a devolved responsibility of the Welsh Assembly Government, performed by Cafcass Cymru. But there should be a close working relationship between Cafcass Cymru and the Family Justice Service, underpinned by service level agreements. (Paragraphs 3.104, 3.105)
- The Family Justice Service should be responsible for procuring publicly funded mediation and support for contact. (Paragraphs 3.106, 3.107)
- Judges and magistrates should be enabled and encouraged to specialise in family matters. (Paragraph 3.113)
- The requirement to hear other types of work before being allowed to sit on family matters should be abolished. A requirement for appointment to the family judiciary should, in future, include a willingness to specialise. (Paragraph 3.113)
- There should be inter-disciplinary induction for all those working in the system and a clear framework for inter-disciplinary working for all those engaged in it. The Family Justice Service should co-ordinate the professional relationships and workforce development needs between key stakeholders. (Paragraph 3.118)
- There should be quality standards for system-wide processes that build on local knowledge, are evidence-based and replicable. Compliance with practice guidelines should be reviewed regularly and this should include the role and performance of local authorities and wider users. There also needs to be a more co-ordinated and system-wide approach to research and evaluation. (Paragraphs 3.127, 3.128)
- An integrated IT system, with the ability to support management of cases, should be developed. In the short term, current IT systems should be adapted in a cost effective manner. (Paragraph 3.142)

- Robust performance information should be fed into the national and local boards, and the judiciary. (Paragraph 3.142)
- A single family court should be created, with a single point of entry, in place of the current three tiers of court. All levels of family judiciary (including magistrates) should sit in the family court and work would be allocated depending upon case complexity. (Paragraph 3.151)
- Some cases, particularly those with an international element or where, under the High Court's inherent jurisdiction, life and death decisions are made, should be described as being determined in the High Court, Family Division rather than in the single Family Court. (Paragraph 3.152)
- Court hearings should be organised in the most appropriate location. Routine hearings should use telephone or video technology wherever possible, and hearings that do not need to take place in a court room should be held in rooms that are family friendly as far as possible and appropriate. (Paragraph 3.159)
- The estate for family courts should be reviewed to reduce the number of buildings in which cases are heard, to promote efficiency, judicial continuity and specialisation. Exceptions should be made for rural areas where transport is poor. (Paragraph 3.161)

Public law

- Courts must continue to play a central role in public law in England and Wales. But this role should be refocused, with changes in the ways of working that will affect the family justice system more widely. (Paragraph 4.144)
- Courts should refocus on the core issues of whether the child is to live with parents, other family or friends, or be removed to the care of the local authority. Other aspects and the detail of the care plan should be the responsibility of the local authority. (Paragraph 4.160)
- A time limit for the completion of care and supervision proceedings within six months should be put into legislation. (Paragraph 4.176)
- Cases must be managed and timetabled strictly in accordance with the 'Timetable for the Child'. This concept needs to be redefined and given greater legal force. (Paragraph 4.185)
- The Family Justice Service should manage the task of developing and maintaining the detailed criteria that will support judges in drawing up the Timetable. (Paragraph 4.192)
- We propose a package of measures intended to enable effective and robust case control by the judiciary in public law cases:
 - courts should strengthen the use of the case progression function; (Paragraph 4.206)
 - courts must continue to work to apply the PLO. We intend at the next stage to consider the implications of our proposals for the PLO; (Paragraph 4.208)
 - the requirement to renew Interim Care Orders after eight weeks and then every four weeks should be removed. Judges should be allowed discretion to grant

interim orders for the time they see fit subject to a maximum of six months. The courts' power to renew should be tied to their power to extend proceedings beyond six months; (Paragraph 4.210) and

- we need to develop the skills and knowledge of judges so they will be better case managers. We shall consider this in public law, in the context of wider workforce skills, in the coming months. (Paragraph 4.214)
- The requirement that local authority adoption panels should consider the suitability for adoption of a child whose case is before the court should be removed. (Paragraph 4.212)
- We support Professor Eileen Munro's recommendations in *'The Child's Journey'* about how local authorities can contribute to reducing delays in care proceedings. (Paragraph 4.220)
- We encourage use of the 'letter before proceedings'. We recommend research be undertaken about its impact. (Paragraph 4.226)
- We recommend that judges should be given clearer powers to enable them to refuse expert assessments and the relevant legislative provisions revised accordingly. (Paragraph 4.227)
- Independent Social Workers should only be employed to provide new information to the court, not as a way of replacing the assessments that should have been submitted by the social worker or the guardian. The relevant rules should reflect this. (Paragraph 4.228)
- Research should be commissioned to examine the value of residential assessments of parents. (Paragraph 4.230)
- The development of multi-disciplinary teams to provide expert reports to the courts has merit. (Paragraph 4.233)
- The judge should be responsible for instructing experts as a fundamental part of case management. (Paragraph 4.239)
- The Family Justice Service should be responsible for identifying and commissioning experts, working closely with local judges to ensure a focus on quality, timeliness and value for money. Multi-disciplinary teams may well have value. (Paragraph 4.240)
- The tandem model should be retained but it needs to be used in a more proportionate way. (Paragraph 4.247)
- The merit of using guardians pre-proceedings needs to be considered further. (Paragraph 4.260)
- The merit of developing an 'in-house' tandem model needs to be considered further. (Paragraph 4.261)
- There need to be effective links between the courts and IROs and the working relationship between the guardian and the IRO needs to be stronger. (Paragraph 4.269)
- There should also be more formal arrangements within local authorities to ensure that the most senior levels, including the Director for Children's Services and the

Lead Member, keep fully in touch with how care plans are being implemented. The IRO has a potential role to play here. (Paragraph 4.270)

- Alternatives to some current court processes should be developed and extended:
 - Family Group Conferences can be useful although their effectiveness needs more research; (Paragraph 4.279)
 - formal mediation approaches in public law proceedings may have potential; (Paragraph 4.285) and
 - the Family Drug and Alcohol Court in the Inner London Family Proceedings Court shows considerable promise. (Paragraph 4.290)

Private law

- No legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents. (Paragraph 5.76)
- A statement should be inserted into legislation to reinforce the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm. (Paragraph 5.77)
- The need for grandparents to apply for leave of the court before making an application for contact should remain. (Paragraph 5.82)
- Parents should be given a short leaflet when they register the birth of their child, providing an introduction to the meaning and practical implications of parental responsibility (PR). (Paragraph 5.86)
- Parents should be encouraged to develop a Parenting Agreement to set out arrangements for the care of their children post-separation. (Paragraph 5.90)
- Residence and contact orders should no longer be available to parents who hold PR, but disputes over the division of a child's time between parents should instead be resolved by a specific issue order. (Paragraph 5.95)
- The terms, forms and evidence required by the court should also be reviewed to reduce their contribution to conflict. (Paragraph 5.95)
- A father without PR who wishes the court to consider the child living with him (currently a residence order) should first apply for PR, and then negotiate for this to be included in the Parenting Agreement or apply for a specific issue order. If a father does not wish to seek PR he is still able to make a contact application. (Paragraph 5.97)
- The full range of the four orders under Children Act 1989, section 8 should remain available to non-parental relatives. (Paragraph 5.99)
- An online information hub and helpline should be established to give information and support for couples to resolve issues following divorce or separation outside court. (Paragraph 5.114)
- Provision should be made to ensure that a signed Parenting Agreement has weight as evidence in any subsequent parental dispute. (Paragraph 5.118)
- 'Alternative dispute resolution' should be rebranded as 'Dispute Resolution Services', in order to minimise a deterrent to their use. (Paragraph 5.123)

- Where intervention is necessary it should be compulsory for the parties to attend a session with a mediator, trained and accredited to a high professional standard, who should:
 - assess the most appropriate intervention, including mediation and collaborative law, or whether the risks of domestic violence, imbalance between the parties or child protection issues require immediate referral to the family court; and
 - provide information on local Dispute Resolution Services and how they could support parties to resolve disputes. (Paragraph 5.125)
- Judges will retain the power to order parties to attend a mediation information session and may make cost orders where it is felt that one party has behaved unreasonably. (Paragraph 5.125)
- The mediator tasked with the initial assessment will need to be the case manager until an application to court is made. (Paragraph 5.127)
- The assessment will allow for emergency applications to court but the exemptions should be narrow. (Paragraph 5.129)
- Those parents who are still unable to agree should next attend a Separating Parent Information Programme and thereafter if necessary mediation or other dispute resolution service. (Paragraph 5.131)
- Mediators should at least meet the current requirements set by the Legal Services Commission. These standards should themselves be reviewed in the light of the new responsibilities being laid on mediators. Mediators who do not currently meet those standards should be given a specified period in which to achieve them. (Paragraph 5.135)
- Where agreement cannot be reached, having been given a certificate by the mediator, one or both of the parties will be able to apply to court for determination on a specific issue. (Paragraph 5.139)
- Safeguarding checks should be completed at the point of entry into the court system for cases involving children. (Paragraph 5.142)
- The First Hearing Dispute Resolution Appointment (FHDR) should be retained. Where further court involvement is required after this, the case will be allocated to a track system according to complexity. (Paragraph 5.146)
- Where cases are on a complex track, the judge who is allocated to hear the case after a First Hearing Dispute Resolution Appointment must remain the judge for that case. (Paragraph 5.148)
- Where an order is breached, a party should have access to immediate support to resolve the matter swiftly and the current enforcement powers should be available. The case should be heard within a fixed number of days, with the dispute resolved at a single hearing. If an order is breached after 12 months, the parties should be expected to return to Dispute Resolution Services before returning to court to seek enforcement. (Paragraphs 5.159, 5.160)
- There should be no automatic link between contact and maintenance. When contact is continually frustrated and it is in the child's best interests, the courts should have an additional enforcement mechanism available to enable them to alter or suspend the payment of maintenance. (Paragraph 5.166)

- People in dispute about money or property should be expected to access the information hub and should be required to be assessed for mediation. (Paragraph 5.169)
- Ancillary relief should be separately reviewed. (Paragraph 5.172)
- The process for initiating divorce should begin with the online hub and should be dealt with administratively in the Family Justice Service, unless the divorce is disputed. (Paragraph 5.175)
- The current two-stage process of decree nisi/decre absolute should be replaced by a single notice of divorce. (Paragraph 5.176)
- Fees in private law should in principle reflect the full cost of services. However, this will depend on achieving a better understanding of costs, affordability and an appropriate remissions policy. (Paragraph 5.178)

iv Questions for consultation

We are keen to seek your views on the proposals set out in the report and have sought to follow the government's Code of Practice on consultation.

The consultation criteria

The seven consultation criteria are as follows:

When to consult – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

Duration of consultation exercises – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Clarity of scope and impact – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Accessibility of consultation exercises – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

The burden of consultation – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Responsiveness of consultation exercises – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Capacity to consult – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

How to respond

Please respond online at <https://survey.euro.confirmat.com/wix3/p635083884.aspx>

If you want to respond in a different format, please contact:

familyjusticereview@justice.gsi.gov.uk

or

Family Justice Review Secretariat
c/o Ministry of Justice
102 Petty France
London
SW1H 9AJ

Publication of response

We plan to include a response to this consultation in our final report, which will be published in the autumn.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with access to information regimes.

If you want the information that you provide to be treated as confidential, please be aware that, under the Freedom of Information Act 2000, there is a statutory Code of Practice with which deals with, among other things, obligations of confidence. It would be helpful if you could explain to us why you regard the information you have provided as confidential. This will be taken into account if there is a request for disclosure, but an assurance cannot be given that confidentiality will be maintained in all circumstances.

Questions

Our questions are organised by section – on systems, public law and private law.

Towards a Family Justice Service (Chapter 3)

1. Do you agree with the proposed role that the Family Justice Service should perform?
2. Ensuring that a child's voice, wishes and feelings are central to the Family Justice Service is crucial. What would you recommend as the crucial safeguards to enable this to happen?
3. Do you agree that children should be offered a choice as to how their voice can be heard in cases that involve them, including speaking directly to the court?
4. Do you agree there should be a single family court?
5. Do you agree that the changes we have proposed to the judiciary – including greater continuity, specialisation and management – will lead to improvements in the operation of the family justice system?
6. Do you agree that case management principles, in respect of the conduct of both private and public law proceedings, should be introduced in legislation?
7. What changes are needed to the culture and skills of people working in family justice and how best can they be achieved?
8. Do you have any other comments you wish to make on our proposals for system management and reform?

Public law (Chapter 4)

9. Do you agree with our proposals to refocus the role of the court?
10. Do you think a six-month time limit, with suitable exceptions, for all section 31 care and supervision cases should be introduced? What should those exceptions be?
11. Do you agree that the Timetable for the Child should be strengthened? What are the elements that need to be taken into account when formulating it?
12. Do you think our approach to the strengthening of judicial case management is correct?

13. What criteria should be used in the decision whether or not to appoint experts? And should the judge draft the letter of instruction?
14. Under a proportionate working system, what are the core tasks that a guardian needs to undertake in care proceedings?
15. Could there be a greater role for other Dispute Resolution Services in support of the public law court process?
16. Do you have any other comments you wish to make on our proposals for public law?

Private law (Chapter 5)

17. Do you agree there is a need for legislation to more formally recognise the importance of children having a meaningful relationship with both parents, post-separation?
18. Do you agree with the proposals to remove the terms 'contact' and 'residence' and to promote the use of Parenting Agreements?
19. Do you agree that there should be a requirement to consider Dispute Resolution Services prior to making an application to court?
20. Do you agree with the processes we outline for the resolution of private law disputes?
21. Which urgent and important circumstances should enable an individual to be exempt from the assessment process for Dispute Resolution Services?
22. What do you think are the core skills required for mediators undertaking an assessment?
23. Is there any merit in introducing penalties, through a fee charging regime, to reflect a person's behaviour in engaging with Dispute Resolution Services, including the court?
24. Do you have any other comments you wish to make on our proposals for private law?

Implementation

25. Do you have any comments about how these proposals might best be implemented?

1. About the Family Justice Review

Background to the Review

- 1.1 The Family Justice Review began work in March 2010 and is jointly sponsored by the Ministry of Justice, the Department for Education and the Welsh Assembly Government. It was established in recognition of increasing pressure on the family justice system and a view that the time was right to take a look at the system as a whole. The Review was subsequently taken forward to fulfil a pledge by the Coalition government.
- 1.2 The Review was tasked with fundamentally re-evaluating and reforming the family justice system in England and Wales. The full Terms of Reference can be found at Annex A. The emphasis was on two areas: the promotion of informed settlement and agreement, and management of the family justice system. This includes consideration of a wide range of issues, in both public and private law:
 - the extent to which the adversarial nature of the court system is able to promote solutions and good quality family relationships in private law family cases and what alternative arrangements would be more effective in fostering lasting and positive solutions;
 - options for introducing more inquisitorial elements into the family justice system for both public and private law cases;
 - whether there are areas of family work which could be dealt with more simply and effectively via an administrative, rather than court-based, process and the exploration of what that administrative process might look like; and
 - the roles fulfilled by all of the different agencies and professionals in the family justice system, including consideration of the extent to which governance arrangements, relationships and accountabilities are clear and promote effective collaboration and operational efficiency.
- 1.3 The Review was also asked to examine the processes involved in granting divorces and awarding ancillary relief. Examination of the law as it relates to the grounds for divorce, or the amounts of ancillary relief that should be awarded, is outside the Review's remit.
- 1.4 In January 2011, the Review was also asked to give consideration to a proposal – contained in the Department for Work and Pensions' Green Paper, *Strengthening families, promoting parental responsibility: the future of child maintenance* – on allowing maintenance arrangements to be considered in the round when determining appropriate contact enforcement measures.

The Review panel

- 1.5 The panel to conduct the Review includes six independent members and three director-level civil service representatives, one from each of the sponsor Departments. David Norgrove was appointed as the chair of the panel and the other independent members were drawn from across the family justice system.

More detail about the panel members can be found at Annex B. The full panel membership is:

- David Norgrove (Chair)
- John Coughlan CBE, Director of Children's Services in Hampshire
- Mr Justice Andrew McFarlane, a family judge sitting in the High Court
- Dame Gillian Pugh OBE, chair of the National Children's Bureau
- Baroness Shireen Ritchie, lead member for children's services in the Royal Borough of Kensington and Chelsea
- Keith Towler, Children's Commissioner for Wales
- Sarah Albon (Ministry of Justice)
- Rob Pickford (Welsh Assembly Government)
- Shirley Trundle CBE (Department for Education)

- 1.6 The panel is supported by a secretariat, made up of staff from MoJ, DfE, HMCS and Cafcass, who have worked with officials from the Welsh Assembly Government. The Secretary to the Review is Jodie Smith.

The panel's work so far

- 1.7 The panel started work in March 2010 and has undertaken a broad programme of information gathering, including a call for evidence, launched in June 2010, to which people submitted evidence both online and on paper. The full list of questions can be found at Annex C.
- 1.8 The response to the call for evidence proved testament to the depth of feeling, level of expertise and the experience that exists around the family justice system. Over 700 individuals and organisations contributed evidence, some submitting a range of documents, case studies, articles and reports. The call for evidence closed in September 2010, although evidence has continued to come in since then.
- 1.9 A clear feature of all the evidence is a shared recognition of the need for the system to be helped to work better, even while many people feel a justified pride in the system, and in the work they do.
- 1.10 The panel has met a wide range of organisations and individuals to hear oral evidence and raise specific questions. This includes children and parents, foster parents, judges, social workers, mediators, solicitors, barristers and people working in contact centres, as well as people from the many representative organisations.
- 1.11 The panel has also undertaken a series of visits around England and Wales, meeting the whole range of people working in the system. Individual panel members have travelled to Australia, France, Scotland and Sweden to gain understanding of processes in other jurisdictions. Full lists of those met by the panel and visits undertaken are at Annexes D and E.

- 1.12 The views of children and young people have been heard throughout the Review's work. Members of the panel have met members of the Cafcass Young People's Board to discuss their views on the system and attended a seminar on the voice of the child, held by Coram on their behalf. Young people also responded to the call for evidence, and the panel has reviewed the wide range of research detailing the views of children.
- 1.13 Working with Roger Morgan, the Children's Rights Director, the panel has also consulted directly with children in care on their feelings about family justice. An event was held in October 2010, at the Space Centre in Leicester, at which 67 children and young people were consulted. Their responses have since been published and provide a timely resource for the work of the panel.³
- 1.14 Lastly, the panel has also been working closely with Professor Eileen Munro, as she undertakes her Review of social work practice in England, and Moira Gibb, the head of the Social Work Reform Board. The panel recognises the importance of linking this Review to both of these initiatives, together with the principles within the Welsh Assembly Government's "*Sustainable Social Services: A Framework for Action*".

Data and Research

- 1.15 The panel – supported by analysts in MoJ and DfE – has reviewed relevant statistics, management information and literature and undertaken a survey of international experiences. It has also commissioned a case-file review and a snapshot survey of the work of the courts.
- 1.16 The case-file review has examined over 800 cases in courts around England and Wales to help understand the progress of cases through the system; changes in applications and orders over time; and to identify changes in how cases are contested over time. The findings of the survey will inform the panel's final report. The snapshot survey sought to analyse who is in the court over a sample period of time, and what they are doing. We would like to thank all those who have taken the time to contribute to both these pieces of work.

Next steps

- 1.17 We present in this report a wide range of recommendations and proposals for the future of family justice in England and Wales. We now seek thoughts, views and opinions. A consultation will be open for 12 weeks, closing on 23 June 2011. There is an online questionnaire at:
- <https://survey.euro.confirmit.com/wix3/p635083884.aspx>
- 1.18 You can also contact the Review team by email, at familyjusticereview@justice.gsi.gov.uk. The panel again plans to consult users and professionals through a series of events and meetings. To ensure that

³ Ofsted (2010) Children on family justice: A report of children's views for the Family Justice Review panel, 2010, by the Children's Rights Director for England, Manchester, Ofsted

children and young people's views continue to be fed into our consultation, we will also be producing a guide to this report designed specifically for them.

- 1.19 The panel will assess all the consultation responses over the summer, as we move towards a firm set of proposals, to be published in a final report in the autumn.

2. The Family Justice System

The work of the family justice system

- 2.1 A “battleground leading to unhappiness” is how one respondent to the call for evidence described the family justice system.⁴ This is a tough description but it aptly sums up the painful and emotional difficulties people in the family justice system encounter every day.
- 2.2 The range of problems faced by the system is diverse and the scale large. In 2009, 163,000 children were involved in family law cases. There were 132,000 divorce petitions, 80,000 orders for financial provision following the breakdown of marriages and more than 20,000 people sought protection through domestic violence orders.⁵ In very broad terms, these cases will fall into the category of either public or private law. But these terms alone do not convey the significance of the issues involved.
- 2.3 Public law governs the types of remedies available when state intervention in family life is needed to protect a child at risk of harm. Typically, it is the means by which children are removed from their parents, through care proceedings. These are hugely painful experiences for the children and parents. The families can be highly dysfunctional, their lives characterised by mental health issues, drug and alcohol addiction, chaotic lifestyles, abuse and neglect.
- 2.4 Private law is the term used for dealing with the consequences of relationship breakdown and private family disputes. Those who choose – or are compelled – to enter the system for these reasons are often under great strain: they can feel confused by legal jargon; children and money can be used as weapons against former partners; others have had their lives blighted by domestic abuse and are seeking protection.
- 2.5 The boundaries between public and private law can often be blurred. Serious child protection concerns can arise in many private law cases, of a level that may trigger the need for state intervention. Conversely, private orders – such as residence orders – can sometimes be more appropriate than public law orders, enabling wider family members to care for children who might otherwise be at risk.
- 2.6 The children and adults involved in all these types of cases are often at their most vulnerable, and the issues involved are hugely difficult, emotional and important. The system must deal with the failure of families, of parenting and of relationships. It cannot heal those failures. But it must ensure it promotes the most positive or the least detrimental outcomes possible for all the children and families who need to use it. The repercussions of the decisions taken can have wide-ranging and continuing effects not just for those involved, but also for society more generally.

⁴ A social worker respondent to the call for evidence

⁵ Judicial and Court Statistics 2009, Ministry of Justice

- 2.7 An effective family justice system is needed to support the making of these complex and important decisions. It must be one that:
- provides children as well as adults with an opportunity to have their voices heard in the decisions that will be made;
 - provides proper safeguards to ensure vulnerable children and families are protected;
 - enables and encourages out of court resolution, when this is appropriate; and
 - ensures there is proportionate and skilfully managed court involvement.

The legal framework – a brief history

- 2.8 Family law – encompassing child care arrangements and the rules and regulations concerning dissolution of marriage and partnerships – has evolved in a piecemeal manner. Both legislation and judicial decisions have developed to reflect changing social attitudes towards children and families, along with changing political agendas during the nineteenth and twentieth centuries.⁶
- 2.9 The state's focus on children's welfare grew during the nineteenth century. Organisations such as the NSPCC put pressure on government to protect vulnerable children from harmful working conditions in industrial factories and from exploitation by their parents. This led to the Prevention of Cruelty to, and Protection of, Children Act in 1889. The first major piece of legislation of its kind, it allowed state intervention into private family matters concerning a child's upbringing by their parents. It enabled courts to investigate suspicion of cruelty and ill treatment towards children within the home, and to remove a child considered to be in danger and place them into the care of another adult. Numerous pieces of legislation followed during the past century, aimed at strengthening the state's role in protecting children who were at risk of harm.
- 2.10 Concerns increased during the 1980s, driven in part by public outcry at the deaths of Maria Colwell in 1973 and Jasmine Beckford in 1984. Coupled with the child protection events in Cleveland in 1987 – where numerous children were wrongly taken into local authority care and denied contact with their parents following unreliable medical assessment that sexual abuse had occurred – child care law was put under the spotlight.
- 2.11 The mechanisms available to local authorities were numerous and confusing, with different levels of scrutiny by different courts depending on which option was chosen. Children were increasingly made wards of court. This meant the court assumed legal control of the child and was involved in all major decisions in their life. There was also growing concern about the adequacy of representation for parents in these cases and that children were only represented on a piecemeal basis, rather than universally in every case.

⁶ For further detail see Cretny S (2003) *Family Law in the Twentieth Century A history*, Oxford, Oxford University Press and Parker R (2010) *The evolution of landmark legislation*. In: *Journal of Children's Services*, Volume 5, Issue 2, June 2010

- 2.12 The unsatisfactory and complex nature of the law led to a recommendation in 1984 from the House of Commons Social Services Committee that there be "...a review of the constitution, procedures and powers of the juvenile courts, as they affected children in care and their parents, and of the whole legal structure of care".⁷ A working party, drawn from the Department of Health, Home Office and Lord Chancellor's Department was established in response. Its *Review of Child Care Law* formed the basis for the government's 1987 White Paper, *The Law on Child Care and Family Services*.

*[The White Paper] spoke of achieving a better balance between 'the State and individual parents', emphasising that the prime responsibility for children's upbringing rested with the latter, but that if there were a need to transfer these responsibilities to a local authority it should be through 'a full court hearing following due legal process.'*⁸

- 2.13 The Law Commission conducted a review of private family law at the same time as the government was responding to the working party's recommendations on child care. Until this point the law in relation to private family matters had developed largely reflecting the state's attitude to the dissolution of marriage.

- 2.14 There was an acceptance, with its origins in the women's reform movement of the late nineteenth century, that women could acquire property in their own right during their marriage and that it was appropriate for ancillary relief to be granted on divorce, particularly if the divorce was as a result of wrongdoing. However, there was reluctance for the state to get involved in matters related to children. As Sir Claud Schuster said in 1922:

*[Courts are] concerned...with the definite ascertainment of the rights of the parties, a party on one side and a party on the other, and if they can ascertain what the right is then the court is inevitably led to its decision. There are no rights here. It is a question of discretion. To take a ridiculous instance, a dispute whether a child is to go to one school, or to another – how on earth is the court going to deal with that?*⁹

- 2.15 By the end of World War II litigation involving children had increased dramatically. Societal shifts now justified intervention by the state. The Denning Committee on Procedure on Matrimonial Causes concluded that "starting divorce proceedings automatically rendered the family liable to scrutiny and report".¹⁰ The 1956 Royal Commission on Marriage and Divorce included a recommendation that the court be content that the arrangements for children on divorce were satisfactory as there was "no adequate means of ensuring that someone is specifically charged to look after the children's interests."¹¹

⁷ *Second Report from the Social Services Committee, Session 1983-84, Children in Care*, Vol.1 (HC 360-I, 1984).

⁸ Parker, 2010

⁹ Sir Claud Schuster, *Joint Select Committee on the Guardianship of Infants Bill*, Minutes of Evidence, 25 July 1922. Cretny (2003)

¹⁰ Ibid

¹¹ *Report of the Royal Commission on Marriage and Divorce*, 1956, cited in Cretny (2003)

- 2.16 By the time of the Law Commission’s work, the law in relation to children was felt to be characterised by conflict in which one parent would gain ‘victory’ as a result of being granted custody by the court. There was a widespread belief that the court should have a more limited role in parental arrangements for the upbringing of children. The focus of the Law Commission’s recommendations was to rebalance the court’s role and to ensure there was state intervention only when necessary.¹²
- 2.17 The Children Act 1989 was the vehicle for the reform of both public and private law. The Act provided “...a more practical and consistent code. It integrates the law relating to private individuals with the responsibilities of public authorities...towards children.”¹³ As Lord Mackay said at the time, it was “the most comprehensive and far reaching reform of child law which has come before Parliament in living memory”.¹⁴

The current context

- 2.18 A few key pieces of legislation govern the way in which family law operates today. The Children Act 1989 remains the foundation, providing in one place the overarching legal framework for family law as it applies to children. It also links together all types of court dealing with children matters.
- 2.19 The Act sets out some core principles.
- (i) *Paramountcy* – the child’s welfare must be the paramount consideration when determining any question with respect to the upbringing of a child. This principle is fleshed out in a ‘welfare checklist’, which lists seven sets of generic circumstances which, to a greater or lesser extent, will be important in determining the ‘welfare issues’ in each case.
 - (ii) *No delay* – the general principle that any delay in determining a question is likely to prejudice the welfare of the child applies, and all the parties have a duty to minimise it.
 - (iii) *No order* – court orders should only be made if they positively promote the welfare of a child and are better for the child than making no order at all.

What is the Welfare Checklist?

The ascertainable wishes and feelings of the child concerned (considered in light of their age and understanding).

- Their physical, emotional and/or educational needs
- The likely effect on them of any change in their circumstances
- Their age, sex, background and any characteristics of theirs which the court considers relevant

¹² *Family Law: review of child law, guardianship and custody*, Law Commission, No.0594 1987-88 (1988)

¹³ Department of Health (1989) *An Introduction to the Children Act* London, DH

¹⁴ (1989) 502 HL Official Report (5th series) col 488

- Any harm which they have suffered or are at risk of suffering
- How capable each of their parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting their needs
- The range of powers available to the court.

2.20 More than 90 new sections have been added since the Act's implementation in October 1991. New types of orders are available, Independent Reviewing Officers have been introduced, additional enforcement mechanisms are provided for and the courts have the power to make contact activity directions to help promote contact between children and their parents.

2.21 Evidence to us has overwhelmingly endorsed the continuing strength of the 1989 Act and its key principles. The Act is also widely admired overseas and has been drawn on by other jurisdictions.

The family justice system must maintain the core principle of the 1989 Children Act that the welfare of the child is paramount. However well intentioned, any watering down of this position could be disastrous.

Action for Children, call for evidence submission

We agree.

2.22 One particular change since 1989 warrants reference. In 1991, the United Kingdom agreed to be bound by the United Nations Convention on the Rights of the Child (UNCRC), with its emphasis on the importance of the voice of the child in the family justice system. Article 12 of the Convention states:

You have the right to say what you think should happen when adults are making decisions that affect you, and to have your opinions taken into account.

2.23 The Welsh Assembly government has recently passed legislation to place a duty on Welsh Ministers to have due regard to the UNCRC when making decisions about the formulation, review or change of policies or about proposed legislation, from May 2012. This will also be extended to apply when Welsh Ministers exercise any of their functions from 2014.

Who is involved in the family justice system?

2.24 Responsibility for family justice is split between the Ministry of Justice, Department for Education and Welsh Assembly Government, who are responsible for a number of different bodies – Cafcass, Cafcass Cymru, Her Majesty's Courts Service (HMCS) and the Legal Services Commission (LSC). The judiciary are responsible for decision-making and guidance on how cases should be conducted in court. Local authorities (particularly social workers) also have a key role. Solicitors, barristers, expert assessors and mediators are all necessary players. The Family Justice Council is the main co-ordinating body, at both national level and through Local Family Justice Councils.

2.25 The core agencies have formal statutory functions and we have focused our work on them. But we also recognise the vital part played by other groups and agencies in the lives of the troubled people touched by the family justice system. We have put them in the outer ring of the diagram below.

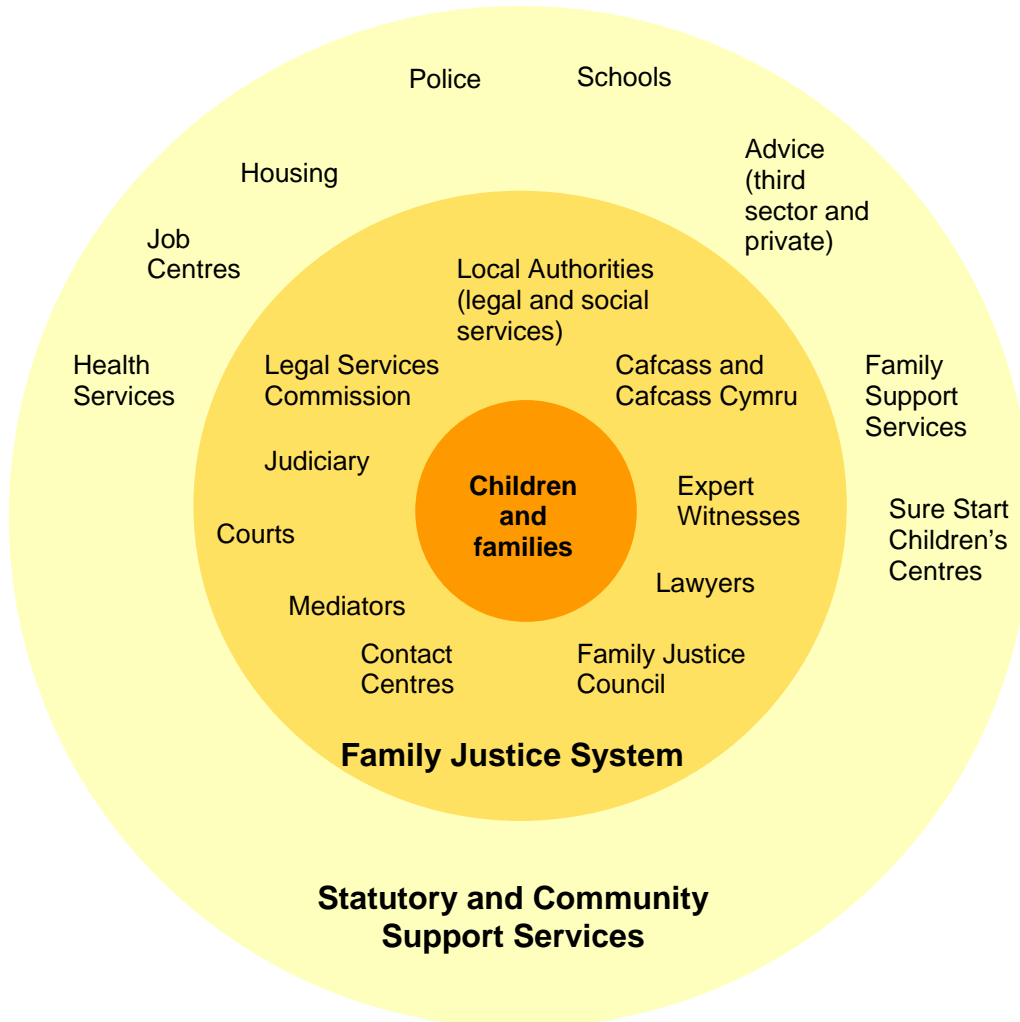


Fig i – The family justice system

2.26 Those in the outer circle are broader, upstream services. These can have an important impact on whether a case might ever develop to such a stage that interaction with the family justice system is necessary, or can prevent further interaction. They cannot be ignored and have been considered in the course of our work as necessary. But it has been beyond our remit to look specifically at the broader role these services have in supporting families and securing remedies for them at an earlier stage. In addition to the work Professor Eileen Munro has taken forward on child protection, this has also been the focus of

three other reviews.¹⁵ In Wales, Integrated Family Support Services are a tool in the Child Poverty Strategy to deliver integrated services around families.¹⁶

The effectiveness of the current system

2.27 We have been impressed by the dedication and capability of those who work in the family justice system. Their work is hugely demanding and often highly stressful. They work to protect children's interests and to promote better outcomes for them. Positive working relationships in many areas have led to the development of innovative practice designed to improve the way in which the system operates. All this takes place against a strong legislative backdrop that provides substantial protections for children and parents.

2.28 Despite these strengths, we have found a system facing immense stresses and difficulties. Some apply only in public law or private law and are considered in more depth in those sections. Others apply to both and we describe them now. They are:

- delay;
- cost;
- confusion for both children and adults;
- complicated and overlapping organisations;
- lack of trust;
- lack of shared objectives and control;
- low morale among the workforce; and
- lack of management information.

2.29 First, delay.

Delay

2.30 Delay really matters. All our understanding of child development shows the critical importance of a stable environment to allow development of firm attachments to caring adults. Yet our court processes lead to children living with uncertainty for months and years, with foster parents, in care homes, or with one parent in unresolved conflict with the other. A baby can spend their first year or much longer living with foster parents, being shipped around town for contact with their birth parents, while courts resolve their future. Going to court is itself also stressful. The longer the case the greater that stress is, both for the children and the adults.

¹⁵ The Independent Review on Poverty and Life Chances, Frank Field MP (available online at <http://povertyreview.independent.gov.uk/>), the independent commission into early intervention led by Graham Allen MP, first report published in January 2011 www.dwp.gov.uk/docs/early-intervention-next-steps.pdf last accessed 28/03/11, and Dame Clare Tickell's review of early years foundation stage.

¹⁶ <http://wales.gov.uk/topics/childrenyoungpeople/poverty/newcpstrategy/?lang=en>, last accessed 25/3/11.

- 2.31 Delay is most acute in public law cases. The average case now takes 53 weeks: 57 weeks in the county courts and 46 weeks in the magistrates' court (known as Family Proceedings Courts).¹⁷ To take on average more than a year to deal with these types of cases is unacceptable. While we acknowledge that purposeful delay can be important, the harm caused to a child in this period of uncertainty cannot be justified other than in the most exceptional circumstances.
- 2.32 We are also concerned that the average case duration will increase in public law, at least in the short term. In December 2010, there were more than 20,000 children waiting for a decision in public law, compared to more than 11,000 at the end of 2008.¹⁸ More than half these cases had been open for more than 30 weeks and some 8% had been open for more than 80 weeks.¹⁹
- 2.33 The difficulties caused by delay have been exacerbated by the increase in caseloads since the Baby Peter case in 2008. The number of children in public law cases increased by some 6,000 between 2008 and 2009.²⁰ Cases dealt with by Cafcass increased by almost 36%.²¹ It appears that the higher caseloads are being sustained and may be increasing further, though at a slower rate.
- 2.34 Delay is also a serious issue in private law. In 2010, the average case took 32 weeks, just over seven months.²² The more difficult and complex cases can go on for much longer. It is not uncommon for private law cases involving children to last for three years or more.
- 2.35 The longer these cases take to resolve, the more entrenched and embittered the dispute is likely to become. Reports from Cafcass or Cafcass Cymru may well be needed to help progress these cases. The time needed depends on the type of report required by the court but ranges, on average, between 10 and 16 weeks.²³ During that time, the court may have limited options available to help resolve the dispute and may be forced to order contact in a supervised setting, particularly if there are safety concerns. In extreme cases no contact may also be ordered. This can frustrate a child's attachment to their parent leading to long-term harm, both for the child and their parent, if it is latterly deemed appropriate to re-establish more regular contact. Again, there is a need early resolution and settlement.
- 2.36 The number of private law cases coming to court has been rising since 2005, with a jump in 2009 when 137,000 children were involved, up 14% compared to the previous year.²⁴ The reasons for this are unknown, though the recession may have increased family strains. Case lengths have not increased, though rising caseloads have undoubtedly added to the pressures on the system.

¹⁷ HMCS FamilyMan data for 2010. These data come from internal case management systems and do not form part of the national statistics produced by the Ministry of Justice which can be found here: www.justice.gov.uk/publications/statistics.htm. As such this data set is not subject to the same levels of quality assurance.

¹⁸ These are figures for all public law work, including care applications.

¹⁹ HMCS FamilyMan data – as footnote 17

²⁰ Judicial and Court Statistics 2009, Ministry of Justice

²¹ Cafcass Case Management System, to December 2010.

²² HMCS FamilyMan data for 2010 – as footnote 17

²³ Cafcass Case Management System, to December 2010.

²⁴ Ibid

Costs

- 2.37 The lack of management information about family justice, including data on costs, is a major concern and is considered in more detail below. Our very rough estimate is that the cost to government alone was at least £1.5 billion in 2009/10, of which roughly £0.95 billion was for public law and £0.55 billion for private law. These estimates can be seen at Annex F. For comparison, the total local authority spend on looked after children in England and Wales was around £3.4 billion for the same year.²⁵
- 2.38 It is impossible to know how much private individuals pay when cases come to court but this figure, too, is likely to be substantial.

Confusion for children and adults

- 2.39 Children and families often do not understand what is happening to them in the family justice system. They can also feel that they are not listened to.
- 2.40 To hear the child's voice is particularly important. The evidence we received from children and young people shows that, above all else, they want to have a family justice system that listens to their views and explains the decisions that are made about them. In a Council of Europe survey about justice, of around 3,700 children 82% "considered it was important that they were heard".²⁶ Evidence from the Cafcass Young People's Board, however, shows a mixed picture in how far this is being delivered in practice.

When [the family justice system] worked for them, it promoted their wishes and feelings and brought their views to the court's considerations. When it didn't, it failed them in listening to their views and in supporting them in finding the right solutions for their future.

Cafcass Young People's Board, call for evidence response

- 2.41 Evidence about children's experiences of the court process leads to concern about how children and young people are engaged with during the legal process. This engagement is a core function of Cafcass and Cafcass Cymru. However, there have been concerns about how children interact with Cafcass officers and what happens to the information they share.²⁷

They [Cafcass] didn't explain confidentiality. I couldn't trust them. They would tell our parents things they shouldn't have and that we wanted to keep between ourselves. Our parents didn't like what was said and this has affected the relationship.²⁸

²⁵ This figure includes spend on children in need in Wales

²⁶ Kilkelly, U., (2010) *Listening to children about justice: report of the Council of Europe consultation with children on child-friendly justice*, Strasbourg, Council of Europe

²⁷ In this report, references to 'Cafcass officers' are for both England and Wales

²⁸ (2010) *Private Law Consultation 'How it looks to me, Cafcass*

- 2.42 More generally, there was a feeling in the call for evidence that more could be done to allow children to have a direct voice in proceedings, especially in light of the UN Convention on the Rights of the Child.

[We are] of the view that the child's voice is highly important in all types of cases. Article 12 of the UN Convention of the Rights of the Child and Articles 6 and 8 of the European Convention on Human Rights confer on children a range of rights including the right to be heard in judicial and administrative proceedings affecting the child and the right to a fair and public hearing. We believe that in all instances where a child wants to have a voice he/she should be given the opportunity to be heard. We are also of the view that children should have the opportunity to be present in court if they so wish.

The Children's Society, call for evidence submission

- 2.43 A child's view may be different from the judgement of the professionals on what is in their best interests.

Children often come to understand over time that their needs will not be met by what they had imagined they wanted, eg to be at home, or close to their mates, indeed that these options are likely to destroy their lives. Thus, the voice of the child cannot substitute for professional judgement about what is right for the child, though it must always be taken into account.

Childhood First, call for evidence submission

- 2.44 But that does not reduce the need for children to understand what is happening, to have the opportunity to put their views forward and to know that, although decisions might be taken that are not what they want, their voices have been heard. Our evidence is that this does not happen enough at the moment.

- 2.45 Adults find the system confusing and characterised by legalese whether they are involved in public or private law.

Our experience is that users are often deeply confused about the FJS and find themselves quite at sea. A recent experience with a litigating couple, who had approached us for therapy, was a complete confusion about who had initiated proceedings, with each believing the other had done so. Court appearances came and went with no sense of why they were happening or what the outcome was. More concerning, is the sense that these processes can have a life of their own that gets lived between solicitors and that once initiated it can seem impossible to get off the court merry go round. When these processes are operating with a life of their own it makes it harder for the individuals involved to take responsibility for their role in the process and a cycle of blame is cultivated further.

Tavistock Centre for Couple Relationships, call for evidence submission

- 2.46 In private law, it is difficult for adults to navigate the system on their own. Two anonymous respondents to the call for evidence highlight this. For one, "it is a minefield and not clear what the processes are. Forms are too complicated and lengthy". Another notes simply, "a lay person is easily lost".

- 2.47 Proposed changes to legal aid, should they go ahead, will mean more people choosing to represent themselves as litigants in person. This complexity will, as a result, become an increasingly important weakness.

Complicated and overlapping organisational structures

- 2.48 We have highlighted the number of different players in the family justice system. Governance and delivery chain maps can be found at Annexes G and H. These show the complications of the current organisational structures.
- 2.49 Yet accountabilities and responsibilities are far from clear and arrangements are too often ad hoc. Devolved management can have great strengths, and we support it in principle. However, the guidance on handling of cases put forward by the President of the Family Division (through the Public Law Outline and Private Law Programme) is not consistently followed by judges, with no evaluation of whether their choices are effective and, if they are, whether those practices should be adopted elsewhere. Experiments abound around the country, again with no evaluation. Agreements between agencies are of varying quality and effectiveness.
- 2.50 There are overlapping arrangements for co-ordination, involving many of the same people including Family Justice Councils, Family Court Business Committees and, more recently, Local Performance Improvement Groups. Oddly, it was not mandatory to include judges in the performance improvement groups.

A lack of trust

- 2.51 Increasing pressure of work has raised tensions and exacerbated a lack of trust between people and organisations.
- 2.52 Judges increasingly do not trust assessments by local authorities. The commissioning of ever more expert reports is one result together with the creation, then, of a vicious cycle in which local authorities may not commission reports themselves. This affects the social workers, who lose confidence and can feel bullied by judges and advocates. Social workers can also feel resentment towards Cafcass officers – who have similar levels of experience, or sometimes less – scrutinising their work and being held in higher regard by the courts. A particularly damaging consequence has been a proliferation of arrangements for one institution to check the work of another.

Lack of shared objectives and control

- 2.53 With no clear governance arrangements, a lack of control over the operation of the family justice system is not surprising. There is no set of shared objectives to bind agencies and professionals to a common goal. As a result, decisions are often taken with little regard to the effects on other parts of the system. The rigidity of pre-proceedings requirements on local authorities, for example, placed unforeseen additional burdens on them. Spending decisions are also taken on a case-by-case basis with no regard to available funding and how this will affect the prioritisation of need and decisions in other areas of an agency's responsibility.

- 2.54 Practice and performance varies hugely across England and Wales. The average duration of care and supervision cases closed in 2010 varied from 46 weeks in the North East to 60 weeks in the North West.²⁹
- 2.55 Opportunities for those involved in the system to engage in mutual learning, development and feedback are too few. The Family Justice Council and Local Family Justice Councils can be effective, and we have seen examples of good practice. But learning and systematic review of performance is seldom undertaken and – in contrast to the health service – we have not found examples of learning from case studies.

Morale is low

- 2.56 Morale seems too often to be low. This may, in part, be a response to necessary but unpopular change. One former Cafcass employee noted:

Until recently I was a children's guardian. This allowed me to ensure that children's voices were heard in proceedings and also gave me time to explain to them what was going on in court. I scrutinised sometimes inadequate assessments of parents and searched out family members who could care for a child. I was able to influence plans on behalf of children... This is no longer possible under the restricted role permitted by the [President's Interim Guidance].

Former Cafcass employee, call for evidence response

- 2.57 But the issues go deeper than this. Family justice needs levels of skill and commitment not matched currently by its status. This is true particularly of social work, where there are recruitment and retention difficulties. Eileen Munro and the Social Work Reform Board are working to change this in England. In Wales, this is in the remit of the Social Work Task Group and Care Council for Wales.
- 2.58 We have been told that changes in legal aid provision over the years have reduced the morale and status of legally aided family lawyers. There are also concerns about the sustainability of this part of the profession.

Lack of IT and management information

- 2.59 We have been astonished by the system's lack of worthwhile management information. Each agency has its own case management system and data. These vary in quality and comprehensiveness. Cafcass has made worthwhile progress. Data from HMCS is particularly poor with, for example, no complete figures for family judicial sitting days or unit costs. Moreover the parts of the system tend to measure the same things in different ways.
- 2.60 The IT of each area also does not communicate. Information flows around the system largely on paper, as though computers and the internet had not been invented. We have rarely attended a court hearing when all the relevant information was available. Lack of systems is not the only reason for this, but it certainly contributes.

²⁹ HMCS FamilyMan data for care centres, December 2010 – as footnote 17

Why these difficulties exist - the need for an effective system

- 2.61 Taken together, these issues show a set of arrangements in crisis despite the efforts of all those involved. This is a situation that simply cannot be allowed to continue. Family justice does not operate as a coherent, managed system. In fact, in many ways, it is not a system at all.
- 2.62 There have been at least seven reviews of family justice since 1989, with countless additional piecemeal changes. All identified largely the same issues we have. Common themes are an increasing concern about delay, particularly in public law cases; a lack of consistency; variations in performance; and a lack of effective, joined up IT. The data gaps identified when the *Review of the Child Care Proceedings System in England and Wales* was published in 2006 are just as relevant now. Improvements have been made but many recommendations seem not to have been implemented or, if they were, they have had a temporary impact at best.
- 2.63 Some argue that more resources are the answer. We do not agree, even were they available. There is, in our view, a clear need for a more coherent set of arrangements with a defined system owner.
- 2.64 System reform and system management can seem remote from the human issues of family justice. We look later in this report at improvements within public and private law focused on improving outcomes for children and families. However, for these measures to be sustainable, system-wide issues must also be tackled. Only by doing this will we enable the system to change and adapt as its pressures, needs and priorities change in future.

3. A Family Justice Service

Introduction

- 3.1 The previous chapter pointed to the need for a coherent, managed system to support the making of complex and important decisions.
- 3.2 In this chapter, we recommend that a dedicated, managed Family Justice Service should be created. The judiciary and the Service together will need to ensure that:
- the interests of children and young people are at its heart and that it provides them, as well as adults, with an opportunity to have their voices heard in decision-making;
 - children and families understand what their options are, who is involved and what is happening;
 - the service is appropriately transparent and assures public confidence;
 - proper safeguards are provided to protect vulnerable children and families;
 - out of court resolution is enabled and encouraged, where this is appropriate;
 - there is proportionate and skilfully managed court involvement; and
 - resources are effectively allocated and managed across the system.
- 3.3 We turn first to two general issues – the child’s voice and transparency – before considering the structure, management and functions of the proposed Service in more detail. Other issues, including safeguarding of children and families and out of court resolution, are discussed in the chapters on public law and private law.

The child’s voice

- 3.4 The Family Justice Service will need to ensure that the interests of children and young people are at its heart.
- 3.5 We highlighted, in chapter two, how important it is to ensure that the voices of children and young people are heard, and that they understand the decisions that can affect them so dramatically.
- 3.6 When children were asked, in a Council of Europe survey, about their views on justice and how they wanted to be heard, 2400 of 2600 children replied that they wanted to be heard directly.³⁰

*I wanted to talk to the judge myself so that my parents couldn’t twist my words...then there’s no lies.*³¹

³⁰ Kilkelly, U., (2010) *Listening to children about justice: report of the Council of Europe consultation with children on child-friendly justice*, Strasbourg, Council of Europe

³¹ (2010) *Private Law Consultation ‘How it looks to me’*, Cafcass

I found “the judge” was mentioned and how he was going to make the decision of who I lived with. And not being boastful, but this court was about me. So why couldn’t I see him?

13-year-old contributor, call for evidence submission

The judge should just make sure that he/she hears EVERY party that will be affected by his/her decision. E.g. I remember having few, if any, of my views making it into the files. Also I was never extended an invitation to court. So every avenue that can ascertain the views of the young person should be explored.

Young person cited by Cafcass, call for evidence submission

- 3.7 Not all children want to participate directly. 55% of 134 respondents in an NSPCC survey said they had not wanted to go to court for their case, while 18% would have liked to go to court and 19% would have liked to meet with the judge.³² It is important to ensure that those who do not want to engage directly have the opportunity to have their views put forward.
- 3.8 In the Children’s Rights Director’s consultation session for the Review, children expressed a number of worries about going to court, mainly around the pressure of decisions and of “not being able to give the right answers to important questions in front of a court”.³³
- 3.9 When children and young people were asked for suggestions about how they might be better heard, proposals included:
- speaking directly to the judge in court;
 - speaking to the judge outside court;
 - writing a letter to the judge;
 - appearing in court/before the judge by videolink/telephone/skype; and
 - views being expressed through a trusted, neutral individual.
- 3.10 The ability of a skilled Cafcass officer to present the wishes and feelings of a child to a court is often necessary. Not all children and young people involved in the family justice system are in a position to express their wishes and feelings themselves. A competent, skilled individual enables their voice to be heard.
- 3.11 Clearly, there are different ways of engaging with children and young people. Many will be happy to have their views relayed by a Cafcass officer. Others may not, or may want additional options to feel content their voice has been heard.
- 3.12 We agree with the Cafcass Young People’s Board that children and young people should, as early as possible in a case, be offered a menu of options to lay out the ways in which they could – if they wished – make their views known. All

³² Timms, J. et al (2007) *Your shout too! a survey of the views of children and young people involved in court proceedings when their parents divorce or separate*, London, NSPCC

³³ Office of the Children’s Rights Director, 2011

professionals should have this menu available to be able to advise the child as necessary in each case.

- 3.13 There are concerns that children and young people might be harmed by participating directly in proceedings with a fear, for example, that they might find themselves having to choose between their parents.

A child should never be put in a position where they have to take responsibility for the decision of the court.

Greater London Family Panel, call for evidence submission

- 3.14 These concerns can be handled by considering the appropriateness of the request case by case. The Family Justice Council DVD "*Inside the family court: Children's experiences of family proceedings*" is a welcome initiative in this area.
- 3.15 Our recommendations will ensure that the operation of the family justice system builds on and strengthens work already completed in relation to the United Nations Convention on the Rights of the Child, in both England and Wales.

Transparency and public confidence

- 3.16 Our terms of reference asked us to have regard to transparency. We are aware of concerns about the balance between a right to privacy and the need for public understanding on the one hand, and how that affects public confidence in the system on the other. Our own work has not led us to share concerns that arbitrary or ill-founded decisions are taken. In fact the reverse is the case. We have been impressed by the great care taken by the courts and all those involved in these difficult decisions. We recognise, of course, that the public are not granted the access that we have been afforded. However, we have not taken evidence on the controversial issue of public access and none of our recommendations affects, or needs to affect the openness or otherwise of the family courts. We can therefore only offer our own comments.
- 3.17 The family courts deal with issues that are hugely sensitive to the people involved in them. This would not, in itself, be enough reason to restrict access and reporting of proceedings. But the involvement of children makes the difference and they are absolutely clear that they would not want any publicity about their cases. We can all imagine, from our own childhoods, how devastating it could be at school and with friends (and other children who are not friends) if our family circumstances were laid out in the local or national media.
- 3.18 On the other hand, panel members who travelled to Australia were impressed by the way in which members of the public and those waiting for their own cases to be heard could sit at the back of the court while other proceedings were in progress. This had advantages in terms of parties – particularly people representing themselves – being able to see how their own cases would be handled, and no one we met identified any problems with it. The media in Australia are not permitted to report anything that identifies parties or expert witnesses.

- 3.19 Legislation in this area has to cover a range of circumstances and the detail of which cases can be open and which not (for example final adoptions) matters. In our view, based on our limited consideration of the issue, the general principle should be that people – including the media – should be able to attend court hearings but not be allowed to do or say anything that might identify the parties in public.

System structure

- 3.20 We have drawn on a range of submissions in reaching our proposal for a Family Justice Service.

- 3.21 Several respondents supported a locally devolved model.

Capacity in the system could be increased with regard to children's representation by decentralising Cafcass to local court based teams, thereby concentrating resources on frontline work

Cardiff Law School, call for evidence submission

It is now time to explore a locally based, more cost effective model in which practitioners are freed-up from excessive bureaucracy and management control to exercise professional child welfare led judgments and to respond directly to the needs of the court. This would in effect return the work of the guardian to their core tasks as set out in the 1989 Children Act and early guidance, where roles and tasks have coherence and are underscored by a philosophy and a practice that is evidence-based.

Julia Brophy, call for evidence submission

- 3.22 The Inter-Disciplinary Alliance for Children also proposed a locally devolved system with:

- a Family Justice Commissioning Board responsible for the allocation of resources to proposed Family Court Welfare and Child Representation Units, as well as a limited number of core functions;
- Family Court Welfare and Child Representation Units responsible for commissioning and delivery of statutory services to children in the family courts in both public and private law proceedings;
- a mixed economy of social work practices (which could include co-operative enterprises) to provide court social work services; and
- a relocation of the role of the Independent Reviewing Officers and independent advocacy services for looked after children, from local authorities to the proposed Family Court Welfare and Child Representation Units.

A diagram presenting this model is included at Annex I.

- 3.23 Some elements of this model are included in the proposed Family Justice Service, but we concluded it is not one that could be recommended in totality. Specifically we take the view that:

- there would, particularly in the short term, probably be a shortage of social work provision in some areas of England and Wales;
- in light of the current national shortage of social workers, and relative immaturity of the existing social work practice pilots, a centrally managed court social work function is preferable to a purchaser-provider commissioning structure; and,
- the IRO function should remain within local authorities (discussed further in chapter four on public law).

3.24 Others argued for more closely aligning the provision of Cafcass and court services.

[We] would urge the Review to examine other options for the organisation of these [court social work] functions than the current Cafcass model. One approach would be to attach teams of guardians and welfare reporting officers to care centres as part of HMCS. Embedding the staff in HMCS would help to emphasise their primary role of providing a service to the courts and to the children subject to family court proceedings. There may also be some benefit in the head of service at each care centre being in a better position to work closely with the Designated Family Judge. There would also be some savings in back office and corporate overhead costs if Cafcass were to be abolished as a separate entity and its staff transferred to HMCS.

Family Justice Council, call for evidence submission

3.25 We agree there is a need to bring together the currently disparate elements of the system as far as possible and sensible, including what is needed to allow people to resolve disputes outside of court as far as possible. We suggest the following core elements are needed:

- an identified system owner who would, among other things, provide trusted data and management information;
- provision of court social work services;
- responsibility for case progression activities in support of the judiciary who have case management responsibility;
- responsibility for an integrated IT system;
- ensuring geographic resource deployment is considered across the system by all participants on the basis of need, and that co-terminous service location is the norm where possible;
- consolidation of the case entry function that is currently completed by multiple agencies;
- information and support to assist resolution without the court's involvement, when this is appropriate;
- a mechanism to ensure research and information is accessible amongst practitioners; and
- responsibility for skills and training provision.

- 3.26 There will, as ever, need to be a careful balance between central control – to manage aggregate budgets and ensure delivery and consistency – and allowing local decision making, as far as possible, to reflect local needs and circumstances.
- 3.27 We propose that the Ministry of Justice, reflecting the need for close relationships with the judiciary, should sponsor this service. But the service will also clearly need to work alongside the Department for Education, to reflect that Department’s role in relation to children and in the setting of policy for local authority children’s services. Arrangements will also need to be agreed with the Welsh Assembly Government who would continue to provide court social work services through Cafcass Cymru, as this is a devolved responsibility.
- 3.28 Our sense is that family justice has, in the past, been treated as the poor relation compared to other parts of the justice system. The location of a service in MoJ might raise concerns that children and family matters would risk being marginalised compared to criminal and wider justice issues. We believe it will be important to build in safeguards against this. We will use the time before publication of our final report to do further thinking here. It may be right, for example, to place a duty on the Ministry to demonstrate how children’s interests have been given priority in the administration of justice.
- 3.29 The structure and governance of the proposed Family Justice Service will be important in achieving the changes required in family law. The precise nature of any governance arrangements would be a matter for government, should our recommendations be accepted. The governance will need to reflect the centrality of children and the intention that the service should look more widely than courts and court processes – a justice service is not just a court service.
- 3.30 We set out below our views on the functions and features such a service should have. Some areas require a particular focus. We now turn to a more detailed discussion of these, starting with leadership and management.

Leadership and management

- 3.31 Strong leadership and management are needed for any organisation or system to fulfil its individual or collective objectives. For family justice to begin to operate as a system it has to have an owner.
- 3.32 The Family Justice Service will need strong management to operate a dynamic organisation that includes the consolidation of functions from across the system. Management will need to engage closely with all stakeholders (particularly the judiciary and local authorities) and be able to reallocate resources across geographical and functional boundaries as need be.
- 3.33 The lack of effective management and governance arrangements for the family justice system runs through the evidence we received.

Individual parts of the system have their own management structures, some more effective than others but the system as a whole is barely managed at all.

Family Justice Council, call for evidence submission

It lacks overall strategic leadership and is relatively unmanaged as the system, in part for reasons of culture and history, is more fragmented than is efficient or necessary. The Review is an opportunity to ensure improved future political and professional leadership of the system.

Cafcass, call for evidence submission

- 3.34 We saw evidence of strong management at local level, focused on meeting individual organisational goals. However, problems were nearly always described as someone else's fault. There was no collective ownership of the system, despite the best intentions of a number of individual players.
- 3.35 The Family Justice Service should allow focused management of the system. But success will require the establishment of agreed whole system goals and working practices, as well as the goodwill of all agencies and parties involved at a national and local level.
- 3.36 We propose that a Family Justice Board should lead the service. This Board should represent a balanced group of qualified people from all parts of this system. This should include, among others:
- representation of the interests of children;
 - the President of the Family Division;
 - the interests of appropriate government departments, including the Welsh Assembly Government; and
 - local authorities.
- 3.37 The Family Justice Board will also include the Chief Executive Officer of the Family Justice Service. The Service will need a Chief Executive with the skills and stature to lead a complex change programme and to command respect among Ministers, judges, lawyers, local authority managers and social workers and the Service's own staff. This person will need to take responsibility for the performance of the system and lead it through major change.
- 3.38 With the creation of the Board the current structure of overlapping bodies should be simplified.
- 3.39 The Family Justice Council (FJC), a non-statutory advisory non-departmental public body, was established in 2004 to bring together all the key groups working in the family justice system. Its key roles are to:
- promote an inter-disciplinary approach to family justice;
 - monitor how effectively the system delivers the service the government and the public need; and
 - advise on reforms necessary for continuous improvement.
- 3.40 The FJC's terms of reference are included at Annex J. The Secretary of State for Justice appoints its members. 39 Local Family Justice Councils support it across England and Wales. These provide an opportunity for local engagement on

issues affecting the family justice system and a mechanism to provide inter-disciplinary training.

- 3.41 In addition to Local Family Justice Councils there are also Family Court Business Committees and, more recently, a National Performance Partnership and Local Performance Improvement Groups (oddly without the mandatory inclusion of judges) have been established to focus on improving performance in public law, particularly the reduction of delay. Both the purposes and the memberships of these bodies substantially overlap.
- 3.42 The President of the Family Division also convenes the President's Combined Development Board, which brings together HMCS, Cafcass, MoJ and DfE to discuss and agree action on matters relating to the family justice system.
- 3.43 These various bodies have done valuable work, but it will make sense to bring them together within the Family Justice Service. We propose that the Family Justice Board should subsume their roles at the national level and at the local level through the establishment of Local Family Justice Boards. Committees will be needed for particular issues. The local boards should have consistent terms of reference and membership and should be established at a sensible, area-based working level.
- 3.44 Local Family Justice Boards should work closely with local authorities and Local Safeguarding Children Boards (LSCBs). There will, rightly, be an overlap between the membership of the two boards and this should enable greater engagement with local service providers who are dealing with children involved in family law disputes (schools and the police for example). Children involved in family law disputes, particularly in public law, will be known to and have often engaged with many organisations represented on LSCBs. These organisations must understand and appreciate a child's journey through the inter-related child protection and family justice systems so that their voice and experience is heard.
- 3.45 The Munro Review of Child Protection is "minded to strengthen the role of LSCBs in monitoring the impact of practice, training and learning on the child's journey, as well as identifying and addressing emerging problems in the system"³⁴. We support this recommendation and believe that the Family Justice Service should have a role in monitoring and working with LSCBs to ensure mutually supportive arrangements are in place. In Wales, this will be considered as part of the review of safeguarding arrangements, which includes the role of LSCBs.

Judicial management

- 3.46 The judiciary, including magistrates, will naturally be key partners in the operation of the Family Justice Service, not solely as judgment makers but because of their impact on the conduct of cases and on the parties more generally. Often simply their legal standing and presence in a case is the catalyst for parties to resolve their issues, change their behaviour or accept that a

³⁴ Munro E (2011) *The Munro Review of Child Protection: Interim Report, The Child's Journey*, London, Department for Education

proposed action is in the best interests of their children. The changes we propose to family justice need the commitment of the judiciary for their success. They will fail without it.

- 3.47 Changes in judicial culture and behaviour are needed if family justice is to be delivered more effectively, and we do not underestimate the difficulty of achieving them.
- 3.48 Judges are rightly independent of government. Most have never worked in a management structure or had management responsibilities. There is no appraisal of family judges, nor measurement of how each judge goes about his or her business. We lack numbers of adjournments or caseloads, for example. Almost the only feedback judges receive will be about the very small number of their cases that go to the Court of Appeal. Judges also mostly work alone and, while they may informally discuss cases with fellow judges, the only input to their work is in submissions in the court. In that sense their working lives are unusually isolated.
- 3.49 A consequence of this independence is variety in ways of working in different courts and areas of the country. The processes set out by the President for public law in the Public Law Outline and for private law in the Private Law Programme are followed, or not, according to the views of individual judges. Experiments abound around the country, with claims being made for each of them. They are rarely evaluated and, even if positive, may or may not be adopted elsewhere.
- 3.50 This lack of consistency, of feedback and of measurement is a barrier to reduced delays and lower costs. We should and do prize the independence of our judges in their decision-making, and none of our proposals imply any compromise of it. Consistency of process and feedback through measurement of key indicators and case reviews of process (not decisions) will not undermine judicial independence. They are, rather, the basis for system learning and improvement.
- 3.51 Such practice is commonplace in Australia where the family courts have taken the lead, led by the Chief Justice and the Chief Federal Magistrate, in obtaining statistical information and management information for the judiciary. Indicative targets for judicial performance are set and used by senior judges to aid discussions about where changes may be needed.
- 3.52 We are encouraged by the widespread agreement on the need for change along these lines.

The Council feels that the judiciary could also benefit from peer review – poorly performing judges place a burden on their competent colleagues who have to take on extra work to cover for them. It is, of course, vital to maintain the independence of the judiciary but, in the Council's view, a system of peer review, of judges mentoring and commenting on the practice and performance of their colleagues, is not incompatible with judicial independence...it may be helpful for the Lord Chancellor and the Lord Chief Justice to examine the issue of judicial independence and to agree a clearer definition of where the proper boundaries lie. At present, the concept is rather fuzzily defined and this has

sometimes been an obstacle to beneficial change in the past. Judges are public servants. They have a special function and role in the constitution but, at present, the issues around judicial accountability lack transparency.

Family Justice Council, call for evidence submission

There seems little opportunity to have redress to judges and would welcome the introduction of a system that monitors their performance and consistency.

Flintshire County Council, call for evidence submission

Ideally, we believe that an appraisal system should be established for the judiciary to receive feedback on their performance, and provide public reassurance about judicial quality.

Law Society, call for evidence submission

- 3.53 The starting point is a clearer structure for management of the family judiciary, by the judiciary. There should be a dedicated post – a Senior Family Presiding Judge – to report to the President of the Family Division and the Senior Presiding Judge on the effectiveness of family work amongst the judiciary. Family Division Liaison Judges should be renamed Family Presiding Judges, reporting to the Senior Family Presiding Judge on performance issues in their circuit.
- 3.54 The Senior Presiding Family Judge and Family Presiding Judges should also work alongside Presiding Judges and report to the President of the Family Division and the Senior Presiding Judge. Those judges with leadership responsibilities should have clearer management responsibilities. There should be stronger job descriptions, detailing clear expectations of those with leadership roles in respect of management responsibilities and inter-agency working.

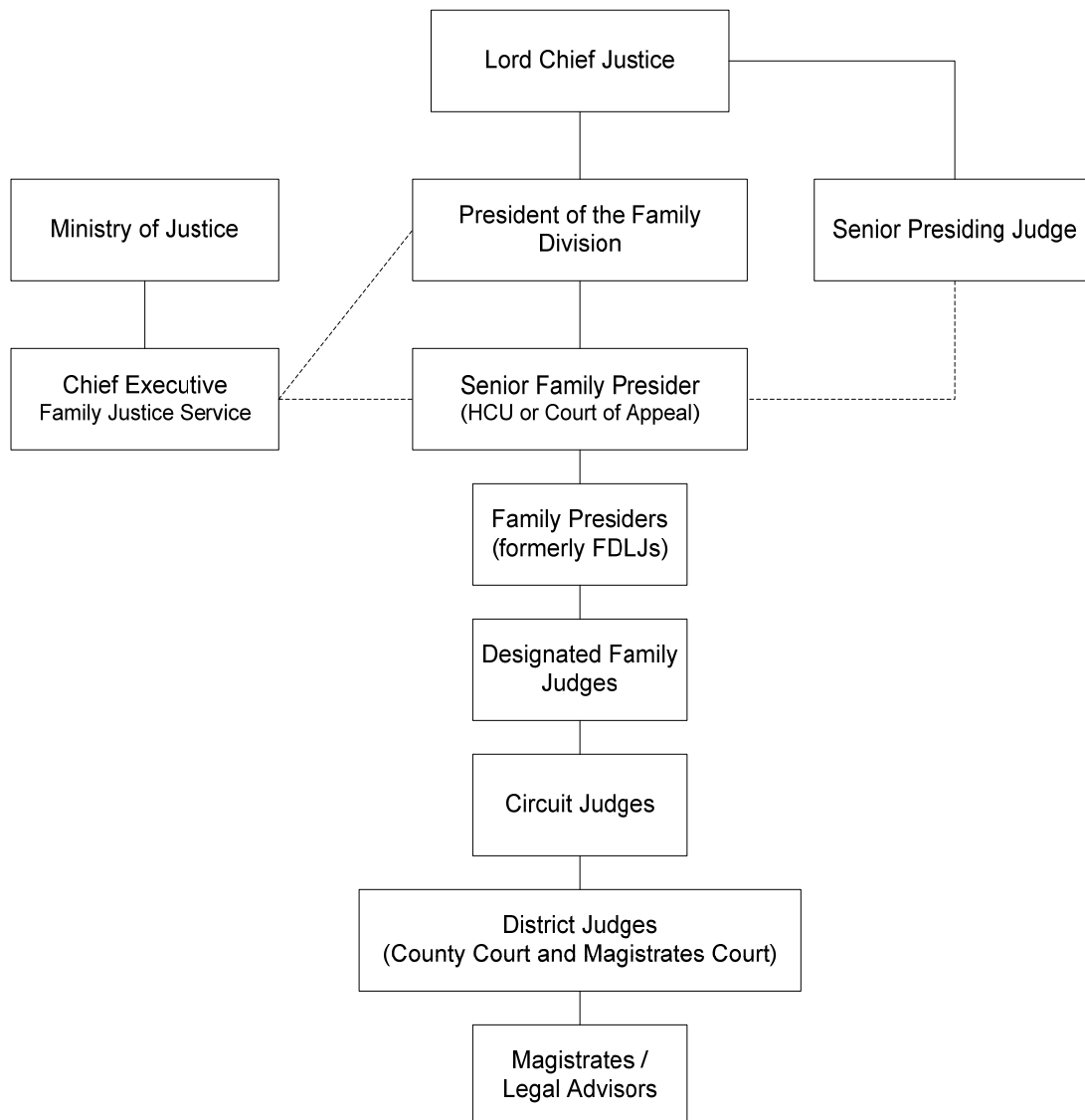


Fig ii – Potential structure for the family judiciary

- 3.55 Information on key indicators such as case numbers per judge, court and area; case lengths; numbers of adjournments and numbers of experts should support this approach to judicial management. It needs also to be seen alongside our recommendations on case management, case progression, judicial continuity, judicial specialisation and court structure.
- 3.56 Judicial continuity and case management are so central to effective management that we include them here, with leadership and management.

Judicial continuity

- 3.57 Currently, across England and Wales there is variation in the way that cases are allocated to judges. Judges and magistrates may change, often a number of times, during the life of a case.
- 3.58 We have been told consistently about the importance of having the same judge throughout a case. We agree. If, as a child, you face the prospect of being

removed from your home or, as a parent, risk your children being taken away from you, how can it be right that each time you go to court you appear before a different judge? Continuity will also increase speed and efficiency, both by making sure that the judge knows he or she will take the consequences of earlier case management decisions and by giving familiarity with the case.

- 3.59 As part of our work, 43 judges participated in a survey to show us how their time was spent during the week. 25% of their time outside the court room, and 15% of time in the court room, was spent in reading and preparation. It seems likely that greater judicial continuity has the potential to reduce this.
- 3.60 We have seen courts where judicial continuity is achieved. If it is possible to achieve it in some courts, then we must ensure that this is possible in them all. The High Court will be an exception because of the difficulty in ensuring judicial availability in different areas of the country, but this should be limited as far as possible.
- 3.61 Where judicial continuity could not be achieved, we would question the capacity of that court to hear family cases. This recommendation applies also to legal advisers and benches of magistrates. The result may be that more public law cases move over time to professional judges. This would in our view be entirely appropriate: the need for judicial continuity outweighs other considerations.

Case management

- 3.62 With judicial continuity should go rigorous case management, in the interests of the child. Case management processes vary widely between courts despite clear guidance from successive Presidents.
- 3.63 Judicial case management needs support. Several respondents to the call for evidence suggested that the role of case progression officers in HMCS was, where available, a useful resource. Having dedicated resource to monitor case progression and liaise with the various parties enables better local performance. Each of the high performing courts visited by the MoJ, in a recent piece of work to look at delay in public law cases, had a case progression function.
- 3.64 We were impressed by the principles set out in Australian legislation, aimed at ensuring there is a strong focus on case management by the court and at ensuring a less adversarial approach to the conduct of family court proceedings. The five principles are:
- (i) the court is to consider the needs of the child concerned, and the impact that the conduct of the proceedings may have on the child, in determining the conduct of the proceedings;
 - (ii) the court is to actively direct, control and manage the conduct of the proceedings;
 - (iii) the proceedings are to be conducted in a way that will safeguard:
 - a. the child concerned against family violence, child abuse and child neglect; and
 - b. the parties to the proceedings against family violence;

- (iv) the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties;
- (v) the proceedings are to be conducted without undue delay and with as little formality as possible.³⁵

3.65 The focus of these provisions is on private law proceedings, but we consider there is potential for a similar provision to be introduced on the face of legislation for England and Wales in respect of the conduct of both public and private law proceedings.

3.66 New duties will be placed on the courts in respect of case management in the Family Procedure Rules 2010 (FPR), due to come into effect in April 2011. The relevant content of the FPR is at Annex K. We believe it may be helpful to strengthen them with legislative provisions along the Australian lines.

Role of the Family Justice Service

3.67 The Family Justice Service is not the same thing as a family court service. It extends beyond case progression and support for the judiciary. The Service needs to deliver a proportionate and appropriate response to issues resolution. Where people can resolve their disputes without involving the court, the Family Justice Service should provide them with the information and tools to enable them to do so. The Service should also facilitate court involvement, which must be proportionate to the needs of the children and families involved.

3.68 The following sections set out the services to be offered within the Family Justice Service. Overall the Family Justice Service should agree priorities in consultation with its partners, such as local authorities, children and families, lawyers and mediators. Specifically, in order to fulfil its responsibilities for performance and delivery, it should:

- manage the budget of the consolidated functions, including monitoring the use of resources during the year and over time;
- provide court social work functions;
- ensure the voice of the child is adequately heard;
- procure publicly-funded mediation services and court-ordered contact services in private law cases;
- co-ordinate the professional relationships and workforce development needs between the key stakeholders;
- co-ordinate learning, feedback and research across the system;
- ensure there is robust, accurate, adequately comprehensive and reliable management information; and
- manage a coherent estates strategy, in conjunction with key stakeholders.

³⁵ Family Court of Australia, *Less Adversarial Trial Handbook*, June 2009, as set out in Family Law Act Amendment (Shared Parental Responsibility) Act 2006, Division 12, section 69ZN.

3.69 We do not envisage that these functions would be taken on simultaneously and understand there would be varying timeframes for implementation. Some need no further explanation. Others are discussed in more detail in the following sections.

Budget responsibility and charging

Current funding routes

3.70 Currently money is spent in the family justice system through both private and public expenditure. Public expenditure is channelled through several different organisations.

- The Ministry of Justice funds:
 1. Her Majesty's Court Service;
 2. the judiciary; and
 3. the Legal Services Commission, which pay certain legal representation and experts costs.
- The Department for Education funds Cafcass and contact services and activities.
- The Welsh Assembly Government funds:
 1. Cafcass Cymru and contact services and activities
 2. Welsh local authority children's social services.³⁶
- The Department for Communities and Local Government funds English local authority children's social services.³⁷

Within each of these organisations there are varying levels of budget delegation to local areas.

3.71 A lack of budget co-ordination at national and local level means that decisions taken in one part of the system can have a knock-on negative impact on another part.

There needs to be a reassessment of the ways in which resources can be most effectively used and managed between the various arms of the system. At present each arm of the system acts protectively of its own resources, thereby increasing the financial burden upon the other limbs (for example absence of targeted support and advice from Cafcass results in review after review in private law cases). In this regard the current system is highly wasteful.

Family Law Bar Association, call for evidence submission

3.72 This can happen both at a system-wide level and in individual cases.

³⁶ Funding to local authorities is a combination of local and national revenue sources. As the majority of funding is not ring-fenced it is not possible to determine which aspects of children's social services are funded from central government.

³⁷ As footnote above

Judicial resources

- 3.73 We were concerned to learn that there are no clear criteria to determine the allocation of judicial resources to family work. Still more surprising is that HMCS was unable to tell us how much time judges spend between civil work and family work.
- 3.74 This is clearly unacceptable if family work is to be managed in an effective way. An understanding of how judicial resources are allocated is essential and this should be supported through an appropriate time-recording system.
- 3.75 Judicial and court resources for family are set in terms of numbers of sitting days. This is strange and makes the management and comparison of budget across the system less clear than it should be. Budgets should be allocated in monetary terms.

Future management of budgets

- 3.76 Certain budgets should, over time, be consolidated into the Family Justice Service. The Family Justice Service should in due course be able to procure court support services, including more flexible premises than courts, both from HMCS and others. This would benefit family law and, through greater accountability and financial discipline, other justice areas.
- 3.77 Decisions on spending should be taken at the most local level possible, subject to appropriately established frameworks and benchmarks. This will allow local decision-makers, within the Family Justice Service and its partners, full scope to work together towards shared outcomes. In time this may include pooling as part of community budgets.
- 3.78 The Family Justice Service should determine the allocation of budgets to its local areas and monitor their usage. Where it makes sense for services to be procured at a national level, for example an IT system, then this should be done.

Inter-agency fees and charges

- 3.79 It is Government policy to charge for many publicly provided goods and services. In our view internal charges only make sense in family justice if they are intended to, and actually can, change behaviour and provided any change in behaviour is not detrimental to children's interests.
- 3.80 Local authorities pay fees to court in order to use their services. Before 2008 the charge was a £150 flat fee, payable on application. The fees were significantly increased in May 2008 to a staged fee, intended to reflect the full cost of the court proceedings. The total fees for a section 31 care and supervision proceeding are £4,825 from application to final hearing.
- 3.81 The fees were introduced to considerable concern from much of the judiciary, the legal profession and from many local authorities in England and Wales.

- 3.82 Francis Plowden reviewed these fees and recommended that they be abolished.³⁸ He found that, at the margin, the fees had an effect on local authorities' decisions as to whether or not to take action to remove children through section 31 proceedings.
- 3.83 Government has so far decided not to implement this recommendation. We endorse the view that charges should be abolished. Any change in local authority behaviour because of a charge can, in this case, only be damaging to children.
- 3.84 We are also aware that local police forces are either considering or implementing charges to Cafcass for police checks. These are expected to be low cost charges applied to a high volume of required services.
- 3.85 To enable local authorities and Cafcass to fulfil their duties to protect vulnerable children these checks cannot be avoided and, if the fees were to cause a change in behaviour, they would potentially damage the children and families in family law disputes.
- 3.86 We also note that court administrators are devoting significant scarce resource to chasing court fees mirrored, no doubt, by a similar burden on local authority back-office services. To process charges for police checks will also use resources. In neither case will there, or should there, be a change in behaviour. This is a waste of public money.

Legal aid

- 3.87 The government plans to abolish the Legal Services Commission (LSC) as a non-departmental public body and to replace it with an executive agency. This is intended to achieve a single set of priorities for legal aid, clear lines of ministerial accountability, improved financial management and opportunities for administrative efficiencies.
- 3.88 Family legal aid is a major part of the government spend on family justice. Were it managed as part of the overall family justice budget there would be opportunities to shift money between activities, from court work to mediation for example. The Family Justice Service should manage relationships with mediators, legal providers and experts. In time, with responsibility for the legal aid budget, it could procure their services. This is not an immediate priority while the LSC is being reorganised, but it has real longer term potential.
- 3.89 In the meantime, as elsewhere, it is important that the LSC should capture and publish data to allow costs of individual cases to be assessed. It is remarkable that figures for unit case costs are not available. A special exercise had to be mounted even to discover total and average expenditure on experts.

³⁸ Plowden F (2009) *Review of Court Fees in Child Care Proceedings* London Ministry of Justice

Court social work services

3.90 Cafcass and Cafcass Cymru currently provide court social work services. Their role is to advise the family courts on the child's best interests. The primary duties of each organisation, specified in legislation, are to:

- safeguard and promote the welfare of children;
- give advice to any court about applications made to it;
- make provision for the children to be represented in proceedings; and
- provide information, advice and other support for children and families.³⁹

3.91 Cafcass and Cafcass Cymru are separate bodies that look after the interests of children involved in family proceedings. Cafcass operates in England and is a non-departmental public body sponsored by the Department for Education. Cafcass Cymru is part of the Welsh Assembly Government. As a consequence:

- Cafcass is an arms length body and has statutory responsibilities for which it is accountable to Ministers;
- Welsh Ministers are directly responsible for the exercise of their functions by Cafcass Cymru and the performance and decisions of its family court advisors.

3.92 There is a lack of clarity and agreement among stakeholders about the proper role of Cafcass and its priorities, particularly around the extent to which it is simply a servant of the court and how this sits with their other functions. Cafcass as an organisation has certain responsibilities, including those relating to safeguarding and promoting children's welfare and providing risk assessments to court, while individual Cafcass Officers, in public law, are appointed as officers of the court.

We are not mainly a safeguarding organisation – we are a court reporting organisation whose safeguarding ties in with proper and full assessments for the courts.

Cafcass employee, call for evidence submission

There is a view among the family judiciary and legal practitioners that Cafcass has placed too much emphasis on safeguarding in recent years and that this has been at the expense of its responsibilities for welfare. Those who hold this view contend that safeguarding should more properly be the responsibility of local authority social workers and that Cafcass should focus on providing advice to the courts on child welfare issues and advocate for the child during the proceedings.

Family Justice Council, call for evidence submission

³⁹ Cafcass was established by the Criminal Justice and Court Services Act 2000. Its principal functions are included in Section 12 of the Criminal Justice and Court Services Act 2000. Responsibility for Cafcass services in Wales was transferred to the Welsh Assembly Government and named Cafcass Cymru in 2005. The main duties of Cafcass Cymru are set out in Section 35 of the Children Act 2004

- 3.93 Cafcass does have an important safeguarding role, particularly in private law cases when they may be the only agency to identify and escalate child protection concerns. In particular Cafcass has a duty to make risk assessments and report them to court whenever there is cause to suspect that a child is at risk of harm.⁴⁰
- 3.94 The majority of those at a workshop we held with Cafcass frontline staff said their role was to serve the interests of the child in a case. However, there was a clear – albeit dissenting – view that the core function was to serve the court. Similarly, as the recent inspection of Cafcass Cymru by the Care and Social Services Inspectorate Wales (CSSIW) highlighted, “A key challenge for the leadership will be resolving the current conflict between accountability of family court advisers to both Cafcass Cymru and the courts.”⁴¹ Those working for these organisations can feel split loyalties – being asked to follow guidelines issued by management, but also needing to answer to the court.
- 3.95 These should not be incompatible responsibilities. Individuals in other organisations such as the Crown Prosecution Service and the probation service face similar issues. But it does highlight the need for good communications between the judiciary and management in Cafcass and Cafcass Cymru, with clear expectations of social work professionals.

The relationship/communication between these two individuals [Cafcass staff and judges] is very important. Ideally, these two people would work with each other on a consistent basis.

Family justice system user, call for evidence submission

- 3.96 The evidence we have received from others working in the family justice system was generally critical of Cafcass. Some suggested that Cafcass has lost sight of its core functions.

I think Cafcass...is a failing organisation. At the time of the merger of functions relating to children and families in both private and public law, many of us were hopeful of a dynamic, effective and cohesive organisation that would serve the needs of children and their families and would by the merging of their expertise work effectively and innovatively. Sadly, the organisation has been beset by problems from its inception and has struggled to provide effective services.

Legal professional, call for evidence submission

- 3.97 We were told that things were much better before the creation of Cafcass and in particular that the loss of self-employed guardians has been damaging.
- 3.98 Recent difficulties in managing the upsurge in care demand have contributed to this view. They led to scrutiny by the National Audit Office⁴² and the Public

⁴⁰ s16 A of the Children Act 1989

⁴¹ <http://wales.gov.uk/cssiwsite/newcssiw/publications/ourfindings/allwales/2010/cafcassreport10/?lang=en> Last accessed 28/3/11

⁴² <http://www.nao.org.uk/publications/1011/cafcass.aspx> Last accessed 28/3/11

Accounts Committee⁴³ in the last year. Evidence to us raised particular concerns about interim arrangements agreed with the then President of the Family Division in August 2009, and the introduction of revised operating priorities in Cafcass, to manage the higher caseloads within a cash-limited service. Agreements were made between Cafcass, the judiciary and HMCS locally but, in broad terms, the following changes resulted.

- Cafcass officers were required to reduce the level of work in a case to a safe minimum standard. Potential safeguarding risks to children were to be the priority while other tasks were to be reduced to those absolutely necessary and within budget.
- A duty scheme was introduced, aimed at ensuring safe, minimum work on all cases pending the allocation of an officer to the case on a permanent basis.

3.99 Some judges in particular have found these arrangements unsatisfactory, arguing that it leads to poor support for children and can add to delay.

3.100 There can also be tensions between Cafcass and local authority social workers, who feel that people join Cafcass to escape the pressures of what local authority social workers see as more arduous front line work. This is compounded by the perceived greater reliance sometimes placed by the court on the word of Cafcass guardians who may (the local authority social workers feel) know the case far less well, be less well qualified, and have been recently a local authority social worker themselves. There is resentment about the extent to which Cafcass staff believe they are expected to check and validate the work of local authorities.

3.101 We have not attempted an in depth study of Cafcass effectiveness and the rights and wrongs of these various arguments. The functions it performs are important and Cafcass has made progress in a number of respects, including ways of thinking about how the system should operate. We are, ourselves, persuaded that there was no golden age before the creation of Cafcass and tend to agree with Professor Trinder's judgement.

Whilst Cafcass has been the author of some of its own problems, many of the difficulties it faces reflect the nature of the work and its particular location within a fragmented family justice system. Any replacement would face exactly the same problems, but without the expertise and experience that Cafcass has developed and with considerable disruption in service.

Professor Liz Trinder, call for evidence submission

3.102 The agreements between Cafcass and the judiciary to cope with the surge in cases, which led to clearer setting of priorities, should in our view be seen as a basis for partnership working. It forms the starting point for new ways of operating that are now being used by Cafcass staff.

⁴³ <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpubacc/439/43902.htm> Last accessed 28/3/11

3.103 As will become clear, a principle of our Review is that, as far as possible, functions should not be duplicated and that there should be less checking of one institution's work by another. To that end we believe that the desired court social work functions are:

- the provision of safeguarding information and welfare reports to inform court decisions; and
- the provision of guardians in care and supervision cases.

3.104 As key advisers to the court, we also believe it is right that court social work services should be brought into a closer relationship with the courts. We accordingly recommend that the court social work function should be brought within the Family Justice Service, and report to the Family Justice Board. This means the functions and staff of Cafcass will transfer to the Family Justice Service.

3.105 Court social work services would not be absorbed into the service in Wales as these services are the responsibility of the Welsh Assembly Government. We have heard that there are tensions between Cafcass Cymru and local authority social workers as in England, but not the same difficulties in relation to the judiciary. Cafcass Cymru will need in any event to work closely with the Family Justice Service, with service-level agreements.

Mediation and contact services

3.106 At present the Legal Services Commission pays for mediation for eligible and suitable private law applicants. The responsibility for procuring and funding these services should be transferred to the Family Justice Service, as noted earlier in our discussion of budgets.

3.107 Other services are funded by the Department for Education and delivered through Cafcass, including support for contact between parents and children involved in family law disputes, Separated Parents Information Programmes (PIPs) and Domestic Violence Perpetrator Programmes. These services should be procured through the Family Justice Service, with the negotiations and relationship management completed at either the local or national level, as appropriate.

3.108 In Wales, these services are currently commissioned by Cafcass Cymru but should be considered as part of the suite of pre-application services commissioned by the Family Justice Service.

People development

3.109 The Family Justice Service needs a competent and capable workforce. We have been impressed by the quality and commitment of the people we have met but, as always, there is room for improvement in both practice and capability.

3.110 We set out below our initial recommendations and, during the next stage of our work, we shall look in more detail at:

- workforce recruitment and supply;

- the core skills all those in the system should have when initially trained; and
- continuing professional development.

We comment first on issues in relation to the judiciary and social work and remark briefly on training and professional development.

Judicial specialisation

3.111 There are divided views on how far judges and magistrates should specialise in family matters. Some highlight the emotional strain of family work and the need to allow time for a break from it. They argue that time hearing criminal cases gives valuable experience that can be brought back to family law. There may also be practical issues about moving people away from other kinds of law.⁴⁴

3.112 By contrast others argue that judges who spend a minority of their time on family work lack the confidence for tight case management and that it also causes difficulty in achieving judicial continuity. Family barristers and solicitors have told us they are discouraged from applying to become judges because they do not want to hear other kinds of case, and that the emotional strain of family law can affect people who have not spent their careers in it before joining the bench.

3.113 We are more inclined to the latter view and propose that both judges and magistrates should be enabled and encouraged to specialise in family matters. Those who want to work solely on family matters should not be deterred from doing so. We recommend that:

- the requirement to hear other types of work before being allowed to hear family matters should be abolished, including the two-year adult requirement to hear family work in Family Proceedings Courts; and
- a requirement for appointment to the family judiciary should in future include a willingness to specialise.

3.114 Family matters are often more about welfare judgements and people skills than the law. Currently, the two-year adult requirement for magistrates enables capacity in this direction to be assessed. Consideration needs to be given to how these skills could be assessed if this requirement is to be abolished.

Social work

3.115 Social workers constantly tackle some of the most difficult issues within our society. In the family justice system social workers are involved:

- within local authorities, where they engage in preventative work with families and work on cases requiring the local authority to intervene and initiate legal action;

⁴⁴ Among the 43 judges who participated in our survey to show how their time was spent during the week, there were very few who seemed to be working on family law exclusively and huge variation in the amount of time spent on family work. Many District Judges only had small amounts of family work, mixed in with their other caseloads.

- in Cafcass and Cafcass Cymru, where they provide advice to the family courts about applications; and
- as independent experts when instructed by the court or an applicant to provide evidence.

3.116 Social work reform has received much attention within government. Professor Eileen Munro's Review and the Social Work Reform Board aim to improve the quality of social work across England. A direction of travel for similar work in Wales was outlined in *Sustainable Social Services for Wales: A Framework for Action*, and is the focus of the Social Work Task Group. The success of this work will be fundamental to the reform of the family justice system.

Training and professional development

3.117 The judiciary, magistrates, legal advisers and Cafcass and Cafcass Cymru staff all receive specialist training in family law. We intend to explore this further, and to look more widely at the training available for the legal profession and experts. There also needs to be greater mutual awareness and recognition of the skills required in all the disciplines involved, including a clearer framework for inter-disciplinary working.

3.118 At this stage, we consider it important that there should be an inter-disciplinary induction for all those working in the system. This induction would enable professionals to appreciate the roles of others in the system. The need for this was succinctly described by Murch and Hooper in 1992:

In the real world, the judge, the social worker, the lawyer, child psychiatrist and others share a common interest in the just welfare of a particular child and his family. Each may have to make "decisions" on the family's welfare, and yet not really appreciate or have insight into the way in which those decisions are made by the others.⁴⁵

3.119 Improving the court skills of social workers from all organisations is also important. We have heard of courts and judges providing mock court experience and feedback and believe this should be encouraged. Other opportunities for mutual learning between court social workers and local authority social workers should be explored, as well as between local authority legal teams and children's panel solicitors.

3.120 The Family Justice Service should co-ordinate the professional relationships and workforce development needs between key stakeholders. This would ensure that an appropriate inter-disciplinary focus was developed and maintained. It would build on work completed by the education and training committee of the Family Justice Council, including their mapping exercise on inter-disciplinary training.⁴⁶

3.121 The changes we propose will need significant culture change to be effective. Just to change structures is not enough. To take one example, everyone

⁴⁵ Murch and Hooper (1992) *The Family Justice System*

⁴⁶ http://www.family-justice-council.org.uk/docs/MappingExercise_Chart.pdf, last accessed 24/3/11

involved – judges, court clerks, Cafcass staff, local authority social workers – should know at all times how long their cases are taking and play their full part in reducing delay. Changed behaviour and new ways of working will need training and development. We recognise both the importance and difficulty of the changes that are needed.

- 3.122 We seek views on what changes of culture and skills are required and how best to achieve them.

Learning, feedback and research

- 3.123 We have touched already on the need for learning and feedback within the judiciary. This also applies more widely. By feedback, we do not mean an assessment of the quality of decision-making or the appropriateness of decisions. However, there is a role for everyone in the system, including the judiciary, to share lessons from case reviews with a view to a collective improvement in performance.

Clinicians use audit and peer review as an intrinsic part of practice. This could be done across the inter-professional groups working in the area, on the same confidential basis, as a requisite of continuing practice, and be credited with CPD [continuing professional development].

Family Justice Council, call for evidence submission

- 3.124 Research is important to ensure that practice within the family justice system is evidence based and focuses on what works. The system needs to have a focus on continuous learning and an ability to adapt to changes in social trends, demand on its services and user expectations.
- 3.125 This focus should come in two distinct, but inter-related, components. Firstly, there should be a greater focus on local practice and researching the currently observable variability. Secondly, there should be a more co-ordinated, system-wide focus on what impact the family justice system has on outcomes for children and families.

Local practice

- 3.126 We have mentioned already some inconsistencies in local practice. While these practices are often described as being in the best local interests, it is not clear to us that the level of discrepancy in practice across England and Wales is justifiable.
- 3.127 Improved case management and individual user experience needs a co-ordinated, system-wide approach. There should be quality standards for system-wide processes that build on local knowledge, are evidence based and replicable. Compliance with practice guidelines (for example the PLO and PLP) should be reviewed regularly and this should include the role and performance of local authorities and wider users.

Outcomes research

3.128 Research is important to understanding the impact of family justice on children and families. There is a particular gap in longitudinal research. Nevertheless a great deal of research is available though known only patchily to people who work in the system. We see a role for the Family Justice Service, through an appropriate committee, to:

- provide a mechanism to ensure peer-reviewed socio-legal research that can inform decision-making is accessible amongst practitioners in the family justice system; and
- ensure key findings are linked into training programmes focusing on interdisciplinary practice development.

3.129 A system-wide approach to research and evaluation, plus better co-ordination of innovation and practice development are fundamental.

Systems, management information and efficiency

3.130 The family justice system needs robust, accurate, adequately comprehensive and reliable management information to work effectively. It currently has little to none. The lack of management information is astonishing, with little data on performance, flows, unit costs or efficiency. Almost nothing is confidently known about how cases flow through the system or what they cost.

The challenge about the provision of management information is that in my 5 years plus experience as the Designated Family Judge the performance statistics which are provided are and have been almost wholly unreliable. Relevant information on which to make informed management decisions is simply not available so for example no one is able to provide me with data about which cases are allocated to and managed by which judges..... I cannot even get access to reliable information about work volumes in different courts. In particular, there appears to be little by way of reliable information available about the care work done within the 10 Family Proceedings Courts relating to work volumes or the timescales for the conduct of proceedings.

Judge Hamilton, Designated Family Judge, Manchester

3.131 While some individual parts of the system (Cafcass, local authorities) have more modern systems and practices there is a lack of system-wide consistency. Definitions are different (what constitutes a case for example) and the systems do not talk to each other. Some parts of the system base their measurement on the number of cases, others the number of children involved. Some measure performance and financial information based on the level of case progression while others use closed cases.

3.132 This creates issues in gaining a common language, leads to wasted time arguing about whether numbers are accurate and prevents a focus on understanding the issues that cause poor outcomes and delay.

3.133 The system cannot be managed without information. Key data gaps (following the recommendations of the 2006 *Review of Child Care Proceedings system in England and Wales*) are listed in Annex L. They include:

- accounting information to determine the use of resources, including the real costs across the system and the appropriate allocation of joint costs where they are provided through shared services (for example, currently HMCS cannot provide unit costs for family work);
- the ability for real-time progress of cases to be tracked, including being linked to an appropriate case management system; and
- the ability to link data when cases enter and exit the system on repeated occasions and to provide this information to system participants.

3.134 As Murch said as long ago as 1992, managers need "...a mechanised day to day on-line flow of management information so that they can closely monitor the progress of child-related cases, to spot causes of delay in individual cases, and to take the necessary remedial action." Nearly 20 years later this remains the case and it is unfortunate that there has been no impetus to take this forward in a system-wide manner by government and relevant agencies.

3.135 The following examples show what can be done.

Case study – transparent use of performance data – UK Border Agency

The UK Border Agency, an agency of the Home Office, process visa applications for entry into the UK.

Through its website it provides detailed information on processing times in each of their 183 offices across the world. This includes analysis of the number of visa applications processed each month, by category, and the timeliness with which the applications were processed.

This information is broken into clear, meaningful time periods which correspond to published Customer Service Standards.

<http://www.ukvisas.gov.uk/en/howtoapply/processingtimes>

Case study – use of performance data in London Criminal Justice Partnership

The London CJP has developed a new performance management framework to go under the name of 'RADAR' (Review, Analyse, Diagnose, Action and Report). The process is used to pinpoint what the issues are and where to target activity to improve performance at both regional and borough level.

This approach clearly sets out key targets and the various stages of the end to end process with a focus on timeliness, effectiveness and enforcement.

<http://lcbj.cjsonline.gov.uk/London/1168.html>

3.136 The lack of management information is one contributor to general inefficiency. This was a theme of the evidence, supported by our own observations. We and others have seen:

- missing or last minute sharing of key information likely to affect the progress of a case, often at a court hearing;
- duplicate administrative functions in the core statutory agencies; and
- system changes being implemented in a way that was not consistent with local practice or IT systems already there.

3.137 The system is still driven by paper, with vast disorganised court files sometimes moved around in supermarket shopping trolleys. It is understandable, but clearly unacceptable, that paperwork goes missing or that delay in progressing work on files is a common complaint.

The system's major weakness is the inefficient flow of information which appears to be supported by processes unchanged since the dark ages.

Family justice system user, call for evidence submission

3.138 The aim must be a substantially paperless system with efficient case management, document preparation and storage. Other industries, and areas of government, moved to greater electronic communication years ago.

3.139 Too many processes in the system are manual with multiple re-entry of basic, factual information:

- in some areas county court staff and clerks use non-system generated forms for orders and then cut and paste these into the FamilyMan system;
- details of private law cases are inputted into the court system and because HMCS cannot send these data electronically they are inputted again into the Cafcass CMS System; and
- police and local authority safeguarding checks require manual intervention by Cafcass and other agency staff.

3.140 Through the establishment of a National Business Centre Cafcass has shown that individual agencies can make their own processes more efficient. However, the next phase of system improvement requires the integration of processes and IT systems between HMCS and Cafcass. Information should only be entered once, upon entry to the family justice system, and then be immediately available to appropriate users.

Case study – Cafcass National Business Centre

As part of its Transformation Programme, Cafcass have established a National Business Centre in Coventry. This Centre has been established to process all private law applications (form C100s) from local courts in a single national service.

Through doing this, Cafcass has improved the efficiency and accuracy with which this process is completed and ensured a consistent approach to processing is taken, regardless of where the application has come from.

Following the successful transfer of all C100 processing, the Centre is now looking at other functions within Cafcass business that can potentially be centralised.

3.141 Some further particular suggestions for improvement include:

- e-filing and transmission of correspondence and documentation, including an electronic courtroom, potentially based on the Australian case study presented in detail below;
- greater use of online, telephone and video meetings, and extending this to directions hearings; and
- online court lists, allowing the Family Justice Service to efficiently book future hearings.

Case study – eCourtrooms

The Family Court of Australia is developing an eCourtroom which is a virtual courtroom that assists in the management of pre-trial matters by allowing directions and other orders to be made online.

The Court is able to receive submissions and affidavit evidence and make orders as if the parties were in an ordinary courtroom.

The Court or a judge may terminate the use of the eCourt for a matter or part of matter at any time either on the Court or judge's own motion or at the request of a party.

3.142 An IT system, with the ability to support the management of cases, should be developed. In the short term, the current unsatisfactory IT systems should be adapted in a cost effective manner to get as much information as possible out of them. Robust performance information needs to be fed into the proposed national and local boards, and the judiciary, to enable system management that promotes improvement based on a full understanding of the resources being used.

3.143 With increasing delay, rising demand and pressure on government finances, the need for greater efficiency is clear. The current primitive systems mean there is ample scope to achieve it.

Court structure

3.144 Currently family proceedings are heard in three court tiers in line with their jurisdictional standing:

- magistrates' courts (also known as Family Proceedings Courts);
- county courts (including care centres); and
- the High Court of Justice.

Further detail is at Annex M.

3.145 The intention is that the simplest cases should be heard in the Family Proceedings Courts, as far as jurisdictional limitations allow, and the most complex in the High Court. An Allocation and Transfer of Proceedings Order sets out the criteria that apply in determining whether cases should be transferred between different tiers of court; this is also intended to guide professionals on the appropriate tier when an application is made to court.

3.146 There is a long history of calls for a unified family court, expressed well in the proposals of the Finer Report which set out what a family court might include:

- a unified institution applying a uniform set of legal rules;
- the organisation of sittings and services in order to maximise the convenience of those using the courts;
- professionally trained staff to assist court users;
- close relationships with other services, most notably social services and social security; and
- organising its procedure, sittings and administrative services and arrangements to gain confidence and maximise the convenience of the citizens appearing before it.⁴⁷

3.147 The Finer Report was never implemented – it was seen as too costly – but work has continued to simplify arrangements, notably by the Children Act 1989. Although there were some exceptions – divorce, for example – for the first time each tier of court could hear the same types of case and make the same type of orders, with cases able to be transferred to different levels of court according to their complexity.

3.148 Since then, steps have been taken to support closer working and specialisation within these different tiers, including:

- the judiciary, magistrates and legal advisers receive specialist training in family law;
- the creation of HMCS in 2005 also provided opportunities for closer working with the Family Proceedings Courts;
- a programme of work aiming to streamline the administration of both the Family Proceedings Courts and the county courts has helped to support better working relationships between them;
- Designated Family Judges are expected to work closely with Justices' Clerks and legal advisers to agree criteria for the allocation of work between the different types of court; and
- from April 2011 a single set of Family Procedure Rules will apply to all courts with family jurisdiction. These aim to ensure common procedures in all courts.

3.149 Recently there have been efforts to develop unified family centres, the strategy being for Family Proceedings Courts and county courts to work together as one regional unit to achieve greater flexibility in the use of resources and easy transfer of family work between them.

3.150 Nevertheless, there are continuing difficulties and inconsistencies. Working arrangements between the tiers have improved, based on local agreements between judges, HMCS and Cafcass. But there is, for example, wide variation in allocation practices between different tiers at local levels. In Humber and South

⁴⁷ *Committee on One-Parent Families*, 1974

Yorkshire three quarters of cases are heard in the care centre and a quarter in FPCs, whereas North and West Yorkshire has about 60% heard in the care centre.⁴⁸ An MoJ-led case study review in Sheffield found up to 90% of the work dealt with by the care centre.

3.151 We propose that a unified family court encompassing the three tiers should be set out in statute. All levels of family judiciary (including magistrates) will sit in the family court and work will be allocated depending upon case complexity. We think this will give the following benefits:

- clarity for court users in providing a single point of entry when applications are made to court;
- opportunities to use the court estate more flexibly as between different tiers of the family court;
- opportunities for greater efficiency in tying the work of the different court jurisdictions more closely together; and
- consistency in case allocation through agreed initial assessment standards.

3.152 The foundation for a family court clearly already exists and the arrangements can now be formalised as originally envisaged by Finer. However, we recognise that incorporating the High Court's international caseload and its inherent jurisdiction into a single family court may present difficulties. We would welcome views on what potential problems there might be and how these may be overcome. It is, in our view, also essential that the senior judges who sit in the Family Court remain High Court judges in the same manner as the senior judges who sit in the Crown Court are High Court judges.

3.153 There should be a single point of entry for all family matters. Magistrates and District Judges (magistrates' court) will continue to hear family work, and the principles set out in the Allocation and Transfer of Proceedings Order 2008 will need to be upheld and monitored.

3.154 Agreed standards will determine whether cases should be allocated to magistrates, District Judges, Circuit Judges or a High Court judge. Working to agreed criteria, a gatekeeper will be responsible for deciding which individual judges, magistrates and legal advisers should take the case forward, based on factors such as the nature of the case and current workloads. We propose that a District Judge, working closely with a legal adviser, should be the gatekeeper.

3.155 One consequence of this proposal is that applications for public law orders, and in particular applications for Emergency Protection Orders (EPO), will no longer commence at the Family Proceedings Court level and, in the case of EPOs, no longer be confined to that level. Public law applications, including those for emergency or interim relief early in a case, will each be allocated to the level of judiciary appropriate to the circumstances of that case.

⁴⁸ HMCS FamilyMan data for 2010. These data come from internal case management systems and do not form part of the national statistics produced by the Ministry of Justice which can be found here: www.justice.gov.uk/publications/statistics.htm. As such this data set is not subject to the same levels of quality assurance.

Estates

- 3.156 Currently different parts of the family justice system conduct their business often in different buildings. There are the courts estate, managed by HMCS, a significant number of buildings used by Cafcass and Cafcass Cymru for the provision of court social work services and consolidated national processing centres separately for Cafcass and the Legal Services Commission.
- 3.157 The establishment of the Family Justice Service offers the opportunity to review the appropriate use of the current estate.
- 3.158 Courts are seen as daunting, intimidating places, especially by children and young people. This is, to some extent, inevitable and can be desirable. But in family law it is often not.
- 3.159 Hearings should be organised in the most appropriate location, determined by the Family Justice Service in consultation with the judiciary. Specifically:
- routine hearings (directions hearings for example) should use telephone or video technology wherever possible;
 - some hearings do not need to take place within the formal court setting and where they do rooms should as far as possible be family friendly.
- 3.160 This is not a new recommendation: the Law Society proposed over 25 years ago that proceedings should be more informal and take place in public buildings such as schools and town halls.
- 3.161 The estate for family courts should be reviewed to reduce the number of buildings in which cases are heard. This would enable courts to 'over list', so allowing more efficient court hearing schedules with other advantages in terms of judicial continuity and specialisation. Shorter cases should outweigh the disadvantage of longer travel times for court users. Exceptions should be made for rural areas where transport is poor.
- 3.162 In consolidating services, the Family Justice Service should review the estates used by Cafcass and the Legal Services Commission.

Consultation questions

1. Do you agree with the proposed role that the Family Justice Service should perform?
2. Ensuring that a child's voice, wishes and feelings are central to the Family Justice Service is crucial. What would you recommend as the crucial safeguards to enable this to happen?
3. Do you agree that children should be offered a choice as to how their voice can be heard in cases that involve them, including speaking directly to the court?
4. Do you agree there should be a single family court?

5. Do you agree that the changes we have proposed to the judiciary – including greater continuity, specialisation and management – will lead to improvements in the operation of the family justice system?
6. Do you agree that case management principles, in respect of the conduct of both private and public law proceedings, should be introduced in legislation?
7. What changes are needed to the culture and skills of people working in family justice and how best can they be achieved?
8. Do you have any other comments you wish to make on our proposals for system management and reform?

4. Public Law

Introduction

- 4.1 Public law provides a mechanism for the state to protect children through intervention in a family's life. The decisions taken in public law – often to remove a child or children from the care of their parents – are rightly acknowledged as some of the toughest that can be made in any form of court. They raise complex legal issues and have heart-wrenching consequences for the children and their parents.
- 4.2 The local authority is the primary provider of support to promote the wellbeing of children. It has lead accountability in the local area for all outcomes for children.⁴⁹ In certain circumstances the local authority's actions to safeguard the child and promote their welfare require court scrutiny and authorisation. Essentially, these involve removing the child from the care of their birth parents. Alternative care for the child may then be given by the local authority, by friends or family, by adoptive parents or by special guardians. The parents do not usually consent to the proposed course of action.
- 4.3 One of the defining characteristics of the public care system in England and Wales (in contrast to most jurisdictions overseas) is the emphasis it places on securing permanence for the child in their legal status. This includes the option, used in a relatively small number of cases, of permanently severing the link between child and birth family by adoption without parental consent. This emphasis on permanence is intended to secure stability and security for children, which is beneficial to them in the longer term. But it drives the more elaborate legal processes followed in England and Wales compared with those in other countries. Processes must be thorough, consistent and robust if children are to be protected while, at the same time, the rights of parents are respected.
- 4.4 Public law covers a number of different applications and decisions. In this report we focus on the making of care and supervision applications by local authorities and, where they are accompanied by a placement order application, adoption processes.

The nature of cases and the families involved

- 4.5 Public law family cases are by their nature highly complex, difficult and riven with conflict. By the time the state needs to consider removing children from their parents, they may have already experienced some of the most unacceptable kinds of human behaviour. They may have been subject to violence or sexual abuse, they may have lived with people who abuse alcohol, drugs, or both. They may be undersized because they have not received the correct nutrition from birth, their motor functions may be impaired, their speech underdeveloped. They may spend most of the day in their cot or strapped in their buggy. They may rarely have attended school or interacted with other people. They may live in a

⁴⁹ See in particular the provisions of the Children Act 2004

house that never gets cleaned, that has dirt and faeces strewn across the floor, that is unfit for human habitation.

- 4.6 Their parents may themselves have faced these problems when they were children. They may now be abusing alcohol and drugs, may be prostituting themselves to feed a drug habit. They may face serious mental health issues and have severe physical and emotional needs. They may be vulnerable to others and have little idea how to look after their own needs, never mind someone else's. They may be part of a complex and unstable family. The problems they face may be exacerbated by poverty, limited education and poor health.
- 4.7 In most public law cases the issues faced by parents and children will be multiple and longstanding. Studies show a majority of cases are likely to contain at least two, and often three, types of maltreatment, from physical ill-treatment, sexual abuse, emotional ill-treatment, neglect and 'child beyond parental control'.⁵⁰ Neglect is the most commonly cited concern.⁵¹
- 4.8 This is uniquely challenging social work and cases are usually only brought before the courts when all other attempts to intervene have failed. These families, more often than not, have been well known to the local authority for some time.⁵² They may have been "struggling along the bottom rung of acceptable parenting for some time".⁵³ That said, they may be families where the problems are complex but have developed incrementally over time and their circumstances do not fit neatly into simple assessments of failed parenting. The parents are often highly fragile and, by the time proceedings are initiated, there has been a breakdown in the relationship between the authorities and the parents.⁵⁴ The cases that arrive at court are peppered with past tensions, conflict and stretched emotions.
- 4.9 Thankfully it is still rare that children do become involved in the public law system. In 2009, there were just over 10 million children under 16 in England and Wales.⁵⁵ On 31 March 2010 local authorities were looking after some 70,000 or around 0.7%.⁵⁶

⁵⁰ Brophy, J. (2006) *Research Review: Child care proceedings under the Children Act 1989*. DCA Research series 5/06. London, Department for Constitutional Affairs,

⁵¹ Ibid

⁵² Masson, J., Pearce, J., Bader, K., Olivia, J., Marsden, J. and Westlake, D. (2008) *Care Profiling Study*, Ministry of Justice Research Series 4/08, London, MOJ

⁵³ Brophy, J. (2006)

⁵⁴ Masson, J., Pearce, J., Bader, K., Olivia, J., Marsden, J. and Westlake, D. (2008)

⁵⁵ Office of National Statistics, Vital Statistics: Population and Health Reference Tables, 1.2 http://www.statistics.gov.uk/downloads/theme_health/Pop-national112.xls last accessed 29/3/2011

⁵⁶ This is the combined figure for England and Wales. It includes children looked after on the basis of a s31 order as well as those voluntarily accommodated under s20 Children Act 1989. At 31 March 2010 there were 64,400 looked after children in England, Department for Education (2010) *Children looked after in England (including adoption and care leaves) year ending 31 March 2010* sourced at: <http://www.education.gov.uk/rsgateway/DB/SFR/s000960/index.shtml> last accessed 15/03/11. At 31 March 2010 there were 5,160 looked after children in Wales, <http://www.statswales.wales.gov.uk/TableViewer/tableView.aspx?ReportId=24414> last accessed 15/3/11

- 4.10 Clearly it is right that we should try to maintain the integrity of a birth family wherever possible. However, we also know that this is not always possible. Local authority care can and does provide a vital safety net for vulnerable children. Care is often perceived as the last resort for a child, because of the poor outcomes associated with time spent in it. Yet care can be the best option for a child:

The poor outcomes of care and accommodation that have been so widely publicised are largely the product of children's long-term exposure to abuse and maltreatment prior to entry, or following unsuccessful returns. The myth that care will have a negative impact on children's wellbeing has meant that professionals have tended to be reluctant to remove children from abusive situations, to the detriment of their long-term life chances. Care placements'... potential to benefit maltreated children should be better recognised.⁵⁷

The legal framework

- 4.11 The framework for intervention, set out primarily in the Children Act 1989, is intended to enable the state to:
- recognise which children and families need additional support;
 - determine what type of additional support is needed and how authorities should provide support services to these families;
 - make an informed assessment of when direct intervention is necessary and appropriate; and
 - provide a system which strikes a careful balance between protecting children and respecting family life, whilst ensuring that the decisions made are fair and proper.
- 4.12 The main provisions of the Children Act were discussed in paragraph 2.19. Its core principles of the paramountcy of the child, that delay is likely to be prejudicial to the welfare of the child and the 'no order' principle all have particular relevance in dealing with public law cases.
- 4.13 The provisions of the Act operate, of course, in a wider context. Local authorities have other relevant legislative duties, including those relating to making arrangements for adoption. A raft of secondary legislation and accompanying guidance underpins the Act.
- 4.14 Human rights legislation is also important. The UK has been subject to the provisions of the European Convention on Human Rights since 1953. The rights contained in the Convention are now directly enforceable in UK courts as a result of the Human Rights Act 1998. Article 6 'Right to a fair trial' and Article 8 'Right to respect for private and family life' are particularly relevant.

⁵⁷ Davies, C. and Ward, H. (forthcoming) *Safeguarding Children Across Services: Messages from Research on Identifying and Responding to Child Maltreatment*

Local authority support to children

4.15 Direct involvement with local authority children's services and other professionals – such as health visitors – will be brief for most families. But where a child is considered to be 'in need' of family support the local authority will be more continuously involved in accordance with their wider statutory duties.

It shall be the general duty of every local authority –

- *to safeguard and promote the welfare of children within their area who are in need; and*
- *so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.*⁵⁸

Assessment of need

4.16 A public law case usually starts well before any involvement of the court. The first point is typically a referral to children's social care services – usually from other local government departments, the police, health services, school or from a concerned friend or neighbour. This sets in train a set of complicated procedures intended to promote and safeguard the welfare of children.⁵⁹ In summary:

- following a referral the authority will decide whether an 'initial assessment' is appropriate. In 2009-10 the number of referrals and initial assessments made were 626,358 and 395,300 respectively in England and in Wales there were 48,500 referrals and 24,400 initial assessments;⁶⁰
- this assessment should be carried out within ten working days of the referral;
- it will include seeing and speaking to the child, family and other professionals as appropriate; and
- there will be an assessment of whether the child is 'in need'.

4.17 The local authority, with other agencies as appropriate, then has a range of options:

- take no further action;
- provide services in the community;

⁵⁸ s17(1) of the Children Act 1989

⁵⁹ For England see Department for Children, Schools and Families (2010), *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*. London, DCSF. For Wales see Welsh Assembly Government (2006) *Safeguarding Children: Working Together Under the Children Act 2004*. WAG

⁶⁰ England figure: Department for Education (2010) *Children in need in England, including their characteristics and further information on children who were the subject of a child protection plan (children in need census - final) year ending 31 March 2010*, at: <http://www.education.gov.uk/rsgateway/DB/STR/d000970/index.shtml> Last accessed 15/03/11. Wales figure: <http://www.stats.wales.wales.gov.uk/TableViewer/TableView.aspx?ReportId=24701> Last accessed 29/03/2011.

- provide social care services – including developing a ‘children in need plan’. At 31 March 2010, a total of 394,000 children were classed as being in need in England, and 18,800 in Wales;⁶¹
- undertake a more detailed ‘core’ assessment of the child, usually to be within 35 working days. There were 137,600 core assessments undertaken in England in 2009-10 and 7,800 in Wales;⁶²
- carry out ‘section 47’ enquiries where there are suspicions that a child may be suffering or is likely to suffer significant harm. There were 87,700 section 47 enquiries undertaken in England in 2009-10.⁶³

4.18 A multi-agency child protection conference will consider whether the child should be the subject of a child protection plan. If the conference decides that the child is likely to suffer significant harm in the future, inter-agency help and intervention will need to be delivered through a formal child protection plan. The primary purposes of this plan are to prevent the child suffering harm or a recurrence of harm in the future and to promote the child’s welfare. Depending on the evidence, the local authority may decide to seek an appropriate Children Act 1989 order.⁶⁴

4.19 A child will become looked after via two main routes:

1. the local authority may make a voluntary arrangement under section 20 of the Children Act 1989 to accommodate a child for more than 24 hours, with the consent of the parents if the child is under 16 years. Parents retain parental responsibility for the child and the local authority does not share this, but the local authority has a duty to comply with their statutory duties to care and provide for the child;
2. when there is reason to believe that the child is suffering or likely to suffer significant harm, the local authority may choose to initiate court proceedings for a care order. These are known as section 31 proceedings, and an order cannot be made unless the criteria set out in section 31 of the Children Act 1989 are satisfied. When a child is subject to a care order the local authority shares parental responsibility for him or her with their parents but the authority has a controlling vote in that it also has the power to determine the extent to which any parent may exercise their parental responsibility for their child.

4.20 Where there is evidence that the life of the child is at risk or the child is likely to suffer serious immediate harm the local authority may apply for an emergency protection order.⁶⁵ This is followed by a section 47 enquiry (which may also have

⁶¹ England figure: Ibid, Wales:<http://wales.gov.uk/docs/statistics/2011/110224sdr192011en.pdf> last accessed 29/03/11

⁶² England figure: Ibid, Wales:
<http://www.statswales.wales.gov.uk/TableViewer/tableView.aspx?ReportId=24701> Last accessed 29/03/11

⁶³ England figure: Ibid. Figures are not collected in Wales. Under s47(1) of the Children Act, the local authority has a duty to investigate any child who is being held under police protection or subject of an emergency protection order, or any child in their area suspected of being harmed, to determine further action needed. The local authority social worker should always interview the child to ascertain their wishes and feelings and give these due consideration

⁶⁴ See Annex N

⁶⁵ s44 of the Children Act 1989

preceded the emergency application) and is usually followed by a section 31 application to court.

Care applications

- 4.21 Where provision of support to a family in the community is not sufficient to safeguard a child and the parents will not consent to voluntary accommodation of the child, or voluntary accommodation is not sufficient to protect the child, the local authority will look to bring proceedings under section 31 of the Children Act 1989. The local authority will normally apply for a care order but, under the same provision and subject to the same tests, the local authority may also apply for a supervision order.
- 4.22 The Act defines the threshold at which state intervention – in the form of a care or supervision order – may be justified.

Under section 31, the threshold is defined as follows:

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.

- 4.23 Harm is defined in section 31(9) as “ill-treatment or the impairment of health (physical or mental) or development (physical, intellectual, emotional, social or behavioural)”. Ill-treatment includes sexual abuse and non-physical forms of ill-treatment.⁶⁶
- 4.24 The court may need to take more urgent action to safeguard the child before a final decision on the making of a care or supervision order. It can make interim supervision or care orders, which have the same effect as full orders, but for a limited time.
- 4.25 The court must decide whether the threshold conditions have been met. This is the element of the court process in family law most akin to the decisions made for example in criminal law in that it is concerned with the finding of facts, i.e. studying the available evidence to try to discover the truth about a previous event. However, because it is looking at whether harm is *likely* to be suffered by a child, it also requires an element of prediction. In this it is unlike most other

⁶⁶ s120 of the Adoption and Children Act amended the definition of harm following growing research to suggest that children are harmed by growing up in an environment where adult violence is prevalent. The definition of harm was extended to include for example ‘impairment suffered from seeing or hearing the ill-treatment of another’. This definition of harm also applies to ‘harm’ in s1(3), welfare checklist

areas of court business. One need only consider the implications of punishing people for the crimes they are 'likely' to commit to see why this is the case.

- 4.26 If the threshold is met the court must decide what action is necessary in the best interests of the child. Following the 'no order' principle, the court should only make an order if this is better for the child than making no order. A care order may be made but the court may also make a supervision order, a residence order, a special guardianship order, or a placement order, where this has been specifically requested by the local authority (see adoption section below). The court can also make a contact order under section 34 of the Act to govern contact between a child who will be the subject of a care or supervision order and its parents. More detail about the orders available to the court are set out in Annex N.
- 4.27 The family court is again unusual in this respect in that it is being asked to make a decision that is essentially a welfare decision – to decide what is best for the child in the future. The court must have regard to the Act's 'welfare checklist' in making its decision (see paragraph 2.19).

Court process

- 4.28 The Family Procedure Rules 2010 govern proceedings from April 1 2011. Sitting underneath those rules is the Public Law Outline (PLO) first introduced in 2008 and amended in 2010.⁶⁷ This sets out how cases should be progressed, including specifying the information that local authorities should make available to the court when they apply for an order. It emphasises the need to streamline cases with an overriding objective to reduce unnecessary delay through stronger case management by judges.
- 4.29 The PLO sets out how to deal with cases justly while having regard to the welfare issues involved, based on these core principles:
- each case is to have a timetable for proceedings based on a Timetable for the Child
 - judicial continuity - with no more than two case management judges; and
 - active and consistent case management.
- 4.30 The PLO envisages that there should normally be four substantive hearings in a case.

Representation in public law

- 4.31 People with parental responsibility (PR) for a child are made automatic parties to proceedings and entitled to free legal representation. Other parties joining proceedings, for example grandparents, have no automatic right to legal aid but may be eligible for it on a means and merits tested basis.

⁶⁷ Judiciary (2008) *The Public Law Outline* available from http://www.hmcourts-service.gov.uk/infoabout/public_law_outline/index.htm and President of the Family Division (2010) *Public Law proceedings guide to Case Management* http://www.hmcourts-service.gov.uk/cms/files/public_law_outline_PD_April_2010.pdf Last accessed 29/03/11

- 4.32 Both a children's guardian and a solicitor represent children involved in public law proceedings in England and Wales.⁶⁸ This is known as the 'tandem model' of representation.
- 4.33 The children's guardian is appointed by the court to act as an independent representative for the child, but Cafcass (or Cafcass Cymru) provide the named guardian for the child and supervise their appointment. It is the guardian's duty to appoint a specialised solicitor for the child, usually a member of the Law Society's Children's Panel.⁶⁹ The court also has the power directly to appoint a solicitor in the absence of an appointed guardian.⁷⁰
- 4.34 The guardian's statutory duty is to safeguard the interests of the child.⁷¹ They independently represent the child's best interests and express the child's wishes and feelings to the court so they can be taken into account in its decisions. In advising the court of their assessment of the child's welfare interests, the guardian should have regard to the duty of the courts to consider the welfare checklist, consider all options available to the court and whether recommending an order is better for the child than making no order. They are usually expected to attend all court hearings and directions, unless excused by the court.⁷²
- 4.35 The solicitor's duty is to act as the child's advocate in court and to present the child's wishes and feelings. The solicitor will have received their instructions from the guardian in most cases, except when the child's wishes are in conflict with the guardian's view of the child's needs. This may sometimes result in divergence between the guardian and the solicitor, with the solicitor then taking instructions from the child, and possibly the guardian seeking leave to appoint their own separate legal representative.⁷³

Assessments and experts

- 4.36 Additional experts will usually be instructed during proceedings to provide expert evidence to the court, including child and adult psychiatrists, psychologists and independent social workers.
- 4.37 The usual process for selecting experts is that one of the parties to proceedings will request an expert and provide the court with the details of the expert they wish to use and why they wish to use them. The judge will make a decision on whether the expert is required and will make an order for the expert to be

⁶⁸ A guardian is appointed to specified proceedings under s41 of the Children Act 1989 and then appoints the child's solicitor. The model is also applied in some (rule 9.5) private law cases.

⁶⁹ Law Society Children's Panel solicitors must have a minimum of 3 years' experience; and must be able to demonstrate their experience of working with children and families and be able cover all aspects of children law in their application. They need to be highly competent at advocacy with excellent presentation skills and they must attend the required three-day training course http://www.cafcass.gov.uk/pdf/Practice_Guidance_for_Guardians_Appointing_a_solicitor_for_the_child%20%5B2%5D.pdf Last accessed 28/03/11. The solicitor is appointed under rule 16.29 of the FPR 2010.

⁷⁰ s41(3) of the Children Act 1989

⁷¹ s41 of the Children Act 1989

⁷² In accordance with rule 16.20(5), FPR 2010

⁷³ Both the child and the guardian have the right to apply to the court for the solicitor's appointment to be terminated. See Rule 16.29(7-8) FPR 2010.

instructed. The judge can also order the expert to be jointly instructed, if it is felt that more than one party to the case requires the expert evidence.⁷⁴

Care planning for looked after children

- 4.38 As soon as a child comes into local authority care (via section 20, section 31 or the emergency route) the local authority is subject to various duties regarding the child's care and carrying out effective corporate parenting.⁷⁵ It must:
- develop a comprehensive and integrated care plan for the child;
 - place the child at the centre of decisions;
 - promote effective care planning;
 - ensure accommodation is provided to meet the child's needs; and
 - ensure effective reviews of the child's case are carried out within specified timescales.
- 4.39 In Wales children in need (including looked after children) and their families who receive an Integrated Family Support Service because of parental substance misuse may also have a Family Plan as well as a child care plan.⁷⁶
- 4.40 The overriding objective of the care plan is to set out common goals for all the professionals involved with the child. Working with the child, and their birth family where appropriate, the aim is to ensure support for the child's overall development.
- 4.41 The plan should set out the current developmental needs of the child – based on information obtained from assessing the child's needs in accordance with the assessment framework – and establish clear expectations about how these needs are to be met by everyone involved with the child. It includes the seven important dimensions of the child's developmental needs: health, education, emotional and behavioural development, identity, family and social relationships, social presentation and self-care skills.⁷⁷
- 4.42 Achieving permanency for the child – including emotional, physical and legally determined permanent PR – is an important objective for local authority care planning.⁷⁸ This is referred to as 'permanence planning' and should be

⁷⁴ See rule 25.7, FPR 2010

⁷⁵ For England, new *Care Planning, Placement and Case Review Regulations (2010)* will come into force in April 2011. For Wales, duties are set out by *The Review of Children Cases (Wales) Regulations 2007* and *The Placement of Children (Wales) Regulations 2007* and Part 3 of the *Children and Families (Wales) Measure 2010*. Processes described refer specifically to England but are broadly similar in Wales unless specified.

⁷⁶ The 'Family Plan' provides a holistic view of the needs of the child and their parents drawing on a range of existing plans, including a child's care plan and adult plan. Set out in part 3 (*Integrated Family Support teams*) of *Children and Families (Wales) Measure 2010*.

⁷⁷ For more detail for requirements in England see *The Children Act 1989 Guidance and Regulations Volume 2: Care Planning, Placement and Case Review*

⁷⁸ Ibid

addressed by the time of the child's second statutory review, usually around four months after they have entered the care system.⁷⁹

- 4.43 For children subject to section 31 care proceedings, the care plan will for a period of time be subject to court scrutiny as the judges satisfy themselves that the making of a care order is in the child's best interests. Under section 31(3A), the court cannot make a care order until it has considered the care plan and, under section 31A(2), the local authority has a duty to ensure the care plan is kept under review and updated throughout the duration of proceedings.⁸⁰

Providing care

- 4.44 The development, maintenance and review of the child's care plan remains the responsibility of the local authority from the time that the child enters care. This includes when a child enters care under an interim care order during proceedings. When a full care order is made the authority continues to be responsible for the care plan. The court's scrutiny has ceased at this point.
- 4.45 The care plan will change over time as the child develops and their needs change, as well as to take into account changes in the child's circumstances.

Scrutiny of care provision

- 4.46 When the court makes a final care order it has no further responsibility for scrutinising the care order, and it cannot impose conditions on the care plan. This is the Children Act's cardinal 'divided duties' principle.⁸¹

*The Children Act 1989 delineated the boundary of responsibility with complete clarity. Where a care order is made the responsibility for the child's care is with the authority rather than the court. The court retains no supervisory role, monitoring the authority's discharge of its responsibilities. That was the intention of Parliament.*⁸²

- 4.47 This principle is founded on the belief that the task of securing the welfare of the child is the primary responsibility of the local authority. The court is not competent to secure this in a continuing way. That said, of course, the local authority is not unfettered. It is accountable for the care it provides and its actions are scrutinised through a number of mechanisms.
- 4.48 On entering care an Independent Reviewing Officer (IRO) is appointed for every looked after child.⁸³ The role of the IRO was placed on a statutory basis in 2004, in response to a House of Lords judgment that expressed concern that young children in local authority care had insufficient protection against local authority

⁷⁹ Ibid

⁸⁰ s31A(2) of the Children Act 1989. S31A is an amendment, inserted by the Adoption and Children Act 2002

⁸¹ Thorpe, M.A. and Clarke, E. (1999) *Divided Duties*, UK, Jordan Publishing Ltd.

⁸² Per L Nicholls, *Re S(Minors)* [2002] UKHL 10.

⁸³ s25A of the Children Act 1989

failures.⁸⁴ IROs must be qualified social workers with substantial post-qualifying experience.⁸⁵

4.49 Their fundamental responsibility is to promote the views of the child and help hold local authorities to account by making sure that they carry out continuous and effective care planning for the child.⁸⁶ Their main responsibilities have been reviewed and, as of 1 April 2011 in England, are to:

- monitor the local authority's performance of their functions in relation to the child's case;
- participate in *any* review of the child's case;
- ensure that any ascertained wishes and feelings of the child concerning the case are given due consideration by the local authority; and
- make a referral to Cafcass when they have a serious concern about the local authority's handling of a child's case. Cafcass will then investigate and consider taking legal action, either by initiating a judicial review or action against the local authority.

4.50 Local authorities are subject to inspection by Her Majesty's Chief Inspector for Education, Children's Services and Skills (OFSTED) in England and the Care and Social Services Inspectorate (CSSIW) in Wales. Professor Eileen Munro has recently recommended that notified inspection of local authority safeguarding activity in England should be replaced with wholly unannounced inspection.⁸⁷ *Sustainable Social Services In Wales – A Framework for Action (2011)* set out a new improvement framework for inspection and regulation of children and adult social services in Wales.⁸⁸ It also recognises the elements of the legal framework common to both England and Wales, and that following Munro's recommendations, the Assembly Government will need to take into account any specific duties on non-devolved organisations, for example the police.

Adoption

4.51 Adoption has long been a feature of our public care system though the number of adoptions made has fallen dramatically in the past 40 years reflecting among other things that fewer children are now 'given up' voluntarily by their parents. In 1971, a total of 21,495 children were adopted in England and Wales. By 2009 that had fallen to 4,655.⁸⁹

⁸⁴ Re S (Minors) [2002] UKHL 10

⁸⁵ In England, the new *IRO Handbook* comes into force in April 2011 and states that IROs should hold at least 5 years social work experience (p12). The *Review of Children's Cases (Wales) Regulations 2007* state that IROs should have 'significant experience in social work' under section 3(2), and this is usually interpreted as three to five years' experience.

⁸⁶ Ibid. Responsibilities described relate to England. They are broadly similar in Wales.

⁸⁷ Munro, E. (2010) *The Munro Review of Child Protection: Interim Report, The Child's Journey*, Department for Education.

⁸⁸ Welsh Assembly Government (2011) *Sustainable Social Services for Wales: A Framework for Action*, Cardiff, WAG.

⁸⁹ Figure from the Office for National Statistics, as sourced at: <http://www.statistics.gov.uk/cci/nugget.asp?id=592> Last accessed 15/3/11 This includes all adoptions – eg adoptions by step parent and relatives as well as adoptions from care

- 4.52 Each year a number of children are adopted from care.⁹⁰ In certain circumstances, parental consent to this can be dispensed with. This feature of our system marks us out from most other jurisdictions. Other countries refuse to dispense with parental responsibility altogether unless the parents agree, although they will limit its exercise where necessary.
- 4.53 When assessing long term future care options for some children, particularly very young infants, planning for adoption holds some clear benefits for the child. Successful adoption can offer a child as good education and health outcomes as for children brought up by their own birth parents.⁹¹ For these reasons adoption continues to be important in our system.
- 4.54 As might be expected, given the implications of adoption, the process is strictly regulated.⁹² Briefly:
- social workers consider permanence options for the child at the statutory review. If the permanence option is that the child be placed for adoption the case will be referred to the adoption panel;
 - the adoption panel considers and gives a recommendation as to whether the child should be placed for adoption. The panel may recommend that adoption is not the appropriate permanence option for the child;
 - the local authority's decision-maker takes that recommendation into account when making the decision whether the child should be placed for adoption;
 - the local authority applies for a placement order;⁹³
 - the court will not make a placement order unless it is satisfied this is in the child's best interests. The court also will also not make a placement order until the adoption panel is satisfied that adoption is in the child's best interests;
 - once a placement order is made the child can be placed for adoption with prospective adopters. After a prescribed period of time, an application to the court can then be made for an adoption order;⁹⁴ and
 - once this order is made the child is adopted and PR transfers to the adoptive parents.

Summary

- 4.55 The child's journey through the care process is complicated, with many different paths, some of which are followed concurrently. It is not impossible for a single

⁹⁰ In 2009-10 3430 children were adopted from care in England and Wales.
<http://www.statswales.wales.gov.uk/TableViewer/tableView.aspx?ReportId=24566> and
<http://www.education.gov.uk/rsgateway/DB/SFR/s000960/index.shtml> Last accessed 29/03/11

⁹¹ Department for Education (2011) *Adoption Guidance – Adoption and Children Act 2002 First revision: February 2011*, London, DfE.
<http://www.education.gov.uk/childrenandyoungpeople/families/adoption/b0072314/guidance/> Last accessed 15/03/11)

⁹² England – Ibid. In Wales the relevant national minimum standards are available at
<http://wales.gov.uk/docs/cssiw/legislation/nmslaadoption/091022laaadopten.pdf>.

⁹³ s22 of Adoption and Children Act 2002. The local authority must make an application when care proceedings are in train and cannot seek parental consent to adopt in this circumstance.

⁹⁴ s42, s47 of Adoption and Children Act 2002

child to be the subject of court proceedings, a care plan (which may include a child protection plan) and adoption planning all at the same time. A range of individuals and agencies are interested in and responsible for securing the child's welfare. The critical question is how well these different agencies, processes and individuals work – collectively – to support the child. The diagram below sets out some of the key individuals and decision-makers who may be involved with a child that is subject to proceedings.

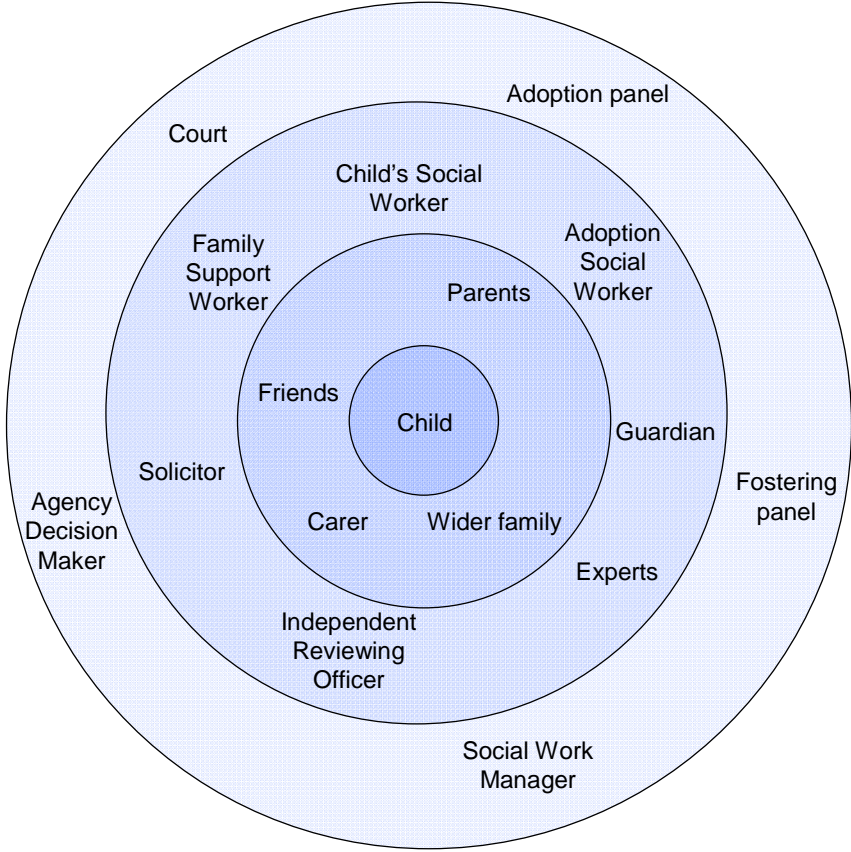


Fig iii – Diagram showing some of the key individuals and decision-makers who may be involved with a child subject to proceedings.

The delivery of the public law system

4.56 The public law system is under severe strain. The cumulative effect is that the paramount interests of the child can too often be buried under the weight of process.

Delay is damaging children

4.57 The central problem in the public law system is delay. In 2010 the average care and supervision applications took 57 weeks in county courts and 46 weeks in FPCs.⁹⁵ In the most recent quarter just 18% of care and supervision cases were completed within 30 weeks, or some seven months. 13% took more than 80 weeks.⁹⁶

The Children Act 1989 envisaged all these cases being resolved within 12 weeks yet the time for resolution has gone up and up over the years That is a monstrous state of affairs and must not be allowed to continue.

District Judge Mackenzie, call for evidence submission

4.58 Delay damages children. By seven months babies show preferential attachment and become anxious around strangers. Children of that age who are treated badly may begin to form maladaptive attachments. Children placed in temporary care placements are likely to start developing secure attachments to their care givers, which can lead to lasting distress for the child when they are then moved on to another placement.⁹⁷

4.59 A study, which followed a group of infants who were identified before their first birthday as suffering or likely to suffer significant harm showed that at the age of three years the long term well-being of around one in five of the infants was doubly jeopardised: by professionals waiting too long for parents to overcome their difficulties and then by staying so long with temporary carers they experienced disrupted attachments when finally placed for adoption.⁹⁸

4.60 Swift adoption can be clearly beneficial for the child. One study found that children who were adopted before their first birthday made just as secure attachments as their non-adopted peers, but children adopted after their first birthday formed less secure attachments.⁹⁹

⁹⁵ Based on HMCS FamilyMan data for 2010. These data come from internal case management systems and do not form part of the national statistics produced by the Ministry of Justice which can be found here: www.justice.gov.uk/publications/statistics.htm. As such this data set is not subject to the same levels of quality assurance.

⁹⁶ Ministry of Justice (2010) *Court Statistics Quarterly July to September 2010: Ministry of Justice Statistics Bulletin*. Figures quoted for Quarter 3, 2010.

⁹⁷ Summarised in Davies, C. and Ward, H. (forthcoming)

⁹⁸ Ward, H., Brown, R., Westlake, D. and Munro, E.R. (2010) *Infants suffering, or likely to suffer, significant harm: A prospective longitudinal study*. Report to DFE. London: Department for Education.

⁹⁹ Van den Dries, L., Juffer, F., Van Ijzendoorn, M.H. and Bakermans-Kranenburg, M.J. (2009) *Fostering security? A meta-analysis of attachment in adopted children*. *Children and Youth Services Review* (31), pp 410-421

- 4.61 During long proceedings, children will often be cared for outside the family home, for example in a temporary foster placement, but will continue to have contact with their birth family. For understandable reasons, courts frequently order high levels of contact – small children and babies may have contact with parents during proceedings as frequently as five times a week for several hours at a time, often involving considerable travel for the child.
- 4.62 These arrangements can be damaging for children. Recent studies give detailed accounts of the stressful and negative impact on infants of high levels of contact during care proceedings. They expose the distress that infants often experience during the daily contact sessions, the disruption to their daily routine and the impact of often long-distance transport arrangements on the infant. This disturbance can last throughout proceedings causing distress to both infant and carer.¹⁰⁰
- 4.63 It has been said to us during the course of the Review that sometimes delay – or purposeful delay – is needed:

Insofar as the avoidance of delay ... we would observe that ultimately what matters is the right decision is made for the child and that should never be sacrificed for short term needs/aims.

Association of Lawyers for Children, call for evidence submission

- 4.64 Public law proceedings can and do offer a space in which parties can come together, analyse the issues and take time to work out the best way forward. Clearly it may be necessary to take time to test the evidence, particularly where there is doubt, but long proceedings – by this we would suggest any lasting more than six months – should be the exception not the norm. Most delay is not a deliberate decision taken in the best interests of the child.

The system is under increasing pressure

- 4.65 Case length is rising. Clearly a sharp rise in caseloads in recent years is likely to be the main cause. However, there has been a steady trend of rising case lengths over the past twenty years even without this factor.

¹⁰⁰ Kenrick, J. (2009) *Concurrent planning: A retrospective study of the continuities and discontinuities of care and their impact on the development of infant and young children placed for adoption by the Coram Concurrent Planning project*, *Adoption and Fostering*, 33(4) pp. 5-18
Humphreys, C. and Kiraly, M. (2009) *Baby on Board: Executive Summary: Report of the Infants in Care and Family Contact Research Project*, University of Melbourne.

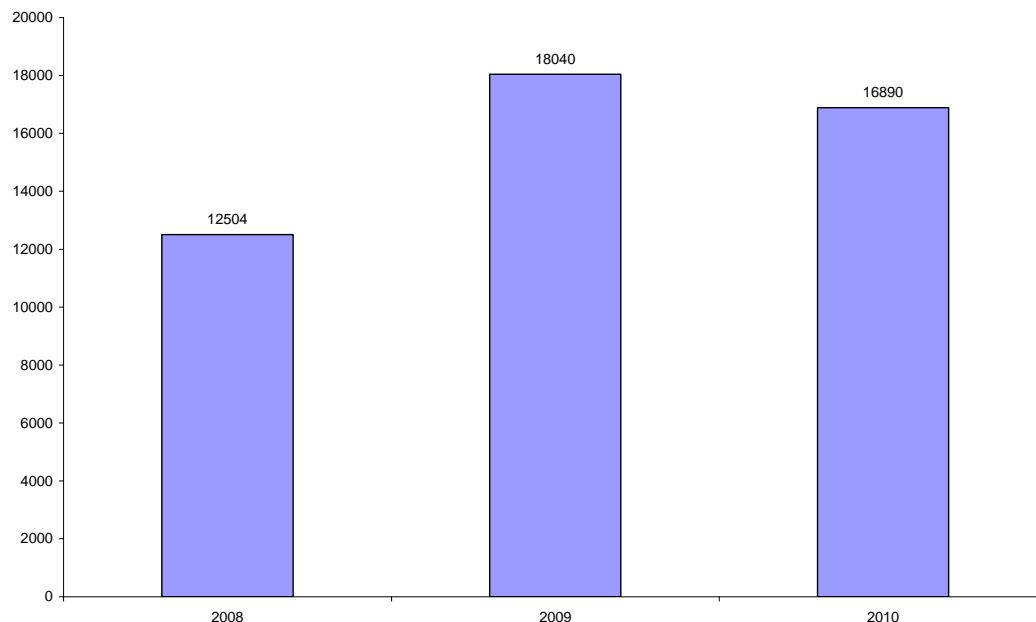


Fig iv. Number of children involved in section 31 care and supervision applications per calendar year¹⁰¹

4.66 This has led to a significant increase in open cases. The number of children currently waiting for the outcome of proceedings has nearly doubled in recent years, as shown here:

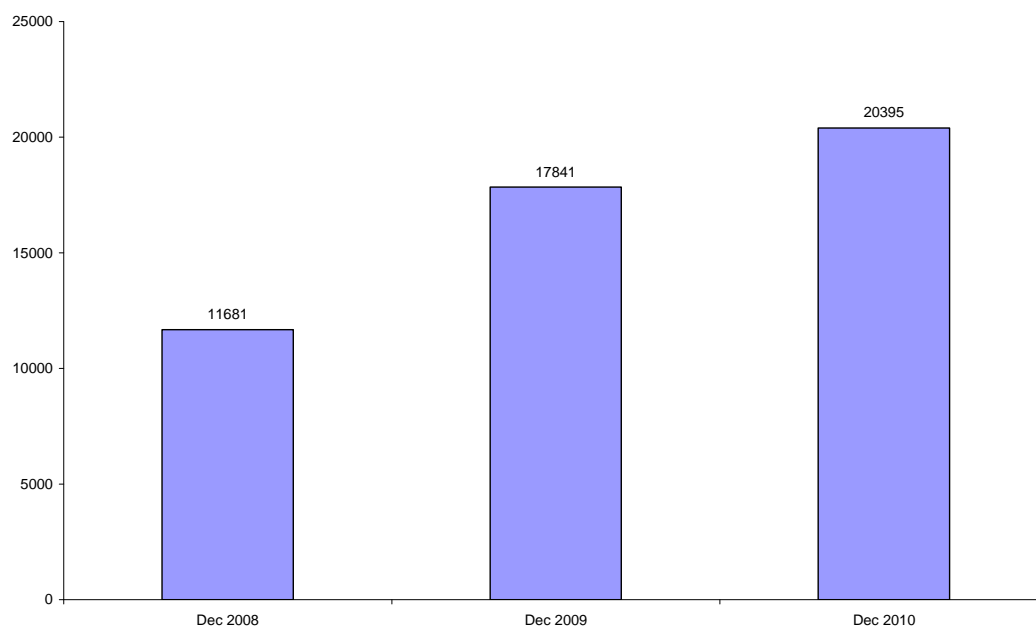


Fig v. Number of children involved in outstanding section 31 care and supervision cases at end of calendar year¹⁰²

¹⁰¹ These data come from the Ministry of Justice's case management system and do not form part of the national statistics produced by the Ministry of Justice, which can be found here: www.justice.gov.uk/publications/statistics.htm. As such this data set is not subject to the same levels of quality assurance

¹⁰² Ibid

4.67 This is causing extra pressure on a system that was already working beyond its capacity, given its current ways of working.

4.68 Pressure on local authorities is not only being felt in relation to the numbers of children who are the subject of proceedings. Authorities are receiving increasing numbers of referrals about safeguarding concerns. The result is more assessments, more child protection plans and care for more children. It seems unlikely that the demands being made on the system will reduce significantly, at least in the short term.

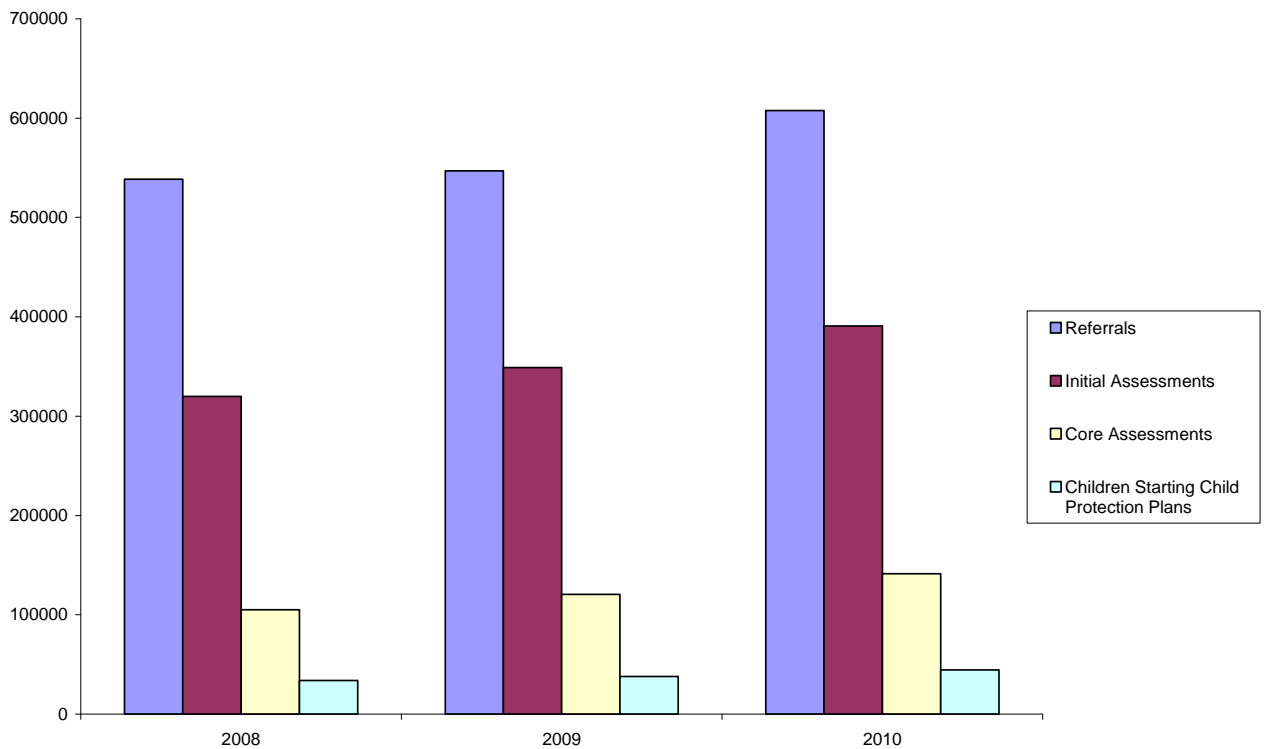


Fig vi. Number of children at different stages of local authority child protection process per calendar year in England¹⁰³

Preparation for court by local authorities can be poor

4.69 Pressure in the social care system sometimes shows itself in a local authority's preparation for court proceedings. Studies consistently show that local authority applications to court are often missing key documents such as core assessments and complete care plans. A study in 2009 found that 40% of cases started without a core assessment.¹⁰⁴ Previous studies noted that between 34%

¹⁰³ Figures from Department for Education: *Children In Need in England, including their characteristics and further information on children who were the subject of a child protection plan (2009-10 Children in Need census, Final)* <http://www.education.gov.uk/rsgateway/DB/STR/d000970/index.shtml> Last accessed 15/3/11 Similar pressures have been experienced in Wales

¹⁰⁴ Jessiman, P., Keogh, P. and Brophy, J. (2009) *An early process evaluation of the Public Law Outline in family courts*. Ministry of Justice Research Series 09/10, London, MOJ,

and 57% of cases were missing this critical document.¹⁰⁵ Difficulties in engaging parents and the need to take emergency action can have an impact here. But we have also heard complaints of inadequate case management, poor preparation for court, poor presentation in court and failure to comply with directions.

Current workload pressures and staffing problems within many children's services have a knock on effect on the family court system. In particular social work turnover during the course of a case contributes to poor case management. This is reflected in the fact that missing or incomplete core assessments are one of the contributory factors to delay, as identified in recent research. There clearly need to be improvements in the overall quality of social worker assessments to the courts.

Barnardo's, call for evidence submission

- 4.70 The system is also operating now to create perverse incentives. The high use of experts, the close scrutiny of the care plan and a perception that courts do not trust local authority work all conspire to create a disincentive to the authority to do the work fully in the first place, as it is expected it will only be repeated once proceedings start.

The massive emphasis on pre action work is sadly largely ignored by the courts. What is the point of pre-proceedings work through child protection, child in need, letters before proceedings, if when the case gets to court we start again with more assessments?

Local authority social worker, call for evidence submission

- 4.71 A particularly common complaint is that even where there is robust evidence from recent previous proceedings that parents would be unable to care for a child the court will insist on starting assessments afresh. The implication is that this is needed to assure the parent's rights.

There should be a presumption that where there has already been a care application and a child removed from its parent(s) then for any subsequent application the full panoply of assessments should only be engaged if there has been a significant change in circumstances of the parent(s).

South Devon FPC, call for evidence submission

- 4.72 The PLO is based on an expectation that local authorities will carry out a thorough analysis of the issues before coming into court. This, in theory, should lead to quicker and simpler proceedings. Local authorities in effect feel let down by the courts that do not rely on their work. Courts in turn feel the work is of insufficient quality. This creates mistrust and sparks a vicious cycle of inefficiency and delay.

¹⁰⁵ Brophy et al (2003) noted 34% and Masson et al (2008) noted 57%. Brophy, J., Jhutti-Johal, J. and Owen, C. (2003) *Significant Harm: child protection litigation in a multi-cultural setting*, London, MOJ., and Masson, J., Pearce, J., Bader, K., Olivia, J., Marsden, J. and Westlake, D. (2008)

The tandem model is under strain

- 4.73 Many people told us of their concerns about the delivery of court welfare services. These centre on the availability of guardians, the quality of their work and the value added by their role.
- 4.74 We have discussed earlier (see paragraphs 3.90 - 3.105) the issues faced by Cafcass in England. The use of the duty scheme, in public law cases specifically, has been viewed poorly.¹⁰⁶ Some say it adds little value, and in some areas does not properly safeguard children in proceedings.¹⁰⁷

The interim measure of introducing a duty system to manage the current demand for Cafcass services has severely compromised the service to children in courts as well as tarnished the reputation of the organisation... This system fails to provide a service that accords with the statutory requirements set out in the Children Act 1989 and has led many practitioners to condemn it as unsafe.

BASW, call for evidence submission

- 4.75 The duty system was a short term measure to manage an acute situation. Delays in appointing guardians have now been largely resolved and reliance on the duty system is also much reduced. At the end of December 2010, 99.7% of public law cases were allocated a guardian, and only 3.3% of those cases were allocated a duty adviser.¹⁰⁸ At end of February 2011, guardians were being substantively allocated (i.e. not duty advisers) to care cases within 10 days.¹⁰⁹
- 4.76 While these improvements are welcome the service remains under strain given the increase in applications and open cases.
- 4.77 Another knock on effect of problems in supplying guardians is the additional pressure that this puts on the solicitor for the child.

Where the guardian does not have the capacity to undertake the work required this undermines the tandem working model, and leaves solicitors in a difficult situation where they have nominal instructions on behalf of their child client but in reality they are often inappropriately left to make welfare recommendations.

The Law Society, call for evidence submission

- 4.78 There are also widespread concerns regarding the quality of the advice prepared by guardians. The judiciary are most likely to be positive about guardian input:

...judges told inspectors that family court advisers are valuable to the courts as independent professional advisers, many of whom have had experience in local authorities, and can be relied upon to make independent assessments and recommendations, unfettered by resource considerations, in the best

¹⁰⁶ Cafcass Cymru has not needed to implement a duty system

¹⁰⁷ Evidence submitted to the call for evidence from Her Majesty's Council of Circuit Judges

¹⁰⁸ Figures are provided from Cafcass' national case management system (CMS), unpublished

¹⁰⁹ Ibid

*interests of children. Judges believe that for this reason, family court advisers do add value to the local authority's work.*¹¹⁰

4.79 However, local authorities are often less positive:

We see Cafcass reports which add little value and which commonly replicate what has been written by the local authority social worker.

Royal Borough of Kensington and Chelsea, call for evidence submission

4.80 And inspectors have expressed their concern:

*...inspectors found that they could not always substantiate that the work of the family court advisers adds value in every public law case.*¹¹¹

4.81 We have heard concerns about the reduction in experience and qualification requirements for guardian appointments. In an attempt to recruit more guardians, Cafcass lowered the level of experience required to become a guardian from five years to three years post-qualifying social work experience.¹¹²

4.82 While not convinced that guardians do actually generally lack experience – Cafcass human resources data would suggest that guardians are in the main experienced social workers – the fact that there is a widespread belief that guardians are not of the quality they once were is itself an issue.

4.83 Concerns about duplication by the guardian of work that has or should be done by the local authority have led some now to believe there is no need for a court welfare service. However, many people also told us that on balance the tandem model adds value – particularly in the context of pressures on local authority social services – and should be retained.

Court capacity is limited

4.84 The increase in public law applications has increased the pressure on judges and HMCS along with Cafcass, Cafcass Cymru and local authorities. Extra sitting days for courts have helped but some respondents to the call for evidence also spoke of serious difficulties in getting court time when needed. These problems seem to be acute in certain areas, particularly London:

In our view, the system as it stands currently is very close to breaking point and children are having to wait an unacceptably long time for their cases to be resolved due to the delay in obtaining court listings, particularly for final hearings.

Barnet Council, call for evidence submission

¹¹⁰ Care and Social Service Inspectorate Wales (2010) *Inspection of CAF/CASS CYMRU 2010*, CSSIW

¹¹¹ Ibid

¹¹² When Cafcass Cymru was created they also retained this three year criteria. In addition we have heard concerns over Cafcass' recent proposal, under its new 2010 workforce development policy, to recruit newly qualified social workers (NQSW) straight into Cafcass. Cafcass have employed a small number of NQSWs, but they are not permitted to work as a guardian until they have their three years of experience.

Court listing is ineffective with insufficient time to fully hear new applications, or to hear any contested matters, without a significant period of delay. We could evidence a number of cases where children are left in circumstances of significant emotional and / or physical harm for many months due to court capacity issues.

London Borough of Hammersmith and Fulham, call for evidence submission

Cases are not properly managed

- 4.85 The PLO is founded on a core principle that cases should be actively managed. The responsibility belongs to the judge. This is a significant change in emphasis and role for the family judiciary:

You have to remember that, historically, the English judge has seen him or herself as the arbiter who sits back and waits, decides the issue and then goes away. In family law that has completely changed. We are now case managers and we are in charge. We have a quasi-investigative inquisitorial role.¹¹³

- 4.86 Yet weak or inconsistent case management is identified as a key factor contributing to unnecessary delay and the wasteful use of resources.

There is a lack of robust judicial court management. More control by judges is needed but they also need to 'let go' when appropriate. We know of many cases where cases are retained before the courts so that every single issue can be resolved to the satisfaction of (very often) the children's guardian and / or the judge. This increases delay and uncertainty and does not guarantee better outcomes for children.

Solicitors in Local Government Child Care Lawyers Group, call for evidence submission

- 4.87 This is a recurring theme in previous reviews of public law. In 1996 Dame Margaret Booth made a number of recommendations on how case management could be improved.¹¹⁴ The theme was echoed in both the 2002 and 2006 reviews into child care proceedings.^{115 116}

- 4.88 As we have seen, there are wide variations in the length of time that cases take in different courts. Research evidence supports the contention that case management is not sufficiently robust and consistent across the country. An early evaluation of implementation of the PLO showed considerable variation across the sample courts.¹¹⁷ This showed itself in differences, for example, in the stage at which experts were appointed, the numbers of different types of

¹¹³ Sir Nicholas Wall in response to public question 166. As cited in the House of Commons (uncorrected) Oral Evidence taken before the Justice Committee "The Operation of the Family Courts" on Tuesday 1 March 2011 (Public Questions 163 – 219) <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/uc518-iii/51801.htm>. Last accessed 28/3/11

¹¹⁴ Booth, M (1996) *Avoiding delay in Children Act cases*, London: Lord Chancellor's Department.

¹¹⁵ Lord Chancellor's Department (2002) *Scoping study on Delay in Children Act Cases*, London; Lord Chancellor's Department

¹¹⁶ Department for Constitutional Affairs and Department for Education and Schools (2006) *Review of the Child Care Proceedings System in England and Wales*, London: Department for Constitutional Affairs

¹¹⁷ Jessiman, P., Keogh, P. and Brophy, J. (2009)

hearings held and the timings of those hearings. The evaluation also found wide variability across local authorities in the extent to which they followed the pre-proceedings checklist.

- 4.89 A recent study by Masson et al, which involved the observation of over 100 different hearings also concluded:

*neither the Judicial Protocol nor the PLO appear to have made any significant impact on the underlying culture of care proceeding.*¹¹⁸

- 4.90 The study suggested that the discrete four stage PLO framework was not being followed in practice, with the majority of cases having significantly more than four hearings. The average number of hearings per case was just over 7.¹¹⁹

*The general view that the PLO structure is fine for 'simple' cases, but cannot be expected to work for 'complex' ones may well reflect what its architects had in mind. However, there appears to be a complete mismatch between what the architects on the one hand, and the practitioners on the other, would consider constitutes a 'complex' case. Those 'at the coal face' consider a large proportion of their cases to come into the complex category and therefore incapable of being forced to fit the PLO structure.*¹²⁰

- 4.91 We have heard some claims that the PLO is not fit for purpose, while others believe it is a positive development that needs more time to bed in. A recent good practice guide, prepared by the Ministry of Justice for Local Performance Improvement Groups, examines performance in courts with relatively low case lengths. It finds that all those studied cited the clear structure provided by the PLO as the principal tool that enabled them to avoid delay.¹²¹

- 4.92 Other elements of poor case management mentioned to us include:

- failing to meet the PLO's expectations around judicial continuity;
- not insisting on compliance with practice directions on the instruction of experts;
- failing to establish a robust Timetable for the Child;
- allowing the parties to dictate how long hearings should last and allowing too much time for hearings; and
- being too ready to allow expert reports or join family members as parties to proceedings even where these are unlikely to add value or, regarding the latter, present a realistic care giving option for the child.

- 4.93 Arguably the system as it is currently organised militates against good case management. One judge was quoted in a recent study saying:

¹¹⁸ Pearce, J. and Masson, J. with Bader, K. (2011) *Just following instructions? The representation of parents in care proceedings*, School of Law, University of Bristol

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Reducing delay – what works best? A case study on the timely completion of care proceedings, (2011)

*You are at the mercy of all the other agents involved in the process - not only the current concerns we've all got about Cafcass; you've got the problems of local authorities who are also heavily over-stretched; you've got the problems of shortage of experts in some areas and long waiting times before they start work and produce a report in some specialties. So from the judicial perspective, you've got a whole range of problems that you can't completely control. And that's a problem.*¹²²

4.94 Another judge expressed their frustration at this:

*I've said it before and I'm going to say it again, that if the parties expect the court to cooperate with them, then they should cooperate with the court. I received the Case Summary and Position Statements at 10.10 this morning. The last Case Summary was [5 months ago] and there has been no update since then. I was in the dark, only enlightened by my own research, when suddenly a tsunami of documents appears. It starts the day on the wrong footing and then I'm trying to dig out all the information. It leaves me with a feeling of depression, irritation and unpleasantness. It is inappropriate for a judge to remind other professionals of their discourtesy and inattention to their cases.*¹²³

Processes are complex and inefficient

4.95 The dysfunction in the organisation of the family justice system is particularly acute in public law. Here a multiplicity of partners must come together to support the child and reach the best solution. This requires co-operation and good will. It also needs process which is simple, easy for all to understand and which meets everyone's needs. It seems we are some way from achieving this goal.

4.96 Over the course of the 20 years since the introduction of the Children Act 1989 a wealth of processes have grown up around it. Many people are concerned at the proliferation of procedure and associated documentation.

*The increased focus on protocols and documentation is expensive and fails to protect children, particularly in cases where neglect by the parents is the predominant feature... The focus needs to be on the child's future, not the proceedings themselves. The protocols have created a lawyer-designed monster, which has become dominant over the needs of the child.*¹²⁴

4.97 The number of renewals of Interim Care Orders (ICOs) and Interim Supervision Orders (ISOs) is a concern. ICOs and ISOs are used to place the child temporarily under the care or supervision of the local authority during care proceedings. Both have to be renewed initially after eight weeks and subsequently every four weeks. The renewal is usually done through an administrative process without a court hearing. The rationale is easy to see but it creates a burden on the courts and local authorities. With the average length of

¹²² Pearce, J., et al (2011)

¹²³ Ibid

¹²⁴ Whybrow, J., (2010). Opening the floodgates: the price of modernisation of child law, *Journal of Children's Services, Research informing policy and practice*. 5(2), pp.60-63.

case now lasting about a year, for a child in care throughout the proceedings, as is common, the ICO would need to be renewed 10 or 11 times.

- 4.98 There are also areas of duplication and overlap. We have already touched on the duplication between the guardian's role and that of the local authority. We also observed duplication in the role of the Independent Reviewing Officer and the guardian:

The children's guardian and the local authority Independent Reviewing Officer are required to listen to children, make sure their needs are of paramount consideration and that the care plans proposed/made for children and young people are the right ones. The IRO scrutinises these plans during the child's statutory reviews, the guardian offers their opinion in court. This is a duplication of effort and role that cannot be sustained in the current financial climate.

ADCS, call for evidence submission

It appears that there are too many [guardian, social worker, child's solicitor and Independent Reviewing Officer] professionals involved, all of whom seek to represent the child's interests. Clearly a sound knowledge of the child, the case and an understanding of the issues is required in order to come to a view about what is in the interests of the child. This duplication can cause confusion, rivalry and conflict, and most certainly is unlikely to lead to efficiency.

London Borough of Camden, call for evidence submission

- 4.99 A further issue is the double scrutiny of adoption cases when a placement application is made. Respondents to the call for evidence pointed out that both the court and the adoption panel scrutinise, based on the same information, the case for adopting the child. Courts complain that they have to wait to make an order until the adoption panel process is complete, which may add delay. Respondents to the call for evidence felt this dual scrutiny was not needed.

The development of the powers of adoption panels alongside, and replicating, some of the court processes has involved increased delay for children, and an unwieldy and unnecessary layer of administrative decision making.

Family Justice Council, call for evidence submission

...we believe that significant duplication of effort and delay could be avoided in all care proceedings where the local authority concludes that the child should be placed for adoption by removing the requirement for the local authority to obtain a "best interests" recommendation from the Adoption Panel... in relation to cases that are the subject of care proceedings, the Panel is duplicating, in advance, the work which the court will undertake at the next stage of the process in any event. Accordingly we believe that such cases should be taken away from the Adoption Panel system, with Panel continuing to deal with relinquished children (where there is less scrutiny by the court), with approvals of adopters and with matches.

The Association of Lawyers for Children, call for evidence submission

Courts instruct too many experts

4.100 The ability to hear expert evidence is necessary to a fair court process. Expert assessment of a bone break for example may be critical in deciding whether the threshold for care has been passed. Assessments of parenting capacity, and capacity of parents to change, can be central to deciding whether a child can return home.

4.101 We have been told that expert evidence can also help persuade parents of the validity of the proceedings to remove children from their care. The parent, who may have had a long and difficult relationship with the local authority, is more likely to accept the conclusions of an 'independent' expert in the court setting, helping to create a more co-operative relationship between the court and the parent.

4.102 Yet there is a widespread view that expert evidence is relied on too much:

There is too much parental assessment; too great a readiness to appoint experts, often more than one because parents do not like the answer first time around.

South Devon FPC, call for evidence submission

4.103 Court of Appeal judgments have also played a part in urging that no stone be left unturned in public law cases and judges have responded strongly to these decisions.¹²⁵ The increased emphasis on the rights of parents, particularly the right to a fair hearing enshrined in the Human Rights Act, has clearly had a major effect here.

Parents' human rights are deemed to be best served by court directed assessments at the cost of delay for the child.

Bridgend County Borough Council, call for evidence submission

We recognise the tension for judges in being seen to meet their obligations under the Human Rights Act, but we believe that the court is often too swayed by this argument [where parents ask for an independent social work assessment] without consideration of the impact of further delay on the child's welfare.

Social Work Reform Board, call for evidence submission

4.104 We have also heard claims that many expert assessments add little to the understanding of the court. A District Judge's written response echoed a common theme of our evidence:

The courts have been too lax in their allowance of experts. We continually have psychological experts for instance who often add very little to what is ascertainable from a common sense assessment of the evidence. We do not

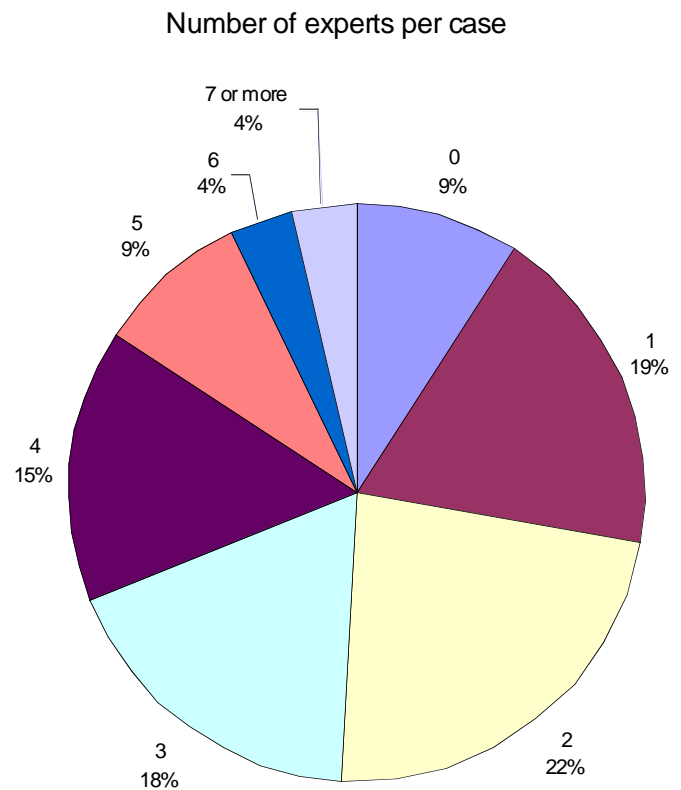
¹²⁵ Discussed in President's Guidance, Bulletin no 2, *Case management decisions and appeals therefrom*, Family Law (Feb 2011), p189, which aims to put these decisions in the wider context http://www.familylaw.co.uk/system/uploads/attachments/0001/4513/Case_management_decisions_and_appeals_therefrom.pdf Last accessed 28/3/11

seem willing to trust the combination of social work skill and the ability of judges and lawyers to assess the evidence in context.

District Judge Mackenzie, call for evidence submission

4.105 Studies have found that the number of cases involving experts in public law proceedings is high and has increased in recent years. Bates and Brophy showed an already high 80% in 1996, Hunt et al gave 87% in 1999, and Brophy et al found 89% in 2003.¹²⁶ Masson (2008) shows a further increase, with expert evidence involved in 91% of cases – in other words, experts were not used in only one in ten cases. Masson also found that the 35 cases not featuring expert evidence were either withdrawn early or were able to use expert assessments from previous proceedings featuring the same family.

4.106 Masson's study showed a range in the numbers of experts per case, with many using multiple experts (see fig vii below). Nearly half used three or more experts, and nearly a tenth of cases used six or more. An average of two experts per case were used in FPCs, this rose to 3.2 in care centres.¹²⁷



Data from Care Profiling Study: Masson 2008

Fig vii – Number of experts per case

4.107 There is a strong correlation between the use of expert assessments in public law proceedings and the length of the proceedings. Masson's (2008) study found

¹²⁶ Brophy, J. (2006)

¹²⁷ Masson, J., Pearce, J., Bader, K., Olivia, J., Marsden, J. and Westlake, D. (2008)

that almost a third of cases completing in 6 months or less had no experts or only one. In contrast, almost half the cases with 5 or more experts lasted longer than 18 months.¹²⁸ This may demonstrate the difficulties in managing processes to time when experts are involved, but may also reflect the greater complexity of longer cases.

4.108 The more experts needed, the greater the likelihood of delay simply because the right experts may not be immediately available. Some areas of the country face particular difficulties in this.

4.109 We have also been told that expert assessments are too often not focused sufficiently on the determinative issues and are too long and discursive. This may be because the expert is not given clear enough instructions. These, it seems, can be created by the parties just adding in the questions they all want to see answered, set out in an unedited list. We were told of one set of instructions that included 55 questions. The judge may not have the inclination or the time to challenge the instructions once the parties agree them.

4.110 Two forms of assessment attract particular criticism: Independent Social Work (ISW) reports and Residential Parenting Assessments. Masson found ISWs were used in 23% of cases; 17% involved a residential assessment.¹²⁹

4.111 With regard to Independent Social Workers:

When the experts appointed are independent social workers, the court has introduced into the process a third professional, alongside the children's guardian, with an identical qualification – and into a setting in which the other two social workers both have a statutory duty to pursue the child's best interests. It is our understanding that the independent social workers often simply replicate the findings of the assessment already undertaken by the local authority social worker.

Social Work Reform Board, call for evidence submission

4.112 Residential parenting assessments also came in for strong criticism as providing little added value to the proceedings while being exceptionally expensive for the local authorities who have to fund them.

In one notable case recently, the Council have spent over £300K on court ordered residential assessment, which is frankly not sustainable nor indeed proportionate with regards to the issues that were being considered.

Oxfordshire County Council, call for evidence submission

Court scrutiny of care plans has limitations

4.113 We have heard repeatedly that courts now take an increasing amount of time to scrutinise the detail of the child's care plan. This is both a result and a cause of the difficulties we are describing.

¹²⁸ Ibid

¹²⁹ Ibid

The role of the court also encompasses the scrutiny of care plans for children, both those for whom the plan is to return home, and also those for whom the plan is permanent separation. However, we are concerned about the level of that scrutiny and believe that in the current framework, the attention to the detail of the care plan from the court has contributed to the severe delays experienced by children who are the subjects of care proceedings.

London Borough of Lambeth, call for evidence submission

- 4.114 It is said, and we agree, that an increased scrutiny of care plans in recent years is driven predominantly by a lack of trust by judges in the ability of the local authority to formulate and then carry out an effective care plan for the child. And while this may be justified in certain cases this judicial behaviour is seen to increase both case lengths and the responsibility of the judge to secure the continuing welfare of the child, in a way that runs counter to the intent of the 1989 Act.
- 4.115 This, it is also claimed, is wasted time and resource because the care plan is a dynamic document that has to change with the child's needs. The court is concerned only with the care plan at the time at which it scrutinises it and, quite rightly, has no input into the care plan once it has made the order. The court can spend considerable time and resource scrutinising a care plan which the local authority may have to quite properly change after the end of the proceedings.
- 4.116 Our sense is that local authorities aim conscientiously to implement the care plan agreed by the court, but often have to change the plan as the circumstances of the child change. A 1999 study found that some attempt was made to follow the overall direction of the plan in every case, 98% of plans were pursued and 88% of placements were in accordance with the plan. However, the study found that only 50% of the care plans could "with reasonable confidence [be] said to have worked out".¹³⁰ This points to the difficulty of predicting outcomes in such complex situations and the fact children's needs change over time. These children will often have suffered great harm and this can make providing stable care for them more difficult.
- 4.117 More worryingly recent studies have reviewed the success of care plans where children have been reunified with their parents.¹³¹ The evidence suggests these break down in a high number of cases, particularly where neglect is the reason the child is in care. The researchers suggest that both courts and local authorities are too eager to attempt to reunify. While the motivation may be admirable, this increases concerns about the value of court scrutiny, particularly when balanced against the time taken to carry it out.

¹³⁰ Discussed in Brophy (2006): Hunt, Joan, Macleod, A (1999) *The Best Laid Plans: Outcomes of Judicial Decisions in Child Protection Cases* TSO

¹³¹ Farmer, E. and Lutman, E. (2010) *Case management and outcomes for neglected children returned to their parents: a five year follow-up study*, Research for DCSF. Wade, J., Biehal, N., Farrelly, N. and Sinclair, I (2010) *Maltreated Children in the Looked After System: A comparison of outcomes for those who go home and those who do not*, Research for DfE.

Relationships between the different agencies are difficult

- 4.118 There are notable examples of co-operative working across the system, and we have seen professionals working together diligently, day in, day out, to achieve the best outcomes in difficult circumstances.
- 4.119 However, the pressures have contributed to a culture where people and institutions too readily blame each other. Social workers have described how judges create hostile conditions in court, undermine their confidence and allow delays to build up. Judges point to social workers who provide poor quality assessments and guardians who provide a much poorer service than their predecessors. Guardians criticise social workers for coming to cases unprepared and judges for poor management of cases. Solicitors are blamed for stringing cases out and for creating overly legalistic proceedings. Experts are said to cause delay and to provide unfocused assessments. The LSC is blamed for not distributing legal aid in a fair and timely manner and HMCS for not providing enough court time.
- 4.120 These concerns all have some grounding in fact. But we are also clear that such a culture is unhelpful and ultimately damaging to the interests of the children whom the system is supposed to serve. In the good practice guide mentioned at paragraph 4.91, strong leadership from the Designated Family Judge, accountability of managers, and open and frank communication between all agencies was the key to ensuring good performance.¹³²

Children don't understand or trust the system

- 4.121 The Review spoke to children who had experience of care. They told us that when they had first come into care, they had not known what was going on. One young person told us that when she had first gone to court she thought she was going to be sent to prison as that is what courts were for.¹³³
- 4.122 Many of the children said that they had no say in what was happening to them. Some said that they did have a say but did not feel their views were listened to.¹³⁴

One young person wrote that they were worried 'about the fact that my life depended in the hands of a random group of strangers', that those strangers 'actually couldn't care less what happened and were overly eager to get to wherever they want to be', and 'also the fact that my views and opinions would only be taken with a grain of salt and barely heard, much less considered'.¹³⁵

¹³² Reducing delay – what works best? (2011)

¹³³ Said in discussion at consultation event held by the Children's Right's Director with children in care in Leicester on 1st and 2nd October 2010

¹³⁴ Ofsted (2010) *Children on family justice: A report of children's views for the Family Justice Review Panel*, Manchester, Ofsted

¹³⁴ Ibid

¹³⁵ Ibid

- 4.123 The Children's Rights Director questioned children who had experience of the care system about their understanding and experience. In answer to the question which of these people is the most helpful in getting the right decisions made for the children only 16% of respondents selected judges.¹³⁶ In addition, half said they thought courts never, or do not usually, make the right decisions for children, compared with a quarter who thought courts usually or always make the right decisions.¹³⁷
- 4.124 Having said that, in another study, the Children's Rights Director found that while the majority of children thought at the time that being taken into care was not the right decision, by the time the survey was taken the majority thought it had been the correct thing to do.¹³⁸

Our conclusion

- 4.125 The delays experienced in care and supervision applications are damaging children. This is a longstanding concern but the problems facing the system now are at their most acute since the introduction of the Children Act 1989. A variety of factors contribute to this, some to do with the nature of the issues and the law, some more practical.
- 4.126 These are very difficult cases and the stakes are high: the decision is often whether to remove children from their families or to leave them in a home that may be unsafe. All parties involved want to make the right decision and to be confident that this has been done in a fair way.
- 4.127 There is now a culture, created by pressures from parents combined with decisions from the Court of Appeal (and possibly a wider culture of dependence on experts), where the need for additional assessments and expert assessments is routinely accepted. The increasing numbers of these coupled with the time taken to secure them – partly from the nature of the assessments and partly from a shortage of qualified experts – contributes to delay.
- 4.128 Judges have a natural tendency to look for certainty and support in making these far-reaching and emotionally demanding judgments, perhaps through a human desire to have the decision made unavoidable. This has been exacerbated by lack of trust in the judgement of local authority social workers, driven by concerns over the poor presentation of some assessments coming from often under-pressure staff. This increases the tendency to commission more reports and delay decisions. There is a hope that the combination of time and more expert advice will reconcile parents to accept a decision, or at least to go along with it.
- 4.129 Cases involve dealing with a complex and shifting picture, in highly conflicted and fraught circumstances. Successful resolution requires judicial case management of the highest order. This has not yet been achieved across the piece.

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Ofsted (2010) *Before Care: A report of children's views on entering care by the Children's Rights Director for England*, Manchester, Ofsted

- 4.130 One significant result has been the ever longer and more detailed scrutiny of care plans. This, along with the numerous additional assessments, substitutes itself for, or duplicates, work which should have or has been carried out by local authorities. The consequence is a vicious circle both of mistrust and, now, of work not being done by local authorities before a case because they know the court will order the work to be repeated. All creates delay.
- 4.131 Both resources and relationships are under pressure. Factors, such as a shortage of court capacity, delays in appointing guardians and the need to meet the various demands of both local authority and court processes, create inefficiency. This is further exacerbated by wider failings in the system, noted elsewhere.
- 4.132 The legal framework is respected, but there is widespread lack of confidence in the way that public law proceedings work. We share that concern. Recognition of the paramount welfare of the child is in our view being compromised by system failures.

Options for reform

Introduction

- 4.133 We have identified a number of areas for change and we set out our recommendations in the sections that follow, together with a list of consultation questions.

What we should retain

- 4.134 We have much to be proud of.
- The decisions to take children into care are not made lightly or arbitrarily. They are carefully considered and are subject to independent and rigorous scrutiny. The framework of the 1989 Act is respected and has stood the test of time.
 - The protection of parents' rights and interests is a clear priority. They can access significant support, particularly from their legal representatives. Legal aid is, and should continue to be, available to them.
 - Although there are concerns about the way the children's voices are heard, their interests and rights are also protected, particularly through the mechanisms of guardians and legal representation. Legal aid is widely available here, too.
 - We seek decisive answers and the decisions of our courts are intended to offer children a sense of permanency, that some in other jurisdictions envy.
 - There are strict and clear requirements on local authorities when children are in their care. Authorities are held to account for their delivery of, or failure to deliver this care, through a variety of mechanisms.
 - Lastly, caring for children who have experienced or are likely to suffer significant harm is a complex task and local authorities do not always get it right. But local authority care can and does offer a safety net for many of them,

giving them better life chances than if they were left in the harmful care of their birth families.

What we should change

4.135 Yet it is clear that our systems need significant change. We must deliver a system which can deliver justice more speedily – the adage ‘justice delayed is justice denied’ applies above all to these damaged children.

4.136 We wanted to consider all options carefully. Our first question was fundamental - should courts remain the central body when deciding whether or not children should be in state care?

4.137 Courts offer certain distinct advantages:

- objective, respected and independent decision making;
- a safe space to consider the best interests of the child;
- legal protections;
- representation for all parties including the child; and
- authoritative fact finding.

4.138 However, in dealing with public law cases there are disadvantages too:

- the arena is intimidating for the parties and may inhibit proper dialogue;
- processes are complex and bureaucratic;
- the system is slow and inflexible;
- adversarial court procedures can increase conflict; and
- the paramountcy principle can be lost when trying to balance the rights and views of all parties.

4.139 This poses challenges in determining public law cases in particular:

- delay damages children;
- cases are complicated and need tailored solutions;
- often the facts are made out – what is being debated is what will happen in the future; and
- a co-operative dialogue is considered helpful to agree sustainable solutions.

4.140 We considered alternatives to the use of courts, notably lay panels along the lines of the Scottish Children’s Hearing System.¹³⁹ These were established following the publication of the Kilbrandon report.¹⁴⁰

¹³⁹ Information about the Hearing System and reforms to it can be found at <http://www.chscotland.gov.uk/> Last accessed 25/03/11

¹⁴⁰ The Kilbrandon Report, (1964), Children and Young Persons in Scotland. HMSO, Edinburgh. Sourced at <http://www.scotland.gov.uk/Publications/2003/10/18259/26900>. Last accessed 29/03/11

The Scottish Children's Hearings system was established in the late 1960s and early 1970s following the recommendations of the Kilbrandon report. This led to the creation of panels of lay volunteers that exercise responsibility for children and young people who commit offences and/or who are in need of care and protection. Panel members are carefully selected and trained.

Where there is a concern about a child a referral is made direct to the hearing system, unless there is a need for emergency protection, where police or court powers may be used to authorise temporary removal from the home. An official known as the 'Reporter' will investigate the referral. If the reporter believes there are sufficient grounds for a referral and that 'compulsory measures of supervision' may be needed the case is referred to a panel.

The panel will hold a hearing, which all relevant parties, including often the child, will attend. Where the grounds of the referral are disputed or the child does not understand the grounds due to age or inability, these cases are sent to the court to determine. Where the grounds are established, the panel then decides what action is necessary to secure the child's welfare.

If compulsory measures of supervision are necessary the panel decides what these are and makes a Supervision Requirement. These include support in the home, foster or family/friends care, residential care or secure accommodation.

A Supervision Requirement must be reviewed at another hearing within a year otherwise it lapses. A local authority can call for a review at any time and must do so if it wishes to change the care plans for the child.

Hence Supervision Requirements are very different from care orders: they do not invest parental responsibility in the local authority (although in effect they suspend the ability of parents to exercise this to varying extents) and orders do not last for more than a year.

4.141 In essence, the Scottish system allocates responsibility for determining the facts to a court but leaves the majority of welfare decisions to its panels. This in principle avoids lengthy legal debate and process leading to quicker and more flexible decisions. The court is also the forum when an application for a permanence order is made. These are similar to care orders, and if certain conditions are met can also grant authority to adopt, similar to a placement order. We were told that applications were made rarely and the court process could take some time.

4.142 We found most children's care arrangements tended to be dealt with through the panel system. In light of the requirement for the panels to review supervision requirements we found it was not uncommon for children in Scotland to be subject to these requirements for a number of years. This is a concern in the Scottish system.¹⁴¹

4.143 Such an approach has advantages in terms of speed and flexibility but offers children perhaps less sense of permanence. We also noted issues around consistency of panel decision making in Scotland (recent and planned reforms

¹⁴¹ SCRA *Research Report: Children who are on Supervision Requirements for five or more years* (Feb 2011) Scottish Children's Reporter Administration

are intended to help address these.¹⁴² We have concluded that to introduce a panel system in England and Wales on the required scale would be disruptive and would not offer sufficient advantage over our current court led process. We reject suggestions for a tribunal system on similar grounds.

Our approach

- 4.144 Courts must continue to play a central role in public law in England and Wales. But this role should be refocused, with changes in the ways of working that will affect the family justice system more widely. Of course courts have to balance the rights of parents and the interests of children. Too often, though, these rights are being asserted at the expense of those interests. We need to redress this.
- 4.145 Judges and the representatives of both adults and children need to recognise the limitations of the law. Too much time is being spent trying to predict the child's future welfare needs through the examination of the detail of the care plan. Yet circumstances change over time and so do children, in ways that often cannot be foreseen when care order decisions are being made. Courts should focus on the fundamental question whether a care order is in the child's best interests. Other means are in place to assure the welfare needs of children who cannot live with their birth families once a care order is made. Quicker decisions may well be no worse than slower decisions and they have the great merit of having taken less time.
- 4.146 We need to remove unnecessary duplication. This should release resource and reduce delay. There should be clear expectations within the law and within the system as to how long cases should take.
- 4.147 The judiciary remain central to the successful management of cases. We need to equip them to take firm control of a case and manage it efficiently, enabling them to take difficult decisions in challenging circumstances.
- 4.148 Change to the courts and judiciary alone will not be sufficient. We also need to improve the control and the quality of the advice and support offered to the court by local authorities, court welfare services and independent experts.
- 4.149 Processes need to be stripped back and made sufficiently flexible to bend to the needs of the particular case. These processes need to take account of and support the wider system of which they are part.
- 4.150 The range of reforms we set out will take many forms. A number will require legislative change. Others involve change to working practices and processes. Significant change to culture and expectations will also be needed.
- 4.151 Lastly, the reforms set out here must be read in light of other reforms we propose, particularly those around delivering a properly functioning family justice service. Of critical importance are improvements to the management and

¹⁴² More detail is available at <http://www.scotland.gov.uk/Topics/People/Young-People/c-h-bill> Last accessed 25/3/11

administration of the system, judicial continuity, development of judicial specialisation and other reforms to the workforce.

The role of courts

4.152 We have already noted a common complaint that the courts have progressively claimed a greater role in care cases through increasing scrutiny of the care plan for the child. This has led to confusion over the respective roles of courts and local authorities, as well as duplication of effort. The care plan is the issue most likely to be contested in care proceedings.¹⁴³

4.153 We can well understand the motivations of the court. It is human nature to want to secure the very best that is possible for children. The courts also have concerns about the ability of local authorities to deliver high quality care plans.

4.154 However, the negative effects of an overly interventionist approach by the courts are significant. These include:

- delayed resolution of cases, leaving children in impermanent care arrangements for longer than necessary;
- commissioning of expert reports which are not always strictly germane to the issues critical to making a care order, causing delay and increasing cost; and
- muddying of the waters between local authority and court responsibilities. This causes unhelpful tension in the relationship between the two as well as overstressing the already limited resources of both.

4.155 In view of the likelihood of breakdown or necessary change to care plans we also question how much benefit is being given by ever longer and more detailed scrutiny when balanced against the extra time taken.¹⁴⁴

4.156 We share the concerns of those who believe change is needed in this area.

At present the courts are encouraged, even where a care order is inevitable, to use the proceedings to the fullest reasonable extent, to ensure that the local authority's plan for the child accords with her welfare. We question whether care planning to the current high degree of detail, should remain the proper function of the court.

FJC Safeguarding committee, call for evidence submission

4.157 We believe that court scrutiny of the care plan can and does go beyond what is needed to determine whether a care order is in the best interests of a child. It now also goes well beyond what was envisaged at the time of the Children Act.

The court's role in relation to care plans

4.158 We do not seek to change the basic requirements of section 31 of the Children Act 1989.

¹⁴³ Masson, J., Pearce, J., Bader, K., Olivia, J., Marsden, J. and Westlake, D. (2008)

¹⁴⁴ See discussion at para 4.113 – 4.117

- It will remain right and proper that a court should determine whether the threshold is made out. And when contemplating making a care order the court will still need to be satisfied that this will be in the best interests of the child. The ‘no order’ principle will continue to apply as will the welfare checklist.
- When the court is satisfied that the threshold is made out it should then determine whether or not the child can remain at home or return to the care of their parents. This is the crux of any application for a care order. If the child should return home this may be on the basis of no order, or perhaps a supervision order.
- The court will also need to consider the alternative of care by family, friends or carers – perhaps under the authority of a residence or special guardianship order.
- The court will also be considering whether a care order is in the child’s best interests.

4.159 We propose that, in making its decision, the court will no longer need to subject the full care plan to ‘rigorous scrutiny’.¹⁴⁵ The critical issue then becomes how much detail the court will require in order to be satisfied that a care order is in the best interests of a child. This is not an easy line to draw. The need to provide the court with the information that it needs to be satisfied a care order is in the best interests of the child must not, as a result, subject the care plan to unnecessary and time consuming debate.

4.160 The court should focus on the core of the care plan. We suggest it will need to know whether the care plan is:

- planned return of the child to its family;
- a plan to place (or explore placing) a child with family or friends; or
- alternative care arrangements.

4.161 The court will also likely want to consider contact with the birth family as part of its determination whether a care order is in the child’s best interests. This does not need to involve detailed scrutiny but the court care plan should set out whether it is intended that contact with the birth family will be regular, limited or no contact.

4.162 The court will not need to examine such issues as:

- whether residential or foster care is planned;
- plans for sibling placements;
- the therapeutic support for the child;
- health and educational provision for the child; and
- contingency planning.

¹⁴⁵ Per Wall J, Re J (Minors) (Care: Care plan) [1994] 1FLR 253

4.163 We want to be clear that these changes will have no impact on:

- placement applications – where adoption is the proposed care plan the matter will still be subject to the full scrutiny of the court;
- local authority care planning responsibilities – local authorities must continue to develop detailed care plans in accordance with the regulations and statutory guidance that govern this activity;
- the ability of parents and others to apply to the court for a contact order under section 34 of the 1989 Act and the court's powers under this section; and
- the ability of the parents or others to seek to discharge a care order.

4.164 There are other safeguards in place, in particular the care planning obligations of the local authority, which make extensive provision for permanency planning. Local authorities in England are under a duty where a child is in its care to provide the child with accommodation. The new section 22C of the Children Act 1989 (which comes into force on 1 April 2011) imposes a duty on the authority to place a child it is caring for back with its parents if this is consistent with their welfare and is reasonably practicable.¹⁴⁶

4.165 If not, there is a hierarchy of placements – family and friends, foster care, residential care or other – which have to be considered. Other factors to be given weight are siblings, closeness to home and education and, if disabled, suitability of accommodation.¹⁴⁷

4.166 In addition the local authority is under a duty to consider discharge of a care order, hold regular reviews and is subject to the scrutiny of a strengthened Independent Reviewing Officer. Parents will of course retain the right to apply for discharge of an order.¹⁴⁸

4.167 It is not the proper function of the court to seek to inspect the work of a local authority. Nor should it attempt to substitute its judgement for that of the authority when it comes to securing the continuing welfare of the child. However, in making this recommendation we do not underestimate the need for high quality social work by the local authority, nor deny that sometimes this is missing. Local authority social work practice needs to improve in its consistency to meet best standards. This is outside the scope of our Review. However, we make our recommendations in light of the work being undertaken by the Welsh Assembly Government, Professor Eileen Munro and the Social Work Reform Board.

4.168 This will require legislative change, most likely to section 31 and section 31A of the Children Act 1989 as well as appropriate amendments to the Family Procedure Rules, the relevant care planning regulations, and associated guidance. Legislative changes will need to be backed up by training across the family justice system.

¹⁴⁶ Wales have not enacted the provision of s22C as yet but s22(4), which currently applies in Wales, makes clear that placement of a child with their family is an expectation.

¹⁴⁷ s22C(5-8) of the Children Act 1989

¹⁴⁸ s39(1) of the Children Act 1989

4.169 This reform underpins our other suggested reforms. It is intended to simplify court processes and keep the debate in court focused on the core and fundamental issues. It should help speed up cases and reduce the burdens on both courts and local authorities. It will also have an impact on the roles of guardians and experts. Their input should similarly be limited to the narrower field of inquiry we are proposing.

Timetabling of cases

4.170 Delay can be defined as any time taken that is not necessary in order to make a decision regarding the best outcome for the child with reference to the section 31 criteria. In general we want care proceedings to happen as quickly as possible, taking into account the interests and rights of the child and the rights of its parents. Sometimes it is appropriate that care proceedings unfold over a period of many months. But not often; this should be the exception rather than the norm.

4.171 With the wide variety of cases it is not possible to say what an average should be in any scientific way and there will always be a broad range. But the average is an appropriate indicator.

4.172 When the proposals that became the Children Act 1989 were first put forward the time needed to hear a public law case was estimated at 8 weeks with exceptional cases taking 12 weeks. Reliable statistics are not available but average case duration may have been in the region of 20 weeks in the early 1990s. By the early 2000s this had climbed to around 46 weeks and as we know now stands at over 50 weeks averaged across both county and Family Proceedings Courts.^{149 150}

4.173 There have been several attempts to control case length through targets. In 2003 the ambition was 40 weeks.¹⁵¹ Currently the aspiration is that 26% of cases should be disposed of in 30 weeks, 66% in 50 weeks and 92% in 80 weeks.¹⁵² These are not being met.

4.174 These indicators were calculated on the basis of what was considered achievable. They were not calculated on the basis of any analysis of what an appropriate timescale in a public law case should be.

4.175 We have considered this, and, based on all that we have heard, would suggest that an average case duration of around six months is reasonable. This is against the background of our recommendation on the scope of court scrutiny and on the basis that it:

- is a reasonable time for necessary additional evidence to be gathered;

¹⁴⁹ Lord Chancellor's Department (2002) *Scoping study on Delay in Children Act Cases*, London; Lord Chancellor's Department

¹⁵⁰ Based on HMCS FamilyMan data for 2010 – see footnote 94

¹⁵¹ Lord Chancellor's Department (2003) *Protocol for Judicial Case Management in Public Law Children Act Cases*, London, Lord Chancellor's Department

¹⁵² Ministry of Justice (2010) *Establishment of a system-wide target for reducing unnecessary delay in care and supervision proceedings*, London, MOJ

- would allow parents or family members who believe they should be able to care for the child to demonstrate their capacity to do so, or at least their potential to develop such capacity; and
- is sufficient time to develop a 'plan for permanence' for the child, accommodating the relevant care planning statutory timescales.

Time limits

4.176 Rather than set targets we suggest there is a need to be firmer. We recommend that a statutory time limit be introduced, placing an obligation on the court to conclude proceedings within a specified time.

4.177 The court would be expected to manage proceedings to a timetable, in our proposal, of no more than six months. At this point, if not before, the court would be expected to hold a final hearing to determine the contested issues.

4.178 A limit of this kind could offer some advantages:

- for the first time, setting an explicit and binding requirement on how long proceedings should last;
- giving all parties certainty about how long proceedings will last;
- setting firm parameters within which the judge should manage the case; and
- providing a shared objective to work towards in implementing reforms to the FJS.

4.179 But a limit is not straightforward. To be both helpful and effective two conditions would have to be met:

- there would need to be some exceptions criteria; and
- there would need to be significant system change of the type outlined in chapter three if this proposal were to be in any way feasible.

4.180 We understand that not everyone will agree with this approach. Several criticisms can be levelled at it:

- it potentially fetters judicial discretion;
- there is a danger that six months will become the norm and cases which should settle quicker will not; and
- some cases will need longer than six months.

4.181 We have not ourselves reached a firm conclusion. We have more work to do to determine if and how this recommendation would be implemented and we seek views in particular on the nature of any exceptions. One exception could be for example where the court believes there is insufficient evidence to determine threshold. Their definition is important. Too broadly drawn and everything will be an exception. Too tightly drawn and they risk threatening the rights and interests of the parties. We are seeking views in our consultation on the desirability and feasibility of setting this time limit.

The Timetable for the Child

4.182 The PLO requires that:

*... each case will have a timetable for the proceedings set by the court in accordance with the Timetable for the Child*¹⁵³

4.183 The Timetable for the Child is intended to support the meeting of the paramountcy principle. It is to be set by the court, taking into account dates of the significant steps in the life of the child, subject to proceedings, and to be appropriate for that child. Legal, social, care, health and education steps should all be considered. The court needs to pay due regard to the Timetable in managing proceedings. The onus is on the local authority to provide and update the key information needed to set the Timetable. The timetable for the proceedings should bow to the requirements of the child so PLO prescribed time limits can be disregarded in this situation.

4.184 Research evidence suggests that the Timetable for the Child is having little impact on the length of proceedings. One study published in 2009 looking at early implementation of the PLO found that only 6% of cases had a Timetable submitted on issue of proceedings.¹⁵⁴ The court was able to confirm the Timetable at the Case Management Conference in just 25%.¹⁵⁵

4.185 However, the basic idea that the timescales of the child should direct a case is obviously right even with a maximum proceedings limit of six months. Many cases can and should take less time. So a Timetable for the Child should be in place for each case and the timetable for the proceedings will then follow from this. In effect the Timetable for the Child should be the plan for the whole court process.

4.186 Responsibility for the Timetable, for the child and thus the proceedings, must sit with the court. It will need to be set out at the start of proceedings, based on advice from the local authority and the guardian. The parents and other parties will naturally be able to challenge the evidence and conclusions. The Timetable as now should remain flexible and capable of being amended as the case progresses.

4.187 The Timetable creates a firm chronology for the whole case, based on the right information. For example, a baby will need swift exploration of issues and adoption may be the priority care plan. Older children with siblings and a complex family set-up may need more time and the care plan(s) might require several possible carers to be considered.

4.188 The chronology will set out both case length and such other issues as how much additional evidence is needed, who should provide it, how long hearings should take and who should be present.

¹⁵³ President of the Family Division (2010) *Public Law proceedings guide to Case Management* available from http://www.hmcourts-service.gov.uk/cms/files/public_law_outline_PD_April_2010.pdf Last accessed 29/3/11

¹⁵⁴ Jessiman, P., Keogh, P. and Brophy, J. (2009)

¹⁵⁵ *Ibid*

4.189 The Timetable will guide the court and other parties who will need to comply with it, including in particular guardians and local authorities. Local authorities' actions prior to proceedings to safeguard and promote the welfare of children should already have had the child's timescales firmly in mind.

4.190 As one respondent to the call for evidence put it:

The Timetable for the Child, as set out in the Public Law Outline, should not be a mere recitation of events, such as an appointment with a paediatrician or the start of nursery, but a proper consideration by the court of the effect on that particular child, at that particular time, of the time it is taking to decide on his or her future.

BAAF Cymru, call for evidence submission

4.191 We agree that the factors to be taken into account should not be as mechanistic as they are now. The Timetable will need to reflect among other things:

- evidence from research around timescales for children;
- the relative priority of babies and young children;
- the extent to which care plans are already fully developed ahead of the court process; and
- readiness of sufficient evidence.

4.192 The Family Justice Service should manage the task of developing and maintaining the detailed criteria that will support judges in drawing up the Timetable. The criteria will also guide the management of court services to perhaps put cases on 'faster' or 'slower' tracks.

4.193 The Article 6 and 8 rights of parents and children will need to be taken into account when deciding the Timetable for the Child. However, in line with the paramountcy principle, the Timetable provides a firm base from which decisions can be made and rights tested on, for example, instructing experts and allowing parties to join proceedings at a late stage.

4.194 We propose that the position of the Timetable for the Child be strengthened in law, probably through the inclusion in legislation of a stronger obligation on the court. It may also be right to place corresponding obligations on other parties to respect the Timetable.

4.195 The effectiveness of this proposal will require appropriate training of those affected by it including the judiciary, guardians and legal professionals in particular.

Case management

4.196 The importance of robust case management in public law (as in private law) cases was a recurring theme in the response to our call for evidence, and we have proposed legislative change to reinforce its importance (see paragraphs 3.64 – 3.66). The PLO places responsibility for case management in the hands of the judge: "The court must further the overriding objective by actively

managing cases.” Yet, as research into the operation of the PLO as well as varying case lengths across the country show, we do not yet have robust management of cases consistently across the country.

4.197 Earlier reviews have considered the nature of case management. The 2002 Lord Chancellor’s Department review set out some principles:

- definitive leadership and overall control of cases by judges;
- a notion of partnership and effective partnership working amongst players;
- robust and pro-active participation in moving the case forward by all key players in individual cases;
- accepting collective and individual responsibility for case management; and
- allowing for the dynamics of families and therefore children to evolve and change but recognising these shifts as early as possible.¹⁵⁶

4.198 The 2002 review made a further important comment:

*...an additional element which has less frequently been mentioned are the skills required to make this process happen. Case management is frequently seen as a process, but it is a process which requires developed management skills, in setting the objective to be achieved, managing the contribution of all those people involved and ensuring the resources are available to complete the task, especially that most important resource, time.*¹⁵⁷

4.199 In considering who should be the case manager we looked at a range of options:

- the guardian;
- a specialist function within HMCTS;
- the child’s solicitor; and
- the judge.

4.200 Taking each in turn, guardians often play a role in case management now. It would however be a major extension to give it to them as a core function. Guardians are already under considerable pressure and this is not a natural fit.

4.201 The child’s solicitor like the guardian may take on case management responsibilities such as instructing experts and chasing paperwork. Solicitors are familiar with court processes, can be objective and facilitate negotiations between parties. And a related idea was to consider creating a ‘counsel to the court’ giving the child’s solicitor a still broader role to:

- frame the key issues to the judge;
- present the evidence (like the ‘counsel to the tribunal’ in the Tribunals of Inquiry Act process);

¹⁵⁶ Lord Chancellor’s Department (2002) *Scoping study on Delay in Children Act Cases*, London; Lord Chancellor’s Department

¹⁵⁷ Ibid

- take the lead in the commissioning of evidence with the agreement of court from a fixed group of experts; and
- cross-examine those against whom allegations have been made or those who disagree with the experts who have been commissioned.

This proposal would move our approach much more towards an inquisitorial model and potentially streamline court procedures.

4.202 While we saw attractions in both solicitor models we have concluded that the scale of change could well prove disruptive and costly, particularly bearing in mind that many judges have already moved towards more active case management.

4.203 We propose a package of measures intended to:

- confirm the central role of the judge as case manager;
- develop wider system reform which will facilitate effective case management; and
- develop the skills and knowledge of judges so they will be better case managers.

Judge as case manager

4.204 We see merit in changes to legislation along the lines of those of Australia to reinforce case management by judges.

4.205 Other changes to public law should further strengthen the expectation that judges will:

- direct the input of guardians;
- take direct responsibility for the instruction of experts;
- set a robust timetable for the case based on the Timetable for the Child;
- conduct proceedings in an efficient and businesslike manner, reducing reliance on lengthy oral proceedings; and
- focus their investigations solely on the issues critical to the case, leaving the detail of care planning to local authorities.

System and process reform to support judicial case management

4.206 Clearly a number of other reforms to the wider system will have a direct impact on the ability of the judge to manage the case. Judicial continuity, increased judicial specialism and IT and administrative reforms are particularly relevant. But other changes too are needed. Case progression should be a function of the Family Justice Service and further discussion is at paragraph 3.63.

4.207 We intend, at the next stage, to review procedures including possible implications for the PLO, but we make some observations at this stage.

- 4.208 A common set of procedures based on active judicial case management is welcome. However, the lack of consistency in the application of the PLO is a concern. Work fully to apply the PLO should continue ahead of any changes that we may recommend.
- 4.209 We shall wish to consider how court processes can be made more flexible to reflect the needs of types of case. Some high performing courts have begun early assessment of cases with a view to timetabling them for quicker or slower proceedings from the start. This is potentially relevant to our proposal on the Timetable for the Child.
- 4.210 A common reform suggested to us was to remove the requirement to renew interim care and supervision orders after eight weeks and thereafter every four weeks. These procedures appear not to reduce case length and create unnecessary cost. We propose that the current time limits should be removed. Judges should be allowed discretion to grant interim orders for the time they see fit subject to a maximum of six months. The courts' power to renew should be tied to their power to extend proceedings beyond six months.
- 4.211 Parents and other parties would have a right to contest the continuation of an interim order at any time in proceedings.
- 4.212 Currently both an adoption panel and the court scrutinise an adoption care plan. This causes delay and is duplication. We propose that court scrutiny is enough, since the court already scrutinises the application in detail. Where adoption is the care plan and there is no placement order the adoption panel will continue to consider whether adoption is the right option for the child. We believe there is a case for a wider review of adoption procedures to reduce delay, but this is outside our scope.

Strengthening judicial case management skills

- 4.213 Case management is a skill but it also needs a change of culture, so that the judge ceases to be solely an arbiter. As Mr Justice Ryder, architect of the PLO commented recently: "*There is no doubt that this was intended to be a huge culture change*".¹⁵⁸ It is clear that the culture change has not been fully realised. The case management function in public law cases is complex. It involves traditional judicial skills of forensic analysis of evidence and interpretation of the law, inquisitorial skills used to reach conclusions about what might happen, an ability to measure and balance relative risks and benefits to children, an understanding of child development and social work practice and an ability to manage time, resources and people.
- 4.214 We shall consider case management skills in public law, in the context of wider workforce skills, in the coming months.

¹⁵⁸ Mr Justice Ryder in response to public question 176. As cited in the House of Commons (uncorrected) Oral Evidence taken before the Justice Committee "The Operation of the Family Courts" on Tuesday 1 March 2011 (Public Questions 163 – 219). Sourced at: <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/uc518-iii/51801.htm>. Last accessed 28/03/11

Local authority contribution to the court process

- 4.215 Local authorities are sometimes inadequately prepared for court. One study found that around 40% of applications under section 31 are made in response to a 'crisis'.¹⁵⁹ This could explain why so many cases have incomplete paperwork when submitted to court. However, in the same case study, in 90% of cases local authorities have known about the family for at least a year.¹⁶⁰ Incomplete and ill-prepared applications cannot be explained simply as a result of a need to respond to an emergency.
- 4.216 We should acknowledge again the complexity of this work. Social workers are dealing with chaotic families with multiple problems. To assess them and develop coherent plans is difficult and parental engagement a problem. If the parent refuses to undergo assessment the application will have missing information. But poor practice is still a significant factor.
- 4.217 An inadequately prepared case can set off a spiral of duplication and delay. Faced with gaps in the authority case the court is more likely to be persuaded that an expert report is needed. This delays the guardian's work and the circumstances in the case may change while reports are prepared– leading to further assessment.

Reforms to social services

- 4.218 Professor Eileen Munro is currently undertaking a review of child protection in England. We have been working with her to explore how local authorities can help to reduce unnecessary delays in the child's journey through the courts and care proceedings. Her reforms will apply specifically to problems experienced in England. However the Welsh Assembly Government have said they will consider Professor Munro's Review alongside their current reform initiatives.
- 4.219 Professor Munro's interim report *'The Child's Journey'* advocates a scaling back of what she finds to be a process-heavy, target-driven culture that has developed in social work departments, in favour of system that recognises the professional skills and judgements of individual social workers. She focuses on improving early help for families, greater social worker expertise, the importance of high quality management and ensuring a system that can adapt to support the work done to protect children.
- 4.220 She identifies what local authorities and children's social care services can do to improve things that are within their control:
- social workers who are well prepared, knowledgeable about a child and family, articulate and confident in their evidence and confident in their professional judgements;
 - processes in place so that children and young people have a voice throughout pre-proceedings and through care proceedings;

¹⁵⁹ Masson, J., Pearce, J., Bader, K., Olivia, J., Marsden, J. and Westlake, D. (2008)

¹⁶⁰ Ibid.

- constructive challenge and authorisation arrangements within the local authority so that only the ‘right’ cases are brought into care proceedings;
- continuity of social workers allocated to cases in proceedings;
- effective pre court work including Family Group Conferencing and full exploration of all potential family carers;
- effective parallel planning and panel processes that have timeliness for the child and the child’s journey central to their purpose and function;
- pro-active and highly efficient local authority legal service departments composed of experienced child care lawyers, so that good quality advice is available to social workers;
- effective engagement in the family justice system so that learning between the courts and the local authority takes place and informs practice on an ongoing basis; and
- appropriate scrutiny and oversight of care planning and final care plans by the local authority, including agreed levels of support and resources available to deliver them.

Not surprisingly we wholeheartedly support all this.

4.221 In her final report, to be published in May, Professor Munro will set out more specific proposals intended to support local authority preparation for court. These will look at the nature and type of assessments to improve the quality, particularly the analysis of the issues, presented to court. The consequence should be a reduced need to commission additional reports from others, and to give judges greater confidence in the decisions they make.

The ‘Letter Before Proceedings’

4.222 The PLO and the accompanying statutory guidance for local authorities emphasise the importance of properly prepared care applications.¹⁶¹

4.223 This includes ensuring that kinship care options have been fully explored, core assessments carried out and care plans discussed with families. Local authorities are expected to seek legal advice and to communicate with the parents (and with the child where appropriate).

4.224 Before submitting an application to the court, and where the short term safety and welfare of the child permits, the local authority should send a ‘Letter Before Proceedings’ to the parents. This letter enables the parents to obtain legal advice and assistance, before meeting the local authority. The aim is to head off the need for proceedings by giving the family clear warning or at least to narrow and focus the issues of concern. This is now widely seen as a useful stage of the process.

¹⁶¹ DCSF (2008) *The Children Act 1989 Guidance and Regulation - Volume 1 court orders*, Department for Children, Schools and Families, London: TSO

- 4.225 Local authorities vary in how much they use this pre-proceedings stage. We also heard that, due to the low levels of funding available from legal aid, the advice may sometimes be given by a junior solicitor or paralegal, rather than by a more experienced solicitor. This, it is said, short-changes the parent and reduces the effectiveness of the pre-proceedings stage.
- 4.226 The general view, however, seems to be that the letter before proceedings can be effective if properly managed and this seems instinctively right: it makes sense to give parents due notice, with a clear statement of the changes they need to make, rather than going straight to court. But there is a need for research on what works and why some areas of the country are not using it.

Use of experts

- 4.227 We believe experts are instructed too frequently in care and supervision cases. It seems to us that the rules governing the court's powers to instruct experts, contained in the Family Procedure Rules 2010, are insufficient. We recommend that judges should be given clearer powers to enable them to refuse assessments and the relevant legislative provisions revised accordingly. This may involve taking into account evidence available from previous proceedings.
- 4.228 The Review has heard claims that family courts in public law proceedings are commissioning too many reports from Independent Social Workers. We are clear that Independent Social Workers should only be employed to provide new information to the court, not as a way of replacing the assessments that should have been submitted by the social worker or the guardian. The relevant rules should reflect this.
- 4.229 Similarly we have concerns about the value added by residential parenting assessments, particularly set against the costs involved. We understand the criticisms expressed to us that they are not a true test of parenting ability and that to rely on their conclusions could be risky.
- 4.230 We recommend that research be commissioned to examine the evidence for this type of assessment, to help identify the circumstances in which such an assessment would be helpful, and where it would not.
- 4.231 We have also heard convincing arguments that the adversarial approach to the testing of expert opinion may inhibit the full examination of the issues, and discourage experts from taking on this work. A more inquisitorial, judge-led approach should be considered and we shall explore options on these lines at the next stage.

Multi-disciplinary teams

- 4.232 The way experts are commissioned needs to change. Too often it seems experts are not readily available, may produce inadequate or recycled assessments or are expensive. Diligent experts report being tasked with inappropriate or excessively long lists of questions. Experts are not trained in the needs of courts and there is little or no peer review.

4.233 We are attracted by the proposals set out in the Department of Health's 2006 report, *Bearing Good Witness*.¹⁶² The then Chief Medical Officer, Sir Liam Donaldson, proposed a system whereby:

NHS organisations with substantial paediatric, child psychology and psychiatry and/or adult psychology and psychiatry services, should provide medical expertise to the Family Courts through the formation of groups or teams of clinicians within the same specialty or on a multi-disciplinary basis. Teams may include other specialists from within the trust, for example radiologists or ophthalmologists who frequently act as witnesses in family law cases, and clinicians who have retired within the last two years from active clinical practice. In time, such groups or teams in adjacent NHS organisations may form managed local networks to enhance the viability of their services, specialisation and spread of expertise, and to share their resources and training more effectively.

4.234 The court would instruct the multi-disciplinary team to take forward all the assessments needed in a case, unless there was a clear reason not to do so. Each party would not necessarily have a full multi-disciplinary assessment, but would be referred to the multi-disciplinary team, where they could be diverted to the most appropriate expert or experts. The proposal would in principle allow for training and peer review and, by bringing the work of the expert within the bounds of their employer, give greater confidence to take on this work.

4.235 This model has some similarities to the model employed by the Family Drug and Alcohol Court (FDAC) pilot. Under this model, once a family is referred to the court, the team automatically undertake an initial assessment of their needs and follow up with a bespoke programme built around the child. This provides a real focus on the family and ensures high quality assessments for the court. We think there is much to learn from FDAC and we discuss it in greater detail at paragraphs 4.286 – 4.290, below.

4.236 Currently, the proposals in *Bearing Good Witness* are being taken forward through the Alternative Commissioning of Experts (ACE) pilot, run by the Department of Health in conjunction with the LSC. The pilot will evaluate the commissioning of multi-disciplinary teams of health professionals to provide jointly instructed health expert witness services to family courts in public law child care proceedings. Several organisations, both private and NHS trusts, have been contracted and are paid directly by the LSC to provide these services with contracts that cover quality assurance and required timescales, as well as fees.

4.237 An evaluation of the pilot will be published in June this year. We shall consider its findings, as well as responses to our proposals, in our final report.

¹⁶² Chief Medical Officer (2009). *Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases*. London, Department of Health

The instruction of experts

- 4.238 The Public Law Outline states that the judge should have oversight of the quality, cost and timeliness of the assessments placed before the court. However we have heard claims that judges find it hard to refuse an expert who is already agreed by the parties, and seems often to have little influence over the scope of the work being commissioned, partly as a result of time pressures.
- 4.239 We recommend that the judge should be responsible for the instructing of experts as a fundamental part of their case management duties. This requires them to control the letter of instruction as well as the choice of expert (in the exceptional cases where this is not through the multi-agency team if that goes forward) and the scope of their work and timescales. This will increase the responsibilities of the judge and represents an increase in workload at this stage. However, it should reap later dividends by enabling them to progress cases more quickly.
- 4.240 The Family Justice Service should be responsible for the identification and commissioning of experts, working closely with local judges to ensure a focus on quality, timeliness and value for money. If our longer term ambition to give the Service control of family legal aid is realised, this will give the FJS greater control over spend and quality in relation to experts.

Monitoring of experts and review of their use

- 4.241 There are currently no formal structures in place to monitor and review the use of experts in public law proceedings and experts need no professional accreditation to appear in court. This has been strongly criticised. The introduction of teams would help mitigate the issue. But in any event the Family Justice Service should have oversight of the process of monitoring and ensuring the quality of experts.
- 4.242 The Service will need to agree with the relevant professional bodies minimum standards before individuals can be instructed as expert witnesses. These would include requirements on membership of relevant regulating bodies, training in providing evidence, and requirements on peer review and continuing professional development.

Reform of the tandem model

- 4.243 The tandem model is fundamental to our system, and receives strong support. However there are concerns and frustrations about the way it now works. Highly regarded in principle, it is being eroded by the pressures we have described. With rising caseloads, high costs and difficulties in ensuring guardians are available to match demand, the question arises whether it can now be afforded in its full sense.
- 4.244 We considered whether the child should routinely have a solicitor appointed or whether a guardian alone would be adequate representation for the child. We concluded that the child is rightly a party to proceedings, and must therefore have their own legal representative.

- 4.245 We have also considered whether the role of the guardian remains essential. Clearly the model is under strain but that is no reason for so fundamental a change. The court needs an impartial social work opinion even though this results in a degree of duplication with the role of the local authority social worker.
- 4.246 The need though is to limit that duplication, which in our view is encouraged by the common expectation that all guardians will provide the same basic functions in all cases. This has now begun to change to a more proportionate approach as reflected in the President's recent agreement with Cafcass to encourage judges to direct guardians to the matters that they specifically wish investigated.¹⁶³
- 4.247 We propose no radical overhaul of the tandem model, but rather some smaller changes in the way the model is applied, to be based on the demands of the particular case.
- 4.248 Our guiding principles are as follows.
- Every case is different and the level and type of representation will vary. There will be a need for a guardian and a solicitor at some point during proceedings, but not necessarily always at the same time. There will be times when one can take a back seat, while the other takes the lead.
 - The child should be represented at every hearing where the other parties are represented, but not necessarily by both professionals. The solicitor will usually lead the court-based activity and the guardian much of the out of court activity. A well-established working relationship between the guardian and the solicitor is key. So too is the understanding of the courts that a guardian does not always need to attend every hearing.
 - The courts will exercise a stronger case management role and will direct a more proportionate input from the guardian and the solicitor. Building on previous attempts, and aligned with our reform proposals, the courts should take a much firmer role in deciding what input is needed and when. This way of working will need to be built into the operational arrangements the new Family Justice Service develops for the delivery of court-based social work services.

The guardian

- 4.249 We agree that the duty system is undesirable. In future, when the wider system allows, it should not be used. The guardian's primary focus should be at the start of a case. Guardian input may not be needed later and both the guardian and the judge should be prepared to reduce the guardian's input in line with what is strictly necessary to resolve the case.
- 4.250 The guardian's role should focus on their core statutory responsibilities of representing to the court:
- the child's best interests, to inform the decision on whether to make a care order; and

¹⁶³ <http://www.cafcass.gov.uk/pdf/Joint%20Agreement%20October%202010.pdf> Last accessed 28/03/11

- the child's wishes and feelings.

4.251 The guardian's role in care planning should parallel that of the court, leading them in future to step back from the detail. Where a child is in care during proceedings (under a section 20 agreement or an ICO) they will have the benefit of an IRO. One of the IRO's responsibilities is specifically to ensure that plans for children are based on detailed and informed assessment, are up-to-date, effective and provide a real and genuine response to each child's need.¹⁶⁴ In short, the IRO is much better placed to act as the guardian of the care plan. The guardian need not fulfil this role.

4.252 The guardian's role of course is still vital. All children will benefit from having an independent adult to champion their interests and communicate their views. The guardian must be there to help them understand what is going on and to enable their participation in proceedings. Skilled guardian input can help children express their often conflicting wishes and feelings. The power of family ties, including emotions of fear, guilt and the wish to make reparation for perceived past misdemeanours, as well as positive emotions of need and affection all affect their ability to decide and express what they want for themselves.

*One older young person wrote about the need for 'actually taking in what young people have to say and believing them', even though listening to children in care is not easy: 'Young people who are in care, are there for a reason. It is because of their experiences and what they have survived through that makes them as defensive and sometimes as cold as they are... their mental state has been set to survival.'*¹⁶⁵

The solicitor

4.253 We have found that solicitors frequently need to step in and help manage the progress of cases, in the absence of robust judicial case management and effective administrative processes, by instructing experts and chasing other parties to comply with directions, among other things. Improvements to the system should reduce the call on solicitors to fulfil this role. They should then be able to focus on their core role of advocating for the child in court and advising on legal matters.

How a more proportionate tandem model might work

4.254 An initial assessment of the case should be made when an application is received at court to decide how much support the case needs from the guardian and solicitor. The guardian is best placed to provide this. The guardian's initial report to the court, based on the evidence and an initial quality assurance of the local authority's work presented in the application could include an assessment of:

¹⁶⁴ For more details of the IRO's responsibilities see (2010) *IRO Handbook statutory guidance for independent reviewing officers and local authorities on their functions in relation to case management and review for looked after children* (DfE)

¹⁶⁵ Ofsted (2010) *Children on family justice: A report of children's views for the Family Justice Review Panel, 2010*, by the Children's Rights Director for England, Manchester, Ofsted

- case complexity;
- the Timetable for the Child ;
- whether the local authority's evidence for their application seems of sufficient quality and is on-track to help the case progress;
- whether any further information is needed for a court decision, and how long this should take, taking into account the child's timescales; and
- whether the plans for the child seem appropriate.

4.255 This assessment will inform decisions by the judge on the extent and timing of guardian and solicitor involvement. There should be continuing contact between judge, guardian and solicitor about this as the case progresses. The judge should ensure that they are not directed to carry out work that should really be done by the local authority.

4.256 We received proposals for more radical changes to the tandem model and the role of the guardian.

Guardian involvement in pre-proceedings

4.257 The PLO and accompanying statutory guidance for local authorities introduced a stronger focus on activity by authorities before an application to court is made (see paragraphs 4.28 – 4.30) While largely welcomed, there is some concern both that the burden pre-proceedings is borne solely by authorities, and that the child is left unrepresented during this stage.

4.258 In response, a pilot project set up by Cafcass and two local authorities is underway to deliver court social work before proceedings. In Coventry and Warwickshire, Cafcass officers become involved once the pre-proceedings stage has been initiated.

4.259 The aim is that they should help to:

- create a better and more coherent plan for the child;
- prevent more cases entering into proceedings – the presence of an independent professional may help to mediate and resolve any tensions between the parents and the local authority;
- progress cases more quickly, for those that do enter court proceedings; and
- reduce the number of independent and/or specialist assessments undertaken during the court process.

Coventry and Warwickshire pre-proceedings project

From 1 December 2010 until December 2011, guardians are now being involved at the pre-proceedings stage of possible care cases, by receiving prior notification of some cases held by Coventry and Warwickshire children's services. The aim is to represent the child's interests at this stage of the process and to help inform the decisions made by the local authorities about their plans for children.

The project requires the Cafcass officer to read the background documents on the child's case and they may visit the child and family prior to the pre-proceedings

meeting (PPM), at their discretion. Prior to the Cafcass officer's involvement, the local authority is responsible for obtaining written consent from the parties. At the PPM, they will take an active role and contribute their views to the plan which emerges from the meeting. Within seven days of the PPM, they will write a report of their views and recommendations which is shared with the parties. The local authority will, in turn, provide a written response. The local authority is free not to follow any recommendations made, but the documents will be disclosed to the court and parties if proceedings are started by the local authority.

The outcome of cases will be tracked. Cases where proceedings are initiated will be followed to the final judgment, which on current figures might not be arrived at for more than a year. Outcomes will be assessed against a comparator group and there will be continuous evaluation, with a final report by independent researchers.

4.260 This approach might bring more overlap between guardian, social workers and IRO. On the other hand it might promote better inter-agency working as well as better case management and progression. We shall monitor the progress of the pilot before making our final recommendations. It will be important to ensure that earlier guardian involvement can be proportionate to the case and delivered without excessive duplication of effort.

Bringing legal support and welfare services together – an in-house model

4.261 Cafcass have proposed developing a wholly in-house model for the provision of tandem support. This would extend their current High Court team approach where solicitors for the child are employed by Cafcass and work alongside guardians. We support the need for a pilot of this approach although it would be worth considering first whether the idea would be feasible on a large scale.

The IRO and guardian service

4.262 There are concerns about duplication in the roles of guardian and the IRO, and suggestions that the IRO is insufficiently independent from the local authority. We were presented with a radical suggestion from the ADCS in their call for evidence submission, to “amalgamate the role of the guardian with the IRO and revise [it] to become a role which advocates for the child and scrutinises and challenges the care plan based on the views, wishes and best interests of the child.”

4.263 Others suggested that the IRO role should be strengthened by making it independent of the local authority.

...one solution would be to extend the role of the Independent Reviewing Officer (IROs) and make it independent of the local authority so they could play an active oversight role from the point a care application is first made.

Barnardo's, call for evidence submission

4.264 Children and young people are less sure, with a recent consultation finding many who thought IROs should work for their local authority children's service, rather than an independent organisation.¹⁶⁶

4.265 Our own view is that the IRO, albeit a relatively recent addition to our system, has a distinct role and provides an important legal safeguard for a child.

Reviewing officers can make you feel comfortable at your meetings when you don't know anyone or when people get angry they can stop it. Because sometimes the social worker doesn't stop it so they help to protect you.

A child's view on their IRO¹⁶⁷

4.266 The role of the IRO is related to that of the guardian, but different. One is most concerned with who should parent the child. The other is concerned with how this parenting is done when the authority is the parent.

*Many of the children and young people in our groups did not know what Cafcass Guardians and Independent Reviewing Officers did...More knew about Independent Reviewing Officers than about Cafcass Guardians. When we had explained their jobs... most in our groups thought that these jobs were quite different and should be done by different people.*¹⁶⁸

4.267 To take the IRO service out of the local authority would leave a gap that the local authority would need to fill in some other way. The role is continuing to develop and grow. It needs time to bed in and we believe there is reason to be confident that it is having a positive impact. A CSSIW report into the effectiveness of the IRO service in Wales found that IROs are highly regarded by parents, children and young people and foster carers alike, and they work well with local authorities and their partner organisations.

*Foster carers spoken to in the review cited improvements in the looked after children system that they believed had occurred as a direct result of the regulations and the guidance.*¹⁶⁹

4.268 The new *Care Planning, Placement and Case Review Regulations (England) 2010*, coming into effect shortly in England, aim to expand the role, facilitating a more complete oversight of the child's case beyond the care plan. A new IRO handbook discusses how concerns will be addressed and the IRO service strengthened.

¹⁶⁶ In the consultation on IROs, 875 children voted on 'What organisation do you think IROs should work for?' the most frequently voted response was for the IROs to work for the local council (38%), compared with only 17% voting for an independent organisation. However 32% were not sure of the best location for IROs. *Children's Views on Independent Reviewing Officers*, Children's Rights Director 2011 (in press)

¹⁶⁷ As cited in the National IRO Project Group submission to the review

¹⁶⁸ Ofsted (2010) *Children on family justice: A report of children's views for the Family Justice Review Panel, 2010*, by the Children's Rights Director for England, Manchester, Ofsted

¹⁶⁹ Care and Social Services Inspectorate Wales (2009) *National review of Independent Reviewing Officer Services 2008-09: overview report*, published July 2009.

- 4.269 We have found, however, that the IRO has low visibility in the court process. There need to be effective links between the courts and IROs if judges are to be reassured that there will be continuing scrutiny of the child's care plan. The working relationship between the guardian and the IRO also needs to be stronger. A clear dialogue and transfer of information between the two professionals should be established when a case moves between IRO and guardian and back (as proceedings are initiated and concluded) and also during proceedings as the child's needs and wishes change and need to be taken into account by both.
- 4.270 There should also be more formal arrangements within local authorities to ensure that the most senior levels, including the Director for Children's Services and the Lead Member, keep fully in touch with how care plans are being implemented. The IRO has a potential role to play here.

Alternative approaches to dispute resolution

- 4.271 Care proceedings must in the end be determined in court. But other ways of helping people change or come to an agreement have a part to play. These are often described as alternative dispute resolution and involve:
- processes designed to resolve a dispute so that the need for court intervention is avoided; and
 - procedures designed to be invoked once an application has been made to court.
- 4.272 Negotiation and use of mediators including family, friends or other professionals are common features of social work but formal processes of this type are little used in England and Wales in public law. In evidence the most commonly cited approaches linked to the court process were:
- the letter before proceedings process introduced in the Public Law Outline
 - Family Group Conferences (FGCs) either before or after an application is made to court.
- 4.273 A three year pilot took place in Britain in the mid-90s with the intention of demonstrating that mediation was a possible alternative to court proceedings. However, the pilot suffered from a lack of referrals and was not able to demonstrate that specialist mediation in child protection cases reduced the need for legal proceedings or was cheaper and less time-consuming than care proceedings.¹⁷⁰
- 4.274 Alternatives are used more in other jurisdictions, particularly New Zealand, Australia, US and Canada and include Family Group Conferencing and Child Protection Mediation (also known as Dependency Mediation).

¹⁷⁰ Described in Brophy, J. (2006)

4.275 The advantages are usually described as:

- less adversarial processes, reducing conflict and enabling more open discussions;
- better communication between parties, repairing difficult relationships between families and child protection services and helping families navigate the system;
- securing the engagement of wider family members;
- the development of more sustainable plans for the care of children; and
- speed, flexibility and cost effectiveness.

4.276 These advantages feel instinctively right but these approaches in public law are relatively new and there is patchy evidence of their effectiveness.

Family Group Conferencing

4.277 Family Group Conferencing began in New Zealand in the late 1980s, based on Maori practice. As originally conceived, conferences involve the child or young person, their representative, the parents, extended family members, other people nominated by the family, the referring care and protection worker and possibly other participants but generally not legal representatives. The focus is on empowering the family to make their own decision about the care of the child or children. Their use is mandatory before child protection proceedings in New Zealand though this has given rise to concern.

4.278 FGCs have been encouraged in England and Wales in recent years. Most (possibly all) local authorities now offer some form of FGC service. There is a variety of commissioning models and the use of the technique varies between local authorities. FGCs aim to develop a care plan for the child that involves wider family members. They follow a prescribed format and the use of private family time is mandatory. FGCs are usually recommended as a pre court intervention, although they can be offered during proceedings and can help resolve a case through negotiation. In England and Wales they are usually seen as a means to avoid proceedings, in contrast to other jurisdictions where they may be used to arrive at binding plans later endorsed by the court.

4.279 Some respondents to the call for evidence suggested that we should introduce a requirement, as in New Zealand, that an FGC be offered before proceedings. We do not want to discourage the use of FGCs, but we think there needs to be a robust evaluation on their use and impact in England and Wales before their role can be further developed.

Child Protection Mediation

4.280 Based on the model familiar from private law, formal mediation in child protection proceedings is now used in some areas of the US and Canada and is developing in Australia (we are not aware of examples in the UK). Parents, other family members, child protection workers, lawyers, children's advocates and others meet a mediator to work out agreements concerning treatment, supervision,

placement and other relevant legal and intervention issues. One key goal is to arrive at a voluntary agreement that can become the basis for court orders.

4.281 A study reviewing the evidence base for child protection mediation in the United States, found evidence that it can:

- achieve good levels of agreement between parties;
- work with complex cases;
- improve parental engagement in the welfare process;
- reach results more rapidly than traditional court methods; and,
- potentially reduce costs.¹⁷¹

4.282 Against this, the study found there were widespread difficulties in setting up mediation services due to low uptake and a lack of judicial and other support. As the author of the study noted, there was widespread scepticism amongst professionals and a number of questions still to be answered before widespread support could be built.¹⁷²

4.283 It appears that this technique is perhaps more flexible than FGCs. There is potential for it to be used to:

- resolve issues and avoid the need for a court case;
- narrow issues during proceedings; and
- agree detail of care plans between the family and the local authority.

4.284 The mediator needs to be independent and involvement of legal representatives is usually considered essential. It is also said that sessions are more effective if social workers are authorised to make decisions.

4.285 This use of mediation warrants encouragement in England and Wales to support and complement high quality social work as well as court processes. We recommend that the feasibility of establishing a pilot programme be explored.

Family Drug and Alcohol Court

4.286 The Family Drug and Alcohol Court (FDAC) is a pilot project operating in London. More detail on the pilot can be found at Annex O.

4.287 FDAC's genesis lies in the specialist drug and alcohol courts found widely in the USA. Research on these courts has suggested some success in securing parental engagement with substance misuse services and enabling more children to return home from care.¹⁷³

¹⁷¹ Thoenes, N. (2009) What we know now: findings from dependency mediation research, *Family Court Review* 47(1) p21-37

¹⁷² Ibid.

¹⁷³ Young, N. K., *Findings from the Retrospective Phase Family Drug Treatment Court National Cross-Site Evaluation*

- 4.288 At the heart of the FDAC process is a specialist multi-disciplinary team that supports parents to stop using drugs and alcohol in a staged process over the course of the proceedings. This is backed up by regular appearances in court where the parents, often informally without legal teams present, discuss their progress with the judge, identify barriers to success and try to find solutions to their problems.
- 4.289 Over the course of the year that most proceedings last, the parents aim to prove that they have given up substance abuse and are able to provide a stable home for their child. The court is directly involved in providing therapeutic help to the parents who come before it.
- 4.290 The initial evaluation of FDAC shows considerable promise, and potentially justifies a further limited roll out. Extension across the country will depend on a comprehensive assessment of all the costs and benefits and a study of the long-term outcomes for children and families who have been through the process.

Consultation questions

9. Do you agree with our proposals to refocus the role of the court?
10. Do you think a six-month time limit, with suitable exceptions, for all section 31 care and supervision cases should be introduced? What should those exceptions be?
11. Do you agree that the Timetable for the Child should be strengthened? What are the elements that need to be taken into account when formulating it?
12. Do you think our approach to the strengthening of judicial case management is correct?
13. What criteria should be used in the decision whether or not to appoint experts? And should the judge draft the letter of instruction?
14. Under a proportionate working system, what are the core tasks that a guardian needs to undertake in care proceedings?
15. Could there be a greater role for other Dispute Resolution Services in support of the public law court process?
16. Do you have any other comments you wish to make on our proposals for public law?

5. Private Law

- 5.1 Private family law deals with issues following the breakdown of family relationships. These are emotionally charged situations and can lead to entrenched and hostile conflict, sometimes taken to extremes of irrationality. The issues involved are difficult and often there is no right or wrong outcome. Conflicts can uncover protection issues that must be dealt with swiftly to ensure that children and vulnerable adults are safeguarded.
- 5.2 It is not the role of the state – nor would it be possible – to fix fractured relationships. But more can and should be done to support families to resolve their issues independently wherever possible. Where this is not possible, there should be a range of high quality dispute resolution services to help families come to workable agreements that are in the best interests of any children involved. At the same time, there must be provision to ensure safety concerns are identified and acted upon swiftly.

What is private family law?

Overview of the scope of the private law system

- 5.3 Parents can agree arrangements for children following separation with minimal involvement from the court – one study showed that the great majority (around 90%) do not go to court.¹⁷⁴ The 90% of couples who did not go to court include around 55% who settled and 30% who did not seek a resolution (including parents who walk away).¹⁷⁵
- 5.4 A survey of contact arrangements showed that around one in ten children with a contact arrangement had this ordered by the court.¹⁷⁶ It is apparent that the cases that do go to court include some of the most difficult, which have multiple problems.¹⁷⁷

¹⁷⁴ Blackwell, A and Dawe, F. (2003): Non-resident parent contact. London, ONS 2003; Office for National Statistics (2008) Omnibus Survey Report No. 38. *Non-resident parental contact, 2007/8 A report on research using the National Statistics Omnibus Survey* produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families.

¹⁷⁵ Office for National Statistics (2008) Omnibus Survey Report No. 38. *Non-resident parental contact, 2007/8. A report on research using the National Statistics Omnibus Survey* produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families; Peacey V, Hunt J (2008) *Problematic contact after separation and divorce? A national survey of parents* One Parent Families/Gingerbread..

¹⁷⁶ Office for National Statistics (2008) Omnibus Survey Report No. 38. *Non-resident parental contact, 2007/8. A report on research using the National Statistics Omnibus Survey* produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families.

¹⁷⁷ Buchanan, A., Hunt, J. Bretherton, H. & Bream, V. (2001) *Families in Conflict: Perspectives of children and parents on the Family Court Welfare Service*. Bristol, Policy Press;
Trinder, L. et al. (2006a) Making contact happen or making contact work? The process and outcomes of in-court conciliation. London: DCA

Divorce

5.5 Divorce is a legal process, carried out by the civil courts, which begins with a petition and ends with a decree absolute that dissolves the marriage.¹⁷⁸ The only ground for divorce is that the marriage has irretrievably broken down, proved by establishing the existence of one of five factual circumstances.¹⁷⁹ Some 130,000 petitions were filed for dissolution of marriage in 2009.¹⁸⁰ The number of divorces is falling, perhaps associated with declining rates of marriage.¹⁸¹

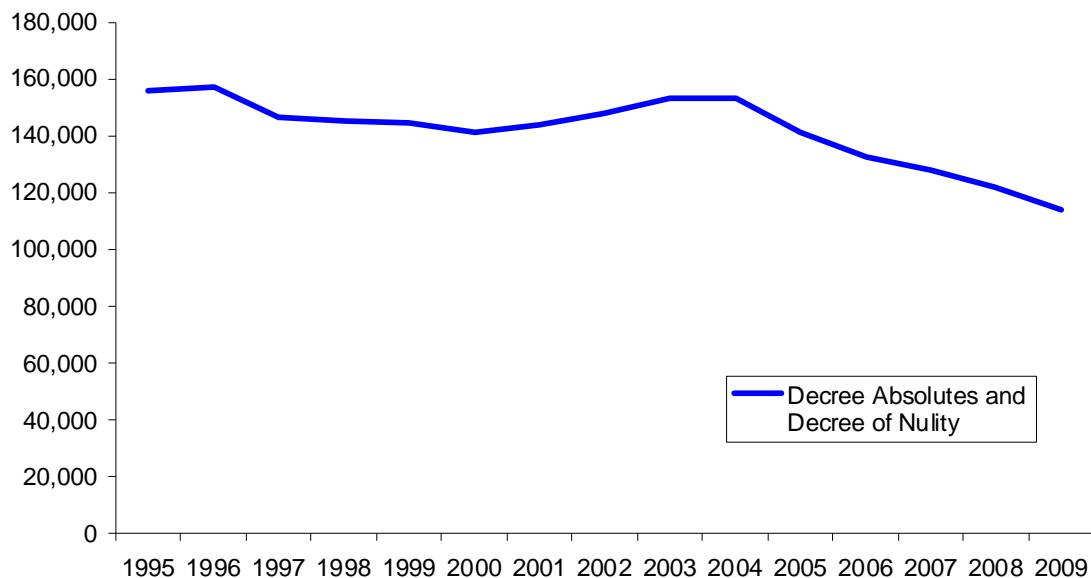


Fig viii – Numbers of divorces since 1995¹⁸²

5.6 Parties only need to attend a court hearing if the proceedings are contested, but the decision to grant or deny a divorce rests with the judge, even when the divorce is uncontested. Parties may have to attend court if they are unable to agree arrangements for their children or financial provision.

¹⁷⁸ Civil partnerships are terminated by 'dissolution' but the procedures and substantive law (with the exception of the law relating to adultery) are the same as the law of divorce. Where the report refers to the process for divorce, it is intended to cover the equivalent civil partnership processes.

¹⁷⁹ The factual circumstances provided by the Matrimonial Causes Act 1973 for the court to hold that a marriage has broken down irretrievably are that:

- (a) the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- (b) the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- (d) the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;
- (e) the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

¹⁸⁰ Judicial and Court Statistics 2009, MoJ, London

<http://www.justice.gov.uk/publications/judicialandcourtstatistics.htm>. last accessed 28/03/11

¹⁸¹ This includes the numbers of dissolutions of civil partnerships. ONS Population Trends 138, Winter 2009; ONS divorce statistics. Judicial and Court Statistics 2009, MOJ; ONS (2009), Civil Partnerships in the UK 2008 Statistical Bulletin, ONS <http://www.statistics.gov.uk/pdfdir/cpuk0809.pdf>

¹⁸² Office of National Statistics http://www.statistics.gov.uk/downloads/theme_population/number-of-divorces.xls; last accessed 18/03/11.

Disputes about children

5.7 Where parents cannot agree arrangements for their children following divorce or separation, they can make an application to the court under section 8 of the Children Act 1989, asking the court to decide the issue by making an order. These applications are generally for:

- **residence** – with whom the child is to live; and
- **contact** – requiring the person with whom the child lives to allow that child to visit, stay or otherwise have direct or indirect contact with another person.

5.8 In 2009 about 45,000 children were involved in section 8 residence order applications and about 53,000 children were involved in contact order applications. These have increased 11% and 23% respectively since 2008. The number of children involved in all private law applications has increased every year since 2005.¹⁸³

5.9 Applications may be made to the court to order that a parent be prevented from taking certain steps to do with the child's upbringing, for example to prevent a change of school. This is called a **prohibited steps order**. The court also deals with applications regarding a single important issue relating to a child, such as disputes over medical treatment or religious upbringing, and any resulting order is called a **specific issue order**.

5.10 Some people, principally parents, guardians or step-parents, may make an application for a residence or contact order under section 8 as of right. Others have first to obtain the leave of the court before making an application. Wider family members, such as grandparents, are able to seek orders by this latter route.

5.11 The Children Act 1989 provides the framework for resolution of disputes over children in divorce or following separation. Supplementary judicial guidance, the Private Law Programme (PLP), sets out a national approach for conducting these cases in court. The intention is to focus parties on reaching a safe agreement. The PLP outlines the process and timescales for the resolution of private law disputes, including the input of agencies, such as Cafcass, and mediation services. It provides a framework to help identify issues for resolution and to ensure that court time is focused on resolving these safely, at the first hearing, without further involvement from the court wherever possible. Cafcass' management information system tracked that from April 2009 to March 2010 29% of the total number of cases closed were closed with just one hearing.¹⁸⁴ This has increased to 44% for April 2010 to October 2010, indicating that pre-hearing and court processes under the PLP are helping to reduce the number that need more than one hearing.

¹⁸³ <http://www.justice.gov.uk/publications/docs/family-matters-jcs-2009-chp2.xls>. Last accessed 24/03/11
Note that these statistics are likely to over-represent the numbers of children involved in private law cases. If a child is subject to multiple orders in a year (for example both contact and residence) he or she will be counted twice.

¹⁸⁴ Cafcass Case Management System, as of October 2010, unpublished.

- 5.12 Under the PLP, specified checks within a set timescale are made ahead of the first hearing so that the court has the information necessary to make a determination at this point, if it is safe to do so. An application triggers safeguarding checks to be carried out by Cafcass or Cafcass Cymru, so that the court is informed of any safety concerns at the first hearing. The parties and a Cafcass officer attend the first hearing dispute resolution appointment (FHDRA), and local arrangements can also be made for mediators to assist at court. At this hearing the court, with the Cafcass officer (and any mediator), will seek to assist the parties in conciliation and in resolution of all or any of the issues between them. A referral will be made to the local authority if child protection concerns are raised at any point.
- 5.13 The resources of the court are further managed at first hearing. If agreement cannot be reached, the Cafcass officer assists the court to determine what further work needs to be undertaken. The court will set out the issues about which the parties are agreed, and the issues that remain to be resolved. It will set out the steps that are planned to resolve the issues, either in the event of an order or pending an order (for example, further Cafcass work on a child's wishes and feelings, and reporting back to court; participation in mediation or a Separated Parenting Information Programme), and details of any contact activity directions or conditions imposed by the court.
- 5.14 Separated Parents Information Programmes (PIPs) are designed to help parents learn more about the challenges of post-separation parenting, including the effects on children of continuing conflict. PIPs aim to provide advice and support about how best to help children in this situation and seek to enable parents to take steps towards their own solutions. They are usually delivered to mixed groups of applicants (parents applying for orders about their children) and respondents (parents responding to such an application) in two, two-hour sessions or one four-hour session. Separated couples do not go on the same course, but it is important that both parents go on a course. Most parents who go on the course say they find it very helpful. A forthcoming evaluation shows that parents and professionals have mostly positive opinions about PIPs:

Attending PIP was associated with modest impacts on some outcome measures including whether or not contact occurred and the likelihood of choosing non-court pathways to decide arrangements in future. There was no discernable impact on parental relationships and parental communication.

The qualitative part of the study identified a number of ways in which the programme could be more effective. In particular, there was a widespread view amongst professionals and many parents that the programme might be more effective if delivered earlier in the process and better follow through.¹⁸⁵

¹⁸⁵ Analysis is ongoing and the full evaluation is due to be published in April, Trinder, a forthcoming study

Ancillary relief

- 5.15 When people apply to the court for a divorce they can also ask for an order to decide upon the division of money and property, known as an ancillary relief order. In the event that financial arrangements are agreed in a divorce, the court may make a consent order. In 2009 a total of some 80,000 orders for ancillary relief were disposed of, down 12% from the 91,000 recorded for 2008, and continuing a downward trend from 2006.¹⁸⁶
- 5.16 A judge, who will not be the trial judge if the case proceeds, may hold a Financial Disputes Resolution Hearing (FDR) to help parties reach an agreement if there are areas of dispute. Of the disposals made in 2009, the majority (73%) were not contested. A further 21% of orders were made by consent after initially being contested. Around 10% of cases at FDR go on to require a final hearing for a decision by the judge.¹⁸⁷

The role of lawyers

- 5.17 Research by John Eekelaar and Mavis Maclean shows that where lawyers are involved in family law issues concerning money or children the majority are resolved either without a court process or without a contested hearing.¹⁸⁸ In addition to a role in dispute resolution, lawyers will often have the technical expertise needed to draw up any resulting agreement or order (particularly financial). We concentrate in this report on dispute resolution processes that minimise the roles of lawyers and courts. But where a dispute has to go to court, our view is that legal representation supports the parties, assists the court, shortens and focuses the court process and enhances the prospects of resolution.

Dispute Resolution Services

- 5.18 Increasingly, alternatives to the court have developed – traditionally termed alternative dispute resolution (ADR) – as an option to help encourage settlement and agreement between parties arguing about family matters. We describe the main forms of ADR below.

Mediation

- 5.19 Mediation is a way of resolving disputes including those that arise before, during or after separation or divorce. It is a voluntary and confidential process enabling parties to explain their concerns and needs to each other in the presence of a qualified family mediator. Family mediation provides the parties with an opportunity to communicate directly with each other rather than via solicitors or across a courtroom. Mediators can help parties reach agreement generally without legal help and give high level information about the law and how the

¹⁸⁶ Judicial and Court Statistics 2009, Ministry of Justice.

<http://www.justice.gov.uk/publications/judicialandcourtstatistics.htm> Last accessed 17/03/11.

¹⁸⁷ Ibid

¹⁸⁸ Eekelaar, J. and Maclean, M. (2010) *Family Law Advocacy: How Barristers Help the Victims of Family Failure* Hart Publishing.

legal system works. They do not give advice about specific legal rights or the best course of action for each party.

5.20 Mediation is open for anybody to access at any stage and can be used to help make decisions about any issue including:

- arrangements for children;
- financial arrangements;
- division of property; and
- other practical issues to do with separation or divorce.

5.21 Mediation takes place in a private and informal setting. The mediator (who will not tell the parties what to do and is impartial) is there to help each party:

- listen to what the other has to say;
- understand the other's needs and concerns; and
- try to find a solution.

5.22 Mediation usually lasts for between two and five sessions, each of about an hour and a half. However, the time it takes depends on how complicated the issues are and the attitudes of the parties.

Recent developments in mediation

5.23 The government is keen to increase the use of mediation to support the resolution of private family disputes. Currently, the solicitor of any publicly funded client whose case falls within scope is required to refer his/her client for a mediation assessment before they can apply for a funding certificate to cover legal advice in support of court proceedings. There are exemptions to this process.

5.24 From April 2011 the government plans to ask prospective court applicants, whether self-funding or publicly-funded, in relevant family proceedings to attend a meeting to learn about mediation before they take their case to court, potentially reducing the number of cases which go on to court. The Ministry of Justice have worked with the President of the Family Division on a pre-application protocol to facilitate this change, which will apply to the majority of private law family court proceedings. The change will harmonise the position between those who are publicly funded and self-funded.

Collaborative law

5.25 Collaborative law is a process in which a divorcing couple and their lawyers agree not to go to court, but instead work as a team to find solutions aimed at enabling them to move forward. In the event that they are unable to reach a solution by this method, the parties must instruct alternative lawyers to take their case to trial (with of course an increase in costs). Collaborative law is more directive than mediation and allows lawyers to be present in the discussion process.

5.26 The system was introduced to the UK by Resolution (an organisation for family solicitors) in the early 2000s. Resolution published a research report in 2009, *Collaborative law in England and Wales: early findings*, reporting that 80% of cases undertaken during 2006 and 2007 reached settlement on all issues through the collaborative process. A benefit of the process is that it is not driven by a timetable imposed by the court. There is no incentive for the lawyer to escalate the case since the parties must instruct new lawyers if the matter does go to court.

Issues with the current system

5.27 There are a number of issues, both specific to private law and more general, driving the need for reform. These include:

- parental conflict having a detrimental effect on children;
- an adversarial approach potentially inflaming, rather than reducing conflict;
- the perception that the system is more favourable to one parent over the other;
- fear that wider family members may lose contact;
- the system being confusing and difficult to navigate;
- children not understanding processes or feeling listened to;
- the court seldom being the best place to resolve the issues present in private law disputes;
- arrangements being made which may not be successful in the long-term, at a high emotional cost, both to the children and adults involved;
- the potential length that cases can stay in the court system; and
- possible changes to legal aid.

Parental conflict has a detrimental effect on children

5.28 Evidence shows that intense parental conflict can reduce the quality of parenting and can damage children. Hunt and Trinder (2011) conclude that there is now a robust body of research on the impact of conflict on children. This has established that, although conflict *per se* is not necessarily problematic for children, prolonged exposure to frequent, intense and poorly resolved conflict is associated with a range of psychological risks for them. This includes anxiety and depression, aggression, hostility and low social competence.¹⁸⁹ A review by McIntosh of conflict research identifies two processes through which these risks occur:

- directly, with the child witnessing and possibly being implicated in or involved with the parental conflict; and
- indirectly, with conflict having a negative impact on family functioning, particularly parenting. McIntosh notes specifically that persistent conflict

¹⁸⁹ Hunt, J. and Trinder, L. (2011) *Chronic Litigation Cases: Characteristics, Numbers, Interventions A Report for the Family Justice Council*.

damages parenting quality, styles of discipline and the affective response of parents to children, all of which influence child outcomes.¹⁹⁰

Given the impact of disputes on children's emotional well-being and the long-term individual and societal impacts the State also has a vested interest, and by necessity a role, in ensuring that disputes are resolved as swiftly, amicably and fairly as possible.

Julia Brophy, call for evidence submission

- 5.29 The impact on the children of conflict was particularly evident in *A v A (Shared Residence)* [2004] EWHC 142 (Fam), [2004] 1 FLR 1195, a case typified by its length, bitterness and the hostility of the parties.¹⁹¹ Mr Justice Wall (as he then was) noted “the distress and the damage caused to children by long-standing and continuous hostility between their parents”, which had lasted for six of the youngest child’s nine years. He also noted that the pressure on the children had been “enormous” and that one child had told the National Youth Advocacy Service that “he could not bear it any longer”.¹⁹²

An adversarial approach inflames rather than reduces conflict

- 5.30 The private law system has been criticised as being overly adversarial. Yet in practice, the processes are designed to reduce this impact. The focus at all times is to ensure, as far as possible, that parties come to an agreement, rather than continuing to a judicial determination. Other factors support the courts in taking a more inquisitorial approach, including the provision of reports from Cafcass officers and the role of the judge in shaping and directing the evidence-gathering process.

Under the PLP there is a considerable degree of cooperation between the judge and the advocates in ensuring that the matter proceeds expeditiously and that the evidence obtained is proportionate and relevant to the issues.

Law Review Committee of the Bar Council, call for evidence submission

- 5.31 Programmes such as PIPs can help to educate parties about the effects of conflict and separation on their children. However, these are only available after an application has been made to court. By the time a case has reached the first hearing, accusations and cross-accusations may have already been made. Furthermore, a court-based system where a party brings their case via application and which requires judicial determination to decide the outcome inevitably means there will be adversarial elements. Many people have the perception that they will ‘have their day in court’ and that there will be a winner or a loser. This tends to inflame conflict even though the courts may not allow the issues to play out in this way.

¹⁹⁰ McIntosh J. (2003). ‘Enduring conflict in parental separation: Pathways of impact on child development’. *Journal of Family Studies*, 9(1) 63–80

¹⁹¹ Hunt, J. and Trinder, L. (2011)

¹⁹² *Ibid.*

- 5.32 Some would argue that an alternative forum, such as a tribunal, would lessen the adversarial nature of the system. The parties would still need to submit their own case to a tribunal. The gain would be that tribunals tend to be less formal. However, we consider that the costs and disruption of such a change would not be outweighed by the gains in these highly emotional cases.

Perception that the system is more favourable to one parent over the other

- 5.33 Our evidence shows that many parents, usually fathers, feel that the private law system is biased. A minority of children will live in shared care arrangements, spending roughly equal amounts of time in each parent's household. One study showed that around 90% reside mainly with one parent. Of this 90%, children typically lived with their mother; only 12% lived with their father following divorce or separation.¹⁹³
- 5.34 We heard evidence that the slowness of the system meant that by the time cases are heard the living arrangements for children leading up until the hearing (usually with the mother) were upheld by the courts. The result was that the other parent lost contact. This has led to calls for a presumption of shared parenting time to be placed in legislation.
- 5.35 Qualitative research has found that the advice given by solicitors to non-resident parents (in both court and non-court cases) is based on court norms and typical case outcomes.¹⁹⁴ This can perpetuate a view that the system is biased and that there is 'no hope' in making an application. Although it is very rare that there will be no contact, the submissions to the call for evidence also suggested that there are continued problems with enforcement of court orders, despite the introduction of wider provisions for enforcement under the Children and Adoption Act 2006. Enforcement provisions are not widely used. In 2010 there were nearly 1000 applications for enforcement orders in respect of contact orders. In the same year, only 55 orders were made. Over the same period, there were 13 applications for financial compensation, with only four orders made.¹⁹⁵
- 5.36 Some non-resident parents believe strongly that once an order is made, the resident parent is free to flout it, again leading to the perception that the system favours one parent over the other.

It is the application of current law that is failing children and parents. For example, in my case I have fought to see my children for 8 years - in that time 450 periods of cancelled contact by mother is continually ignored, on the one occasion I as father allowed the child to refuse to go home (at her insistence) I was threatened with prison within 24 hours by the judge in the same case. Why the difference in approach? Certainly not in the child's interests, but this is now the norm.

Parent, call for evidence submission

¹⁹³ Peacey, V. and Hunt, J. (2008)

¹⁹⁴ Hunt, J. and Macleod, A. (September 2008) *Outcomes of applications to court for contact orders after parental separation or divorce.*

¹⁹⁵ HMCS FamilyMan data, unpublished. These data come from internal case management systems and does not form part of the national statistics produced by the Ministry of Justice which can be found here: www.justice.gov.uk/publications/statistics.htm. As such this data set is not subject to the same levels of quality assurance.

Fear that wider family members may lose contact

- 5.37 We received evidence from grandparents who felt they had little recourse when the resident parent prevented contact with their grandchildren.

In our experience grandparents can play a significant role in terms of providing emotional support for and ensuring the physical well being of their grandchildren but grandparents generally feel very disempowered and excluded from contact arrangements.

Children's Society, call for evidence submission

- 5.38 At present grandparents are able to make applications for contact but need permission of the court to do so, which is seen by some as a further barrier.

The system is confusing and difficult to navigate

- 5.39 We received many submissions which suggested that families and individuals did not know where to turn to receive information and good advice about how to resolve family conflicts and the processes for resolving issues following relationship breakdown. We also heard that many relied on advice from family and friends or used internet searches. Many sought legal advice immediately, unaware of alternative routes available to them.

I believe I am a reasonably intelligent person, however good free advice about proceedings is not available unless you are in the welfare system. Case studies would help and the types of questions and evidence to support your arguments would have been useful.

Parent, call for evidence submission

- 5.40 It is not clear to whom people should go for advice. They may need to see several different professionals and engage with the LSC before court action is even contemplated. If an application is made to court, it is difficult to find the necessary form and the forms seem to have been designed with lawyers and the courts in mind. It must be very difficult for individuals to complete them unaided.
- 5.41 This complexity, teamed with a lack of information, adds to the stress of those who use the system. People can also incur significant costs. It is clear that there is a need for better information, provided in a neutral manner, to be accessible for all who are considering divorce or separation.

Children don't understand processes or feel listened to

- 5.42 A survey by Cafcass found that where children and young people were not happy with the outcome of their parents' separation it was mainly because they felt they had little input into the process or their views were not taken into account.¹⁹⁶ The survey found many young people would have liked to present their views themselves in court and speak to the judge directly so that these

¹⁹⁶ *How it Looks to Me*, Private Law Consultation Report, Cafcass
<http://www.cafcass.gov.uk/pdf/How%20it%20looks%20to%20me%20report%20FINAL%2025.01.10.pdf>
last accessed 18/03/11.

could not be misrepresented. An NSPCC survey of 141 children involved in private law cases found that 55% of respondents felt that having a say had made a difference to the outcome of their case. They also found “that some respondents felt a degree of disempowerment and that they would have liked their views to be taken into account to a greater extent”.¹⁹⁷

- 5.43 Submissions from the Cafcass Young Person’s Board felt more should be done to make straightforward, clear and accessible information available.

I do think that there needs to be more clarity on the roles as a lot of young people and families can get very confused with the various different people and why they are all necessary. Perhaps there should be something devised to explain the process and everyone involved e.g. some kind of specialist website or government booklet that explains it simply.

Cafcass Young People’s Board, call for evidence submission

Court is seldom the best place to resolve private law disputes

- 5.44 Issues relating to the welfare of a child are not of themselves true matters of law, capable of a neat, clinically administered legal determination. They arise from family relationships that have broken down and, where that family gets as far as the door of a court, those relationships may often be highly dysfunctional. The judge, by court order, can provide a resolution of the issue, but judicial determination in the field of family relations is a blunt instrument and the very process of achieving that determination may itself cause further harm to the people involved.

- 5.45 In our view, too many cases come to court with issues that are not suitable for resolution through judicial determination. Furthermore, in some cases the court tends to perform a monitoring role, for example checking how things are progressing if mediation and PIPs are ordered. This seems a waste of scarce resources.

- 5.46 We cannot ignore, however, that many complex cases do come before the court. Cases may involve substance abuse and violence, which present real safety issues. A judge at the Principal Registry of the Family Division (PRFD) undertook for us a three-day snapshot of cases. Many were straightforward, and the court was focused on seeking to support the parties in coming to an agreement. But there were also many that showed high levels of risk.

Father applies for residence and contact; he has numerous convictions including recent one for assaults on mother and admits to cocaine/cannabis use; she has had four previous children removed. Father abusive in court. Residence order to mother; no contact ordered; social services report ordered; drugs test ordered on father. (Both parties represented).

¹⁹⁷ Timms, J. E., Bailey, S. and Thoburn, J. (2007) *Your shout too!: a survey of the views of children and young people involved in court proceedings when their parents divorce or separate*. London: NSPCC

Father applies re previous order for contact, which is no longer happening. He now lives in India but wants to retain fortnightly staying and holiday contact. Mother opposes as he is not consistent. Referred to mediator but Mother's brother threatens F outside court. Brother removed from building. Mediation fails. Monthly contact and Christmas holiday contact ordered and adjourned. Mother assaults Father outside courtroom. (Both litigants in person).

Arrangements made may not be successful in the long-term, at a high emotional cost, both to children and to adults

- 5.47 A study in 2007 into the longer-term outcomes of in-court conciliation found that the process can increase contact.¹⁹⁸ But it is hard to shift attitudes and behaviour. Of a sample of 117 parents, most had needed further professional intervention and 40% had been involved in further litigation. After a two-year follow-up, 60% of the agreements had changed or broken down because one of the parties (including the child) had no longer supported the agreement.¹⁹⁹
- 5.48 Deterrents to return to court (for those with failed contact arrangements) were listed as cost, emotional exhaustion, loss of faith in the courts, and the difficulty of enforcing orders.

I cannot stress enough the amount of upset having court proceedings hanging over you causes and that on top of having to bring a child through a divorce with the minimum of damage.

Parent, call for evidence submission

The time that private law cases can stay in the court system: the system is slow and expensive

- 5.49 Our evidence shows there are still significant delays in private law applications, despite the progress made under the PLP in terms of defining and tightening timescales:

The family justice system is profoundly inefficient and inept — delay, for example, has reached the point where a parent applying for contact can easily have to wait a year before receiving his first order, effectively losing all contact with his child/children during that time. This in turn leads to a status quo which the courts fail to repair.

Fathers 4 Justice, call for evidence submission

- 5.50 In the three years 2006-2008 the average case duration for private law (all children cases) in the county courts was 33 weeks. This rose to 36 weeks in 2009, and was 32 weeks from 2010.²⁰⁰ Research has found that cases are likely to take longer than a year to resolve when the resident parent is initially opposed

¹⁹⁸ Trinder, L and Kellet, J. (2007) The longer-term outcomes of in-court conciliation. MOJ

¹⁹⁹ Ibid

²⁰⁰ HMCS Familyman data, unpublished – see footnote 194.

to contact; the child is opposed to contact; and serious welfare concerns have been raised.²⁰¹

- 5.51 The longer a case goes on the more expense is incurred; often to such an extent that court action might not be able to continue even though no resolution has been reached. The time taken may also cause attitudes and behaviours to become entrenched. This is particularly harmful if contact stops and there are later moves to try to re-establish it. We have heard the distress of non-resident parents who feel that delay has damaged their application for contact or residence, as the child's routine had become established with the resident parent from the time before the case was heard.

Possible legal aid changes – the need to help litigants manage the process

- 5.52 On 15 November 2010, the Ministry of Justice published a Green Paper, *Proposals for the Reform of Legal Aid in England and Wales*. This included proposals to reduce the number and types of cases that are eligible for legal aid. The government believes that it is in the best interests of both adults and children involved in divorce or separation proceedings for agreement to be reached out of court wherever possible, including through mediation. The paper therefore proposes excluding ancillary relief and private law children cases from the scope of legal aid unless there was evidence that domestic violence or forced marriage was an issue.
- 5.53 The paper proposes that legal aid be retained for family mediation in private law matters. The consultation has now closed and a response will be issued later in the spring.
- 5.54 We received a number of submissions highlighting concerns about the proposals outlined in the Green Paper and the effect that they could have on private family law, in particular from Resolution, the Association of Lawyers for Children, and the Family Law Bar Association. While responses to the legal aid reform consultation paper have welcomed the intention to continue to provide legal aid in public law family cases, opposition to the proposal to remove private law from scope focused in particular on concerns that:
- the consultation paper does not sufficiently recognise the importance and complexity of the issues in private law cases;
 - the circumstances that would be accepted as evidence of domestic violence are too narrow and many victims would not qualify;
 - there may be an increase in accusations of domestic violence by those who wish to qualify for legal aid;
 - funding would not be available in cases involving child abuse and where expert reports are needed; and
 - while legal aid would be available for cases of international child abduction after the event, it would not be available to prevent it.

²⁰¹ Hunt J and Macleod A (2008)

- 5.55 Should the proposals go ahead as set out in the Green Paper, the reduction in the scope of legal aid may result in greater numbers of people representing themselves, or litigants in person. Such people often have limited legal expertise and need greater support from the court during their proceedings, which may lead to longer cases. Litigants in person may also be disadvantaged by not knowing their entitlements.

There should be much more readily-available information for litigants in person. People should not have to fork out huge legal fees, go on benefits or be disadvantaged by a lack of information on appearing as a litigant-in-person - just so that they can put forward their case regarding the most important things in their lives i.e. their children.

Parent, call for evidence submission

- 5.56 We share these concerns, both as to the ability of litigants in person to conduct their case effectively and as to the inevitable increased burden in terms of time and resources this will place on the court. We are also concerned that some parents will simply not pursue their dispute leading to some children losing contact with a parent.
- 5.57 We await the government's conclusions, following the consultation and their response to these concerns. However, we note that our recommendation (paragraph 3.88 above) that the legal aid budget be managed as part of the overall family justice budget, would enable the Family Justice Service to take a more holistic approach to ensuring there are available services to support these families.

The way forward

The aim of private family law

- 5.58 The state cannot fix fractured relationships or create a balanced, inclusive family life after separation, especially where this was not the case before separation. This truth has to be kept firmly in mind in developing a private law system to support the resolution of conflict.
- 5.59 There is a great need for parental education across the board – from parental responsibility, to how the law is applied, to likely outcomes of parental disputes. The focus of conflict resolution should be clear: children have *rights* – to be cared for, to have meaningful relationships with both their parents and to be financially supported; parents have *responsibilities* to provide this.
- 5.60 Court is generally not the best place to resolve these disputes. Where possible disputes should be resolved independently or using Dispute Resolution Services such as mediation, when it is safe to do so. Parents who choose to use the court system must understand it will not be a panacea. Courts will only make an order where this is in the best interests of a child. Furthermore, where the court does make an order, this may well not be in line with one or both parents' expectations or wishes. People need to expect that court should be a last resort, not a first port of call.

- 5.61 Serious child protection concerns are raised, or come to light, in a significant proportion of private law cases. Where there are concerns for the child's safety or for a vulnerable adult swift and decisive action must be taken to protect them. We intend in the coming months to investigate further this overlap between public and private law.
- 5.62 In private law the aim should be to:
- provide separating couples and parents with the information and education they need to resolve any issues independently;
 - have processes that are timely and speedy, simple, accessible and fair – encouraging early education and intervention where possible;
 - provide a range of high quality, well regulated Dispute Resolution Services for those people who need additional support;
 - ensure that the best interests of children are upheld when their welfare is at risk or their families are in dispute about the best arrangements for them;
 - work with parents to enable them to develop Parenting Agreements that will suit them and their children;
 - provide a service that is focused on the best possible outcomes for children and enables stable, safe and fair arrangements;
 - consult children and young people about the decisions that affect them;
 - provide a fair, swift court process, which is proportionate to the issue in dispute, for those cases that require judicial determination;
 - ensure swift enforcement where court orders are breached;
 - be responsive to the needs of users, developing new services to meet the diverse and changing nature of society; and
 - learn from good practice both in the UK and in other jurisdictions.

Principles and process

- 5.63 Our recommendations can be grouped into two parts: first the principles that we believe should underpin the private law system and secondly the process that couples should follow in the resolution of their disputes.

Principles - Promoting awareness of parental responsibility

- 5.64 Being a parent brings with it responsibility to ensure that a child has the emotional, financial and practical support to thrive. These duties, or as the Law Commission describes them, “the everyday realities of being a parent”²⁰² are recognised in the Children Act 1989 as parental responsibility (PR), under section 3.²⁰³

²⁰² Law Commission *Report on Family Law: Review of Child Law, Guardianship and custody*, Law Commission Report 172, HC594

²⁰³ The Act describes Parental Responsibility as ‘All the rights, duties, powers, responsibilities and authority, which by law a parent has in relation to the child and the administration of his or her property’.

*The [Act] assumes that bringing up children is the responsibility of parents and that the State's principal role is to help rather than to interfere. To emphasise the practical reality that bringing up children is a serious responsibility, rather than a matter of legal rights, the conceptual building block used throughout the [Act] is "parental responsibility". This covers the whole bundle of duties towards the child, with their concomitant powers and authority over him, together with the procedural rights to protection against interference... It therefore represents the fundamental status of parents.*²⁰⁴

5.65 Fathers automatically have PR if they are married to the mother at the time of the child's birth. They can acquire it if they are present for the registration of the child's birth and jointly registered on the child's birth certificate, or if they have acquired it by formal legal agreement with the mother, by court order, or by subsequent marriage to the mother. Mothers have PR from the birth of the child (section 4 CA1989). Provision is made for others, including step-parents, to apply for PR, and case law indicates that where parents have been married, or have lived together as a family with their child, it is now rare for the father not to be given PR.

5.66 Important aspects of exercising PR include:

- naming the child;
- providing a home for the child;
- having contact with the child;
- protecting and maintaining the child;
- administering the child's property;
- consenting to the taking of blood for testing;
- allowing the child to be interviewed;
- taking the child outside of the jurisdiction of the UK and consenting to emigration;
- agreeing to and vetoing the issue of the child's passport;
- agreeing to the child's adoption;
- agreeing to the child's change of name;
- consenting to the child's medical treatment; and
- arranging the child's education.

5.67 These duties and responsibilities do not disappear upon divorce or separation.

5.68 The question arises, however, whether more should be said in legislation around the level of contact that a child should have with both parents (and others, for example grandparents) to enable their relationship to be meaningful following

²⁰⁴ Hoggett, B. (1989) *The Children Bill – the aim Family Law* 19, 217-222, 217, cited in *Journal of Children's Services*, vol 5 issue 2, June 2010.

separation. The panel has heard considerable evidence on the issue, most often framed as the need for a presumption of shared parenting time.

- 5.69 An outline of the evidence on the merits of legislating for a presumption of shared parenting is provided in Annex P. On one side, we heard the real anguish of parents, usually fathers, who had spent months or years at huge cost using the courts to try to reach a level of contact which they felt was right for them and their children, or any at all. They argued that a presumption would remedy a bias in the family courts towards the parent with whom the child resided during proceedings, usually the mother. There was a sense that courts should recognise the rights of parents and that this would give greater fairness.
- 5.70 We have great sympathy for these parents. The panel has debated whether a presumption of shared parenting time would bring about the improvements these parents seek, whilst also maintaining the best interests of children. Our starting point is that shared parenting is already the aim of current legislation and case law, with established law and practice.
- Where parents have been married, or have lived together as a family with their child, it is now rare for the father not to have (or to be given) PR for the child. As a result both parents share PR, a status which endures beyond any parental separation.
 - There is a lack of awareness of PR amongst the general public, and those who are separating.
 - There is a large body of evidence indicating that the starting point for the judge is to try to come to an agreement between the parents whereby children should and will have contact with both parents following separation, recognising it is in the child's interests to have a continuing and significant relationship.
 - Case law states in terms that 'it is almost always in the interests of a child whose parents are separated that he or she should have contact with parent with whom the child is not living'.²⁰⁵
 - Research in child contact applications shows that contact is granted in most cases.²⁰⁶
 - The courts will only depart from this presumption where the potential for harm is such that the need to safeguard the child outweighs the benefit that would ordinarily flow from parental conflict.
 - Early conflict and behaviour by parents, however, teamed with the strains on the court system, may mean that it is difficult for the court to help parents to come to an agreement which is based on shared parenting.
- 5.71 The panel heard from many of those working within the family law system who argued that contact is a right of the child, not the parent or grandparent. They argued that the role of the parents and the court, where necessary, was to uphold that right following separation, where it is safe. Many respondents then

²⁰⁵ Re P (Contact: Supervision) [1996] 2 FLR 314

²⁰⁶ Hunt, J. and Macleod, A. (2008)

went on to rebut calls for any presumption that would interfere with the principle contact rights needed to start from the best interests of the child.

The Children's Society advise against any change to law or guidance which would make it possible for a child's best interest to be compromised in favour of any concept of the rights of mothers, fathers, or grandparents to future involvement

Children's Society, call for evidence submission

- 5.72 The panel took evidence in Sweden and Australia about the significant damage done to children in high conflict cases when legislation creates expectations about a substantial sharing of time. These countries have also experienced considerable difficulties around interpretation of a presumption, which does not sit well with a move towards taking disputes out of the courts.
- 5.73 Trinder suggests that research indicates early or pre-existing parent or family characteristics predict subsequent pathways and outcomes.²⁰⁷ Co-operative parents tend to develop flexible shared care arrangements with positive outcomes. High conflict parents tend to develop rigid arrangements, often through litigation, that are associated with poorer child adjustment and lower levels of child satisfaction. It appears that if parents share parental care fully before separation, they are more likely to do so successfully after separation. The panel sees that there are limits as to what legislation can achieve if this approach to parenting is not taken prior to separation.
- 5.74 In our view, achieving 'shared parenting' in those cases where it is safe to do so is a matter of raising parental awareness at the earliest opportunity. This is intended to manage expectations and move towards recognition of parental responsibilities rather than parental rights, as opposed to making any significant changes to the welfare principle of section 1 of the Children Act 1989, or to the approach of the courts.
- 5.75 Our proposals are designed to enhance the regard given to the status of shared parental responsibility and to shift the focus of potentially warring parents so that consideration is given to how this responsibility is practically shared post-separation.
- 5.76 Based on the experiences of Sweden and Australia, the panel has concluded that no legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents.
- 5.77 But we do see merit in inserting a general statement of intent, similar to the delay principle, into the Children Act 1989. This would reflect the case law on contact, reinforcing the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm.

²⁰⁷ Trinder, L *Child and Family Law Quarterly*, vol. 22, no. 4, 2010, 475-498

- 5.78 Such a statement would guide parents when coming to their own arrangements, whether or not they seek assistance via mediation or alternative dispute resolution. It would also reinforce the starting point of the courts, which has been recognised in case law, for the minority of cases that do require judicial determination. This amendment would require courts to take into account:
- the benefit to a child of having a meaningful relationship with both of his or her parents; and
 - the need to protect the child from physical or psychological harm.

Grandparents and other people who have an important relationship with the child

- 5.79 The panel recognises the importance that grandparents play in children's lives, and that this is a relationship that is often highly valued by both children and other family members. The importance of this continuing after parents have separated came through strongly in the call for evidence.

For children and young people keeping in touch with family is clearly very important. A recent Ofsted report noted that children voted keeping in touch with parents, grandparents, brothers and sisters "if I want to and they want to, wherever we all live" as one of their top ten wishes.

Children's Society, call for evidence submission

- 5.80 Part of exercising PR after separation includes facilitating, as far as practicable, the child continuing to have a relationship with those who have an important role in their life, such as siblings and grandparents, when this is in the best interests of the child. The need to achieve this should be built into the process of Parenting Agreements, discussed below.

- 5.81 Under the present system grandparents must also apply for leave of the court before making an application for contact. Some have argued that this is an unfair and unnecessary barrier, and have called for it to be removed:

Give dads automatic 50/50 status and grandparents automatic rights.

Parent, call for evidence submission

- 5.82 The panel has considered the evidence, and has concluded that, while it is important that all relationships the child holds most significant are able to continue in a meaningful and practical way following separation, the need to apply for leave should remain.
- 5.83 First, a significant number of submissions pointed out that, just as contact is not a right of parents but of the child, grandparents do not have a 'right' to contact. Furthermore, research from Cardiff Law School showed that grandparents are unlikely to lose contact with a grandchild if they had meaningful contact whilst the parental relationship was still in being and if they resist taking sides after the separation.²⁰⁸ The study also found that the benefit to children from a

²⁰⁸ Ferguson et al (2004) *Grandparenting in Divorced Families* Bristol Policy Press.

relationship will depend upon the extent to which the grandparents can engage with the interests of the child.

- 5.84 We are not convinced that the courts are refusing leave unreasonably or that seeking leave is slow or expensive for grandparents. It is apparent that the requirement to seek leave does serve a purpose, however, in preventing hopeless or vexatious applications that are not in the interests of the child.

Systems are in place whereby grandparents may either apply for Section 8 orders (generally with the permission of the court) and this filter is appropriate to avoid unnecessary and costly litigation between the child's parents and grandparents.

Law Review Committee of the Bar Council, call for evidence submission

While many grandparents can provide a vital positive role, in our experience this can sometimes be negative or harmful if it exacerbates and intensifies existing disputes or risks. We have seen some examples of cases where grandparents perpetuate or collude in abuse against a child and their non-abusing parent, especially if they are facilitating contact between the child and the abusive parent. In our view, for a court to grant contact with grandparents this should be assessed for risk in exactly the same way as for an abusive parent.

Women's Aid, call for evidence submission

- 5.85 Others argued that to remove the leave requirement would run counter to current policy, which is based on attempts to divert cases away from court.

Clear information for all parents

- 5.86 We believe that, from the outset of parenting, there needs to be a greater focus on, and awareness of, the importance of raising a child in a co-operative manner. This is vital if there is to be a real shift towards shared parenting and a reduction in the intractable cases that reach the courts. We see value in parents being given a short leaflet when they register the birth of their child. This would provide an introduction to PR, so that they are aware of both the legal concept and what it involves in practice. The leaflet would also contain information around how to access local parenting support services, which could be as simple as providing a link to an on-line information hub. Awareness of PR should also inform all parenting information classes and groups.
- 5.87 The aim of providing such information for parents is to raise each parent's awareness of the likely impact on the child should a rift occur in the parental relationship. They should be encouraged to see the situation from as rounded a perspective as may be possible, focusing on the practical arrangements for the child's care in a way that recognises the benefit to the child of having a continuing relationship with each of them.
- 5.88 Raising awareness early on will help to avoid a post-separation status quo based on a misunderstanding of what the law is and what the courts will promote, and an emphasis on 'rights' rather than shared responsibility.

Non-resident parents and others have some contact rights, in any event. People should be aware of how to exercise those rights without the need to enter a dispute and parents should be aware of the benefits of regular contact to non-resident parents and the wider family following separation. It is a real shame that all too often parents feel that their only recourse is through the courts.

Anonymous respondent, call for evidence submission

5.89 We agree. Information needs to be available universally and as soon as conflict arises post-separation. Families should know where to turn to get easy access to trustworthy information that:

- supports them to resolve their issues independently;
- directs them to find available support to assist resolve disputes outside of court; and
- helps them to understand what to do and what to expect where an application to court is necessary.

Parenting Agreements

5.90 The panel propose that Parenting Agreements between the parties should set out how they will jointly exercise their parental responsibility following separation. Parenting Agreements are currently available via Cafcass, known as Parenting Plans. Tools such as these are also used by mediators, as in Resolution's *Parenting after Parting* schemes, but have been used in an ad hoc rather than a routine way.

5.91 A Parenting Agreement is a document drawn up by parents setting out the manner in which they will act, either jointly or independently, in discharging PR for their child. Each family is different and the contents of the Parenting Agreement will also differ. The Parenting Agreement model encourages parents to discuss the range of parental activities and responsibility with a view to identifying matters of agreement or disagreement. The result can be that:

- focus remains on the detail of a child's day to day arrangements and care, rather than on status or broad ideas such as 'residence' or 'contact';
- the document sets out in advance what the ground rules are for the child's care in certain given situations (for example how decisions about future schooling are to be approached, or the division of time between one parent's home and the other), so that both parents know the position; and
- the number of disputed issues is reduced.

5.92 Parenting Agreements can increase confidence and trust between the parents and focus them on practicalities with less emotion. There should be an expectation that children (having regard to their age and understanding) would participate directly in the formation of the Agreement, by having their views heard in a meaningful way. Children should feel consulted on decisions that will affect them and be informed of the outcomes, especially where these are not in line with their wishes.

Changes to terms

- 5.93 We received evidence on the need for changes to terminology, particularly around 'contact' and 'residence', in order to promote the fact that both parents retain a role and responsibilities in their child's life following separation. A focus on the shared role for parents post-separation, it was argued, would place both parents on an equal footing and discourage one parent from arbitrarily restricting contact; and reduce court disputes.

If the starting point was the expectation and assumption that both parents would continue to parent the child and mediation was given at the outset by the state to achieve this, then the court's time would only be needed for exceptional cases, where child safety was an issue. The system at present is biased in the extreme against men, or against the non-resident parent. The very use of the term 'non-resident parent' detracts from equality.

Grandparent, call for evidence submission

- 5.94 Chief Justice Diana Bryant in Australia told the panel she had no doubt that the move away from using 'residence' and 'contact', made in 2006, has been very beneficial.
- 5.95 We recommend the removal of the terms 'contact' and 'residence' from all issues concerning parents with PR. Instead the focus should be on encouraging parents to work out a plan that sets out the arrangements for the child after separation, including where the child will live. Parents who cannot agree will be able to apply to the court for determination of specific issues. This is intended to reduce the number of long and unfocused hearings, by focusing parents and the court on the outstanding issues rather than on matters of status. The terms, forms and evidence required by the court should also be reviewed to reduce their contribution to conflict.
- 5.96 One facility of the present law is that a holder of a residence order automatically has permission to take the child out of the jurisdiction of England and Wales for up to 28 days. This automatic provision will be lost to parents as a result of our proposals, but we believe that any issue about short foreign trips should be included, along with all other aspects of PR, in the Parenting Agreement.

Applications by those who do not have parental responsibility

- 5.97 We recommend that a father without PR who wishes the court to consider the child living with him (currently a residence order) should first apply for PR and then negotiate for this to be included on the Parenting Agreement, or apply for a specific issue order.
- 5.98 A father without PR who wishes to spend time with his child is not having a specific issue in relation to his (non-existent) PR determined, he is simply seeking contact and, as such, a contact order seems appropriate. We will give further thought to how disputes should be resolved where fathers do not have PR in the next stage of our work.

5.99 The full range of the four orders under Children Act 1989, section 8 should remain available to other non-parental relatives. Thus a non-parental relative, such as a grandparent, may apply for a contact order or even a residence order, in addition to a specific issue order or a prohibited steps order. The benefit of keeping this range of orders for such cases is that, if it is in the child's best interests to reside with a grandparent, for example, the grandparent will gain PR for the duration of the residence order.²⁰⁹

Disputes should be resolved using Dispute Resolution Services wherever possible

5.100 We set out some further background on mediation and PIPs before turning to our proposed changes in processes.

Mediation

5.101 Many submissions pointed to mediation as a means of encouraging parties to put aside petty disputes and focus on the important issues, take responsibility and come to arrangements that will work in the long term:

Family Mediation is predicated on assisting couples to resolve their own disputes in the way best suited to their needs, and the positive involvement in children's welfare by both parents. The fact that mediation is based on encouraging couples to take ownership of their own dispute leads to commitment to outcome and goodwill rather than a detached involvement in someone else's imposed resolution. All too often, court-based processes can magnify and embed conflict at a personal level, and replace personal responsibility with an impersonal imposition of 'resolution'. This can have far-reaching adverse implications in future family relationships.

Family Justice Council, call for evidence submission

We support compulsory attendance at mediation information and assessment meetings in relation to all family cases (with limited exemptions) before a court application is processed. That would increase the take-up of mediation, reduce court waiting lists and encourage co-operation over children. Family disputes which are resolved through mediation are cheaper, quicker and, according to academic research, less acrimonious than those disputes which are settled through the courts.

Magistrates Association, call for evidence submission

²⁰⁹ under s12 of the Children Act 1989

Case study – Oxfordshire Family Mediation

A case was referred from court, where a mother had made an application for the daughter to change her name to her own (the mother's). The mediator saw both parents and they agreed that the daughter, aged 12, should be seen. When the mediator met her, the daughter was happy with the contact arrangements with her father and his partner. In terms of the name she said that she had always been known by her father's name and she didn't want to change this, though she understood that her mother wanted her to feel a greater part of her family. She asked whether her mother's name could be a middle name. The parents met to discuss this and decided to investigate the means for this to happen formally.

5.102 We have reviewed the available evidence on the effectiveness and cost of mediation. Evidence on effectiveness is mixed and some, for example Dingwall, take a more sceptical view.²¹⁰ High quality evidence on the effectiveness and cost of mediation seems to be lacking. The proliferation of different approaches to mediation makes it difficult to draw firm conclusions.²¹¹ However, evidence suggests that parents do value the assistance provided.²¹² We have also been impressed by the strong and wide variety of evidence we received in the UK, Sweden and Australia.

5.103 Submissions also pointed to possible cost savings.

As much of all cases as possible should be conducted outside of the courts, not by lawyers and judges, but by mediators, counsellors and skilled children's practitioners. Luckily, these people generally do not seek the remuneration commensurate with those they would replace in the system.

Member of the public, call for evidence submission

Cost would be the incentive [of mediation] - people disagree but when faced with hard realities of money being wasted on lengthy proceedings mediation should be compulsory as a first step.

Member of the public, call for evidence submission

Early research found no cost saving through mediation.²¹³ More recently (2007) the NAO estimated that the average cost of legal aid for successfully mediated cases was £752 compared to £1682 in non-mediated cases. Agreement rates for publicly funded and privately funded mediation clients vary in a number of small scale studies. Data from the LSC shows that the full agreement rate for publicly funded mediation clients is 66%.²¹⁴

5.104 The extent of any cost savings will need to be tracked as the system is developed.

²¹⁰ Dingwall, R *Divorce Mediation: Should we change our mind?* Journal of Social Welfare and Family Law, Volume 32, Issue 2 June 2010, 107 – 117.

²¹¹ Walker, J (2009/unpublished) *Family Mediation: The Rhetoric, The Reality and The Evidence*, Paper presented to Ministry of Justice Family Mediation Group on 2 Feb 2011

²¹² Trinder, L et al (2006) *Research report RR720: Evaluation of the Family Resolutions Pilot Project* Nottingham Department of Education and Skills

²¹³ Davis et al 2001, *Monitoring Publicly Funded Mediation*, report to LSC

²¹⁴ Legal Service Commission internal data 2009/10 data, unpublished

Developing the system to meet the needs of users

- 5.105 The panel accepts that the evidence for the durability of mediated agreements compared to court outcomes is currently limited. The panel is building its proposals on what it has heard through the call for evidence. Further research is needed, but this should be used to help inform the development of the assessment process – ensuring people are directed to the most appropriate type of forum to help them resolve their difficulties. Assessment skills, including identification and appropriate action when risk factors are present, are key at this point. This may include support outside mediation, including for mental and physical wellbeing. We are aware, for example, of the approach of the Tavistock Centre for Couple Relationships through their *Parenting Together* counselling service and will continue to consider how to build in wider support services.
- 5.106 Other developments in England and Wales are expanding the range of Dispute Resolution Services, The Family Law Arbitration Group (FLAG) intends to launch a scheme as an additional tool to help parties resolve financial disputes post-separation. We would expect a broader range of services to develop with a stronger move towards ADR.
- 5.107 There is also much more to learn from other countries where the approach to dispute resolution is becoming increasingly sophisticated, notably parts of the United States (Connecticut and Florida appear to be leading examples) and in Australia.

Separated Parents Information Programmes

- 5.108 PIPs were seen as a great success in our evidence, with calls for more of them and for them to be made compulsory for all who want to bring private law proceedings.
- 5.109 At present PIPs are available only as a court-ordered contact activity under the Children and Adoption Act 2006. Cafcass figures show a threefold rise in the number of separating parents taking part in court-ordered PIPs this year. The growth in referrals is thought to be due to greater awareness by judges, improved partnership between the courts and Cafcass, and the removal of the attendance fee from April 2010. From 1 April 2009 to 31 March 2010, 945 people participated in the programme. In the five months from 1 April to 31 August this year, the number taking part rose to more than 3,000. It is expected that 13,000 will be delivered by the end of 2010/11, with more than 20,000 planned for 2011/12.²¹⁵
- 5.110 These are early days for PIPs, and they should continue to develop based on research in what works. We note that in Australia there are indications that having lawyers explain the disadvantages of going to law is beneficial in that it gives the parents a realistic and grounded understanding of what resort to court is likely to involve and what it can, and cannot, achieve.

²¹⁵ Cafcass Case Management system, unpublished

Case Study: Separated Parents Information Programmes (PIPs)

The clients were high income professionals who had been to court several times, with no communication between them other than through lawyers. They had a six year old son. Contact was erratic and a focus for disputes to which the child was exposed. The judge made a contact order and also ordered them to attend a PIP.

During the PIPs:

The father was very defensive when he first started the course - he could see no other alternative to keep doing what he was already doing, that there was no other option. He said that they had spent their child's inheritance on the courts but he couldn't give up because doing so would mean giving up on his son. He said that he had tried to communicate with his ex-wife but that she didn't trust him. He did not appear to shift when hearing different perspectives from other mothers on the course. However hearing other fathers change their opinions helped him think about things differently.

It was evident from his contributions to the group that he started to think and express himself differently when working through the scenarios and thinking about tips for communication. He said that he could see how sensible it was and that a curtain had been lifted from his eyes.

He said that he could see that he had been very intense because he was so distraught when she left and that things had just happened and escalated.

The mother said she desperately wanted to be a good parent and that she knew that her ex-husband was also a good parent and a good person. She had left the relationship and thought that by keeping her distance she was doing all the right things so as not to inflame the situation. She said that direct communication was impossible because it always led to hostility. Whenever they had tried to communicate she felt interrogated and this was why she had put such strong limits on communication. She didn't want to continue with the court system but could see no alternative. The question about imagining her child having a conversation with friends in ten years' time impacted on her quite strongly – it was a light bulb moment in the course. She also got quite emotional when discussing the loss process, although she had been the one to end the relationship she desperately wanted to be able to communicate with him and felt very guilty.

She said that she could see that withholding communication could potentially be very damaging for their child and wanted to start building a relationship as parents not partners but didn't think that he would.

Both were encouraged to attend mediation and are still going through the process. They have had one session where they agreed the details of how they would communicate at pick-up and drop-offs. They also agreed about times for phone calls and that they would have one conversation a week specifically about their son. If either one started to feel uncomfortable during the conversation they would say so and agree to arrange a phone call within a week.

They were hesitant at first but were able to communicate well during the mediation session.

Processes - Effecting the Change

5.111 Our aim is a supportive, clearly delineated process for private law cases that emphasises PR at all stages, provides information, manages expectations and that helps people to understand the costs they face at each stage. The emphasis throughout should be on enabling people to safely resolve their disputes outside court wherever possible.

5.112 The process runs from early advice and information, right through to the end of the court process. The diagram below (*Fig ix*) shows it in outline.

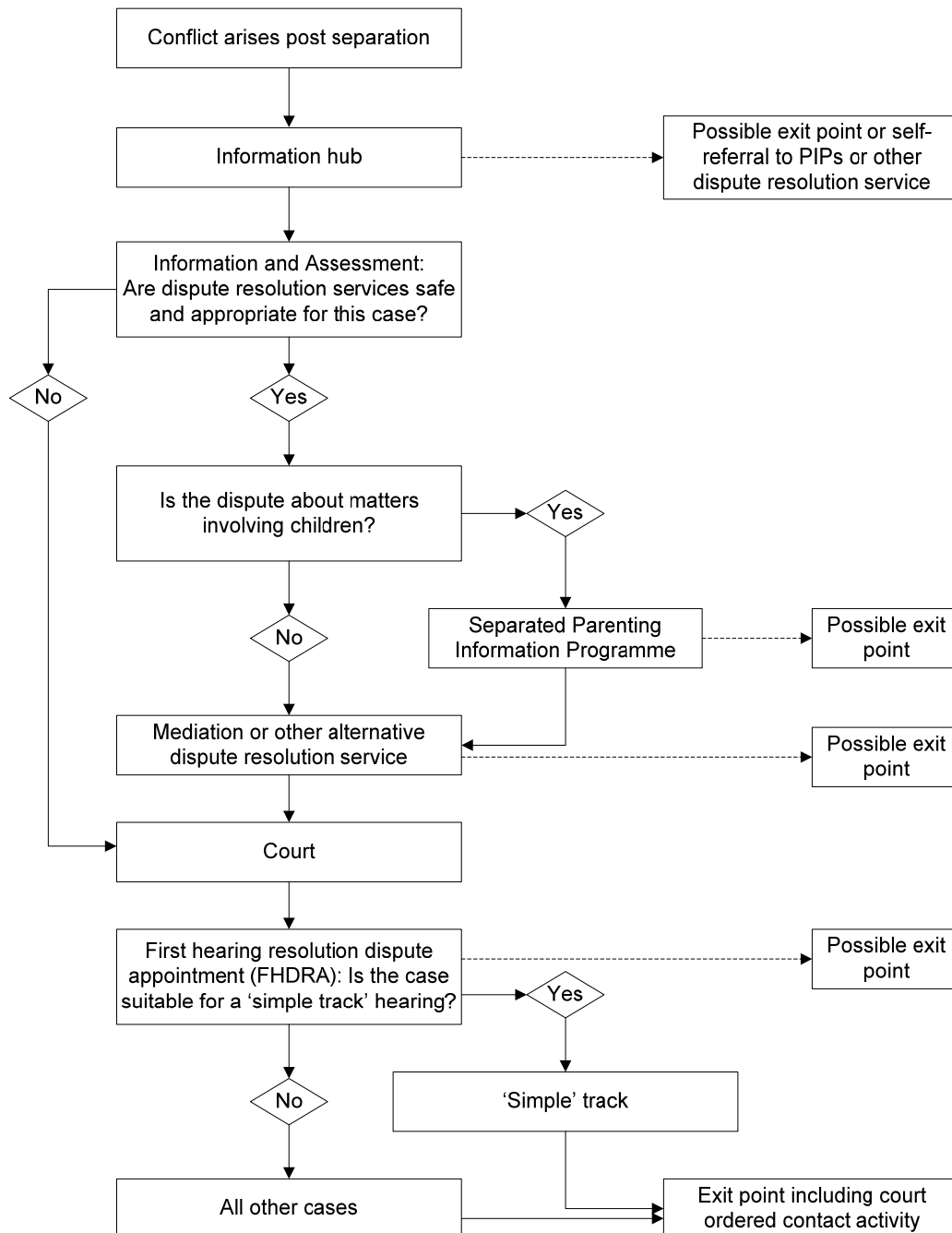


Fig ix – Diagram showing proposed private law process

Information hub

5.113 Government in its own administration necessarily disaggregates the issues that arise post-separation. Families, of course, do not separate things out in this way. The Green Paper *Strengthening families, promoting parental responsibility: the future of child maintenance* published by the Department for Work and Pensions (DWP) recognised that “families need a range of support around the point of separation to enable them to be in a position to reach family-based arrangements.”

5.114 The Green Paper invited views on how to integrate support on the wider post-separation issues to a single point of access for families.²¹⁶ We support the aim to provide a range of family support around the point of separation. We recommend the introduction of an online information hub for England and Wales to provide a single point of access for information, legal documents and applications for family related issues. The online system would be supplemented with a telephone helpline and paper based information for those without access to the internet or who need further information on a specific issue. This will include:

- clear guidance about parents’ responsibilities towards their children whether separated or not, including their roles and responsibilities as set out in legislation;
- information and advice about services available to support families, whether separated or not;
- information and advice to resolve family conflicts, including fact-sheets, case studies, peer experiences, DVD clips, modelling and interactive templates to help with Parenting Agreements;
- advice about options for supported dispute resolution, which would highlight the benefits of alternative forms of dispute resolution, including mediation, and PIPs;
- information about court resolution, should alternative dispute resolution not be suitable, and costs of applications;
- support for couples to agree child maintenance arrangements;
- guidance on the division of assets; and
- what to do when there are serious child welfare concerns.

5.115 The hub should include support and information for children and young people, to help them through this difficult time. It will provide information to divorcing couples about the divorce process, directing them to the online divorce portal where they will find the forms and tools they need. It should also be a source of information for wider family members, who can often be the first and main point of information and emotional support for separating couples.

²¹⁶ It is important to note that the statutory child maintenance system extends to Great Britain but our remit only extends to England and Wales.

Case study – Online calculator to support couples considering divorce in financial matters

In December 2010, MoneyMadeClear²¹⁷ launched an online calculator to help couples thinking of separating to get an indication of the financial impact. The calculator helps people draw up a budget, work out what they have and what they owe, and how they might split what they have.

This is a first of its kind, created with help from experts, including Relate, Resolution, National Family Mediation, Families Need Fathers and the Family and Parenting Institute. The calculator has received positive feedback both during the testing phase and now that it has been launched.

In addition, the website provides information on what couples should consider when deciding to break up, what options are available to them if they have children, how they could go about splitting any assets they have, what steps they need to take, their options on living arrangements and managing their money post-separation. The site averages nearly 5,000 visitors per month.

- 5.116 The focus of all information and professional intervention in this area should be to support and encourage each parent to reach a child-focused agreement on arrangements for their child's future welfare and care, based on recognition of their parental responsibility. The aim is that most parents would come to an agreement and construct a Parenting Agreement at this stage of the process.
- 5.117 We propose that parents should be able to download a template for a Parenting Agreement, with supporting information to assist completion, from the hub. They may choose to complete this without further external support. However, when parents seek the assistance of mediators or any other form of alternative dispute resolution, the focus should be on helping the parents to negotiate a Parenting Agreement for their child's care. Where a Parenting Agreement is made between parents it should be signed by them and, if agreed during mediation or any other professional intervention, may be witnessed by the professional concerned.
- 5.118 Whilst there is no facility for the agreed Parenting Agreement to be filed or registered with the family court, provision should be made in legislation to ensure that a signed Parenting Agreement has weight as evidence in any subsequent parental dispute.

Support for parents to develop Parenting Agreements

- 5.119 Some parents may need further help to develop Parenting Agreements. Many sources for this are available, but there is widespread ignorance about what these services involve, where to go to access them or the advantages of doing so over making a court application.
- 5.120 Recent research commissioned by the Ministry of Justice highlights this:

²¹⁷ Moneymadeclear is a website that provides impartial information about finances to couples that are going through a divorce or separation. The website is provided by the Consumer Financial Education Body established by the Financial Services Authority.

Awareness of alternative dispute resolution (ADR) and mediation was generally low among those participants with civil and family disputes... Most of those participants who had not used mediation were not aware of it. But a few explicitly rejected it as an option... Less self-confident participants (who tended to be women) worried that they would not be able to stand up for themselves; and wanted more support than mediation was thought to offer. Alternatively, some participants assumed mediation would be like relationship counselling which did not seem relevant or useful to people who had already separated.²¹⁸

5.121 With hindsight, many participants wished they had tried or persevered with mediation rather than go to court.

5.122 The panel heard that some people are reluctant to use ADR, such as mediation, because they think court will be more effective. One issue is that the name (alternative) puts many people off and automatically makes it look secondary to court processes.²¹⁹ Many do not understand the benefits of ADR and some think it is a pre-separation service to help with relationship issues.

There should be greater incentives for the use of ADR - but most importantly, people need to know and understand what it is, where it is available and to have the opportunity to discuss how it may be of assistance for them. The Gingerbread report into contact - 'I'm not saying it was Easy' - indicated that most people who had separated and had had to deal with issues relating to contact for their children when interviewed described what could be most closely identified as a mediation process when asked what would have helped them most - but did not identify it as such. Any new system should encompass an opportunity for anyone making a legal application to find out about ADR processes - such an opportunity would also present the prospect of providing other information in regard to the effect of family relationship breakdown for children and for adults and information about other supporting services.

Magistrates Association, call for evidence submission

5.123 We recommend rebranding ADR as 'Dispute Resolution Services', in order to minimise one deterrent to their use.

Directing users to appropriate services

5.124 In those cases where couples do decide that they need further support to help resolve their dispute, our process is based on using assessment and targeted interventions to ensure that users are directed to the most appropriate form or method of resolution at every stage. This builds on the approach of the pre-application protocol, which aims to ensure that people know about mediation before they make an application.

²¹⁸ MOJ (unpublished) Customer insight into the experience of civil and family justice events and areas for change Part of MOJ Understanding Customers Research Programme 2010.

²¹⁹ Ibid

A requirement to consider Dispute Resolution Services

5.125 In our view, the majority of users would benefit from a requirement to learn about and consider Dispute Resolution Services before making an application to court. To this end, the panel proposes to make it compulsory for all parties seeking to litigate first to be assessed by a mediator for suitability of attendance at a PIP and for use of a dispute resolution service such as mediation (subject to the provision of an emergency route to court, discussed in the section at paragraphs 5.129 – 5.130). The mediator will need to give a certificate to allow a court application. The intention is that a minority of cases will require court determination, namely those with significant complexity, a point of law or pivotal point of fact to be considered, or where there are serious welfare concerns.

5.126 One or both parties may be unwilling to pursue out of court dispute resolution, even though their case may be suitable for it. Unlike the assessment session and PIP, we do not recommend dispute resolution be compulsory. However the court should take into account what attempts have been made to resolve the issue before the application. The certificate issued by the mediator (see paragraph 5.132 below for more detail) should identify those parties who have refused to take part in the dispute resolution process. Judges will retain the power to order parties to attend a mediation information session and may make cost orders where it is felt that one party has behaved unreasonably.

Assessment for Dispute Resolution Services

5.127 The hub will provide clear information on the different services available and direct users to local, accredited mediators who will provide further information and undertake an assessment of the case. The mediator's role here is central. They will:

- assess whether there are risks of domestic violence, imbalance between the parties or child protection issues that require immediate diversion to the court process. They will, if so, issue a certificate to that effect; and if not
- provide information on local Dispute Resolution Services and how they could support parties to resolve disputes;
- encourage the take up of Dispute Resolution Services and refer the case to a local intervention (most likely mediation but, possibly, other services depending on local provision, for example a Domestic Violence Perpetrator Programme, currently available only by order of a court);
- contact the other party and invite them to attend a mediation information and assessment session; and
- actively manage the case until the issues are resolved or until an application to court is made.

5.128 The assessment will need to be developed carefully, drawing on learning from other jurisdictions where similar assessment models are already in use. This is a difficult task and experience elsewhere – in Australia for example – shows that, unless there is proper design of the process and training and supervision of mediators (discussed below), people who are not suitable for mediation can be

pushed into it, with consequent risks to parents and children. Australia and Connecticut also use screening tools to help identify risk and target people to the most appropriate intervention.

Case Study – Family Relationship Centres, Australia

The Australian family law system underwent significant reform in 2006, through the introduction of the Family Law Amendment (Shared Parental Responsibility) Act 2006. This included the establishment of 65 Family Relationship Centres (FRCs) and a national advice line. These have been established prominently often on high streets, easily accessible for people who are experiencing relationship difficulties. FRCs were initially designed actively to discourage input from lawyers, but this has been reversed and now lawyers increasingly attend dispute resolution sessions with their clients.

The process for those approaching FRCs for assistance broadly encompasses:

- assessment at first contact as to whether dispute resolution is likely to be appropriate, followed by detailed screening and risk assessment;
- making contact with the other party to participate (usually up to three times);
- attendance at an information session, also attended by other people going through the process. Lawyers in some centres participate in these to present information about the legal process;
- education programmes (similar to PIPs); and
- three hours of publicly financed mediation (for those deemed suitable), although charges are due to be introduced.

Emergency routes to court

5.129 There may be some circumstances where even the relatively short time required for the assessment process is too much, where there are, for example, concerns about the risk of child abduction or where domestic violence is a strong concern. So, where the case requires urgent attention, there will be an emergency route directly to court. This will also allow for immediate consideration as to whether the child needs separate representation via a rule 9.5 appointment.²²⁰ The information hub will provide clear guidance about where an individual may be exempt from the need to consider mediation and what they should do.

5.130 Whilst allowing for emergency applications, the panel believes that the exemptions to the assessment process should be narrow, with a clear expectation that the great majority of applicants should, in the first instance, meet a mediator. Initial exemptions should be limited and the panel is keen to hear views about what these should be.

²²⁰ Note that this will be a Rule 16.4 appointment from 6th April 2011, under the Family Procedure Rules 2010.

After the assessment: PIP and mediation, or other dispute resolution service

- 5.131 All separating couples (both applicants and respondents) with disputes about children's matters will be required to attend a PIP, where this is considered appropriate by the assessor. Some couples may be able to resolve disputes using the skills they develop on the PIP. Those who need further support will be expected and encouraged then to seek to resolve their disputes through mediation or another dispute resolution service. Those who do not wish to mediate will need to return to the mediation assessor to obtain a certificate to enable them to apply to court. Those who fail to reach full agreement through mediation or another form of dispute resolution will also need to obtain a certificate.
- 5.132 Where a mediator considers that one parent is using the assessment and information process to extend and delay proceedings, to the detriment of the other parent and possibly the child, the mediator would issue a certificate for court under a general heading of the kind allowed in Australia (see point f, in the box below).

Case study – Exemptions to Family Dispute Resolution in Australia

In determining whether family dispute resolution is appropriate, the family dispute resolution practitioner must be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:

- a) a history of family violence (if any) among the parties;
- b) the likely safety of the parties;
- c) the equality of bargaining power among the parties;
- d) the risk that the child may suffer abuse;
- e) the emotional, psychological and physical health of the parties; and
- f) any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.

If, after considering these matters, the family dispute resolution practitioner is not satisfied that family dispute resolution is appropriate, the practitioner must not provide family dispute resolution.

Qualifications of mediators

- 5.133 This process envisages an expanded role for mediators. They will need training and experience as well as support and continuing professional development, and the mediator must be accredited to a high standard. Currently the LSC sets a minimum standard that all mediators must meet in order to provide mediation under legal aid. Mediators must be assessed as competent through either:
- successful completion of the competence assessment process managed by member organisations of the Family Mediation Council; or
 - practitioner membership of the Law Society Family Mediation Panel.

- 5.134 This requirement is set out under the Mediation Quality Mark Standard with which contracted organisations have to comply. It covers seven key quality areas.
- **Access to service:** planning the service, making others aware of the service and non-discrimination
 - **Seamless service:** signposting and referral to other agencies
 - **Running the organisation:** the roles and responsibilities of key staff and financial management
 - **People management:** equal opportunities for staff, training and development, supervision and supervisors' standards
 - **Running the service:** case management, independent review of files and feedback to caseworkers
 - **Meeting the clients' needs:** providing information to clients, confidentiality, privacy and fair treatment, and maintaining quality where someone else delivers part of the service
 - **Commitment to quality:** complaints, other user feedback and maintaining quality procedures
- 5.135 We recommend that all mediators should be accredited at least to this level. The standard should be reviewed further to ensure practitioners are able to meet the demands that an expanded role will require.
- 5.136 It will be particularly important to ensure that all practitioners are able to assess risks of domestic violence or child protection concerns, which could make Dispute Resolution Services inappropriate. Mediators and dispute resolution practitioners already receive training around domestic violence as part of their accreditation. This will need to be further developed. However, domestic violence should not automatically preclude the use of dispute resolution. Domestic violence varies greatly in its characteristics, and we have heard evidence that the mediation process can successfully handle some cases that involve it.
- 5.137 Those practitioners who are not qualified to the expected standard should be allowed a specified time to reach this. The Family Justice Service will not approve mediators where this standard is not met.
- 5.138 We recognise that it will take time to build and train the workforce consistently across England and Wales to deliver services that meet the required standards. Government will need to work with the sector to build capacity and supply to ensure that all users have access to high quality services. Implementation will need to be managed and phased carefully.

The court process – children's matters

- 5.139 As noted earlier, parties will only be able to make an application to court, having been given a certificate by the mediator, for determination of a specific issue. The judiciary nationally should be encouraged to adopt a short statement of

‘judicial expectations’ (in a form similar to that recently issued by the judges and magistrates of the Midland Circuit, see Annex Q).

- 5.140 Where an application to court is made, a court gatekeeper will assess it initially; this should be a judge working with a legal advisor. Where an applicant has multiple issues that need consideration by court, including disputes over money for example, these should be dealt with by the same judge to increase speed and efficiency. This is something that we will consider further at the next stage.
- 5.141 We have also heard arguments that a single application form should be developed that applicants would fill in once, covering all issues for which they were seeking judicial determination. Whilst this is an attractive proposal, there is some risk that the form could become long and complicated in order to deal with all the potential issues that could be in dispute.
- 5.142 In addition to the checks made at the earlier stage of mediation, safeguarding checks should be completed at the point of entry into the court system.
- 5.143 One study found that parents raise serious welfare concerns in over half of all contact cases.²²¹ In a small-scale snapshot undertaken by the Review team, among the 75 applications studied where the C100 harm box had not been ticked, around a third of applicants and a sixth of respondents were found to have convictions or cautions relevant to safeguarding. This is in line with Aris and Harrison’s finding that in 29% of 140 cases where applicants answered no to the harm question examination of the court case files revealed evidence of a high level of violence.²²² The family was known to the local authority in almost one half of cases. Domestic violence was alleged in telephone interviews in around one third of the 100 cases.
- 5.144 Cafcass Cymru has developed a Domestic Abuse Toolkit for use in all private law cases, where the organisation’s practitioners systematically screen for issues of domestic abuse and where necessary conduct an assessment. Cafcass’ screening process before the first hearing is set out at the beginning of this chapter. These safeguarding checks identify in a substantial minority of cases significant issues that may otherwise not be found.
- 5.145 Checks, in addition to those made at assessment, should continue to be completed at point of entry by Cafcass and Cafcass Cymru now, and by the Family Justice Service in future. Information held by police and local authorities, teamed with information gathered from interviews with both parties individually, should as now be brought together for the court for the first hearing. The case will then be listed for a First Hearing Dispute Resolution Appointment, as now under the Private Law Programme. Cases may also need to be referred to the local authority.

²²¹ Hunt, J and Macleod, A (2008)

²²² Aris and Harrison, University of Warwick, (2007) ‘Domestic Violence and the Supplemental Information Form C1A’, London MOJ

First Hearing Dispute Resolution Appointment (FHDRA)

- 5.146 We heard evidence that the FHDRA plays a valuable role and should continue. We agree it would help focus on resolving any specific issues in order to support and enable the parents to complete and sign a Parenting Agreement for their child.
- 5.147 We also heard evidence that more focused streaming of cases could be beneficial. The Family Law Bar Association recommended that active consideration be given to putting some cases on a track that would lead to swifter decision making. In particular, they suggested that a model similar to the allocation of cases in civil work – to the ‘fast-track’ or the ‘multi-track’ – could be adopted. We agree and set out proposals about how a two-track system could operate below.
- 5.148 If proceedings remain unresolved following the FHDRA, the case should be allocated to a ‘simple’ or ‘complex’ track. A named judge or named magistrates will conduct the next hearing and all subsequent hearings. Other than in certain exceptional circumstances (for example the long-term indisposition of the judge or an unforeseen development in the case, making it necessary for referral to a higher level of judiciary), the allocated judge or magistrates should conduct every hearing within the proceedings.

The ‘simple track’

- 5.149 We propose the establishment of a ‘simple track’ facility to determine narrow individual issues, where the court undertakes a tightly managed hearing (limited to up to two hours), held at short notice and during which each party can be heard.
- 5.150 Tailored case management rules and principles will apply. These could include:
- informal hearings;
 - limited cross examinations;
 - removal of strict rules for evidence; and
 - limitations on numbers of hearings and the expectation of only one in the majority of cases.
- 5.151 These are likely to be relatively simple cases without allegations of domestic abuse, and where no findings of fact are required.
- 5.152 The ‘simple track’ will also allow the court to adopt a more flexible approach in resolving disputes. The court should be able to proceed in whichever manner it considers practical and fair in order to support the parties to reach agreement. At any stage the judge may move the case to the ‘complex track’. Where a case is assigned to the ‘simple track’ clear instructions will be given to both parties to enable them to understand the process and to minimise the scope for delays. The parties will be required to submit all documents related to the case within clear deadlines before each hearing.

Complex cases

5.153 The President of the Family Division is to be invited to build on the success of the FHDRA and to focus on further developing the case management and trial skills of the family judiciary in relation to those cases that are complex. The panel suggest that the following proposals might guide complex cases:

- focus upon the future arrangements for the welfare and care of the child, and limiting the parties to litigating any issues relating to past behaviour to those that may impact upon the future arrangements;
- early evaluation of those factual issues that do need to be determined and those that do not;
- an early hearing to determine the factual issues that do call for resolution;
- early declaration as to the weight that the matters that do not call for resolution may attract;
- not listing a final hearing unless and until it is necessary to do so but, instead, adopting the use of the 'issues resolution hearing' from the Public Law Outline; and
- in the event that issues are to be contested at a full hearing, the hearing should be tightly controlled by the judge who, in accordance with the overriding objective in the Family Procedure Rules 2010, will determine the time to be taken by each party and each witness in a proportionate manner.

Breach of court orders

5.154 Where a court has made an order and the parent named in the order has failed to comply without reasonable excuse, the court has a range of enforcement powers. Refusal to obey a contact order is contempt of court. The High Court and county court have unlimited powers to fine people for contempt of court, while this is limited to £2,500 in the Family Proceedings Court. They can also order a term of imprisonment of up to two years (limited to one month in the Family Proceedings Court). However, it is widely recognised that such penalties may not always be appropriate because of the effect they may have on the child.

5.155 Courts were given wider enforcement powers in 2008. The court now has the power to enforce the order by requiring the person in breach to undertake unpaid work. Either parent can apply to the court under section 11J of the Children Act 1989 to enforce the contact order, if it has been breached. There are also provisions to enable the court to award compensation for financial loss from one person to another, for example where the cost of a holiday has been lost as a result of failure to comply with a contact order. These provisions are in addition to the court's powers to treat the breach of a contact order as a contempt of court.

5.156 When the Family Procedure Rules are introduced in April 2011, individuals seeking to enforce a financial order will be able to apply to court for enforcement, using whatever order the court thinks appropriate.

5.157 Nevertheless, issues around enforcement of court orders in private law persist and leave many parents deeply disillusioned.

- 5.158 It is, of course, important for court orders to be followed. It is unacceptable for an order to be flouted by either party. We have considered many ideas to strengthen the enforcement powers available, including measures to suspend driving licences, electronic tagging and reversing residence orders. We have, however, concluded that these would have little if any effect. Those currently available are rarely used even now. Linking of contact and maintenance is considered in more detail below.
- 5.159 Where an order is breached, a party should have access to immediate support to resolve the matter swiftly. If the order is not obeyed, the case should go straight back to court, to the same judge. The case should be heard within a fixed number of days, with the dispute resolved within a single hearing. Where the order needs adjusting to reflect the changing needs of the family, the court gatekeeper could do this, without the need to go to a formal hearing.
- 5.160 Where an order breaks down after 12 months, we believe the parties should be expected to return to Dispute Resolution Services before returning to court to seek enforcement. This reflects the situation in Australia. Similarly if the dispute concerns a different issue(s), the parties would need to go to an assessment with a mediator and attempt to resolve the issue through Dispute Resolution Services.

Contact and maintenance

- 5.161 On 13 January 2011, the Department for Work and Pensions (DWP) published a Green Paper on the future of the Child Maintenance and Enforcement Commission entitled *Strengthening families, promoting parental responsibility: the future of child maintenance*. There, DWP asked us to consider whether there might be circumstances when it would be right to link maintenance and contact. The statutory child maintenance system, which DWP is responsible for, extends to Great Britain whereas our remit is confined to England and Wales. In Scotland, contact is a devolved matter for the Scottish Parliament.

Strengthening families, promoting parental responsibility: the future of child maintenance

“We know that one of the most significant issues for non-resident parents is when contact with their children is denied or withheld. This can lead to tension and hostility between the parents, especially where maintenance is still being collected through the statutory system. We are keen to explore approaches that allow maintenance arrangements to be considered in the round when determining appropriate contact enforcement measures. We recognise, however, that there are challenges in linking maintenance and contact in this way, most importantly how such decisions might impact on the best interests of the child. We also recognise that it is important that this issue is considered within the context of wider reforms that are currently being progressed elsewhere in government. We have therefore requested that the Family Justice Review consider this issue as part of its wider work in developing options for reform of the family justice system.”

- 5.162 We invited further views on this issue from those who responded to the call for evidence and also considered relevant responses to the Green Paper. There were about 70 responses.
- 5.163 The central concern over linking contact and maintenance is that, in effect, the welfare of the child would cease to be the paramount consideration. Submissions cited the ruling by the Court of Appeal in *Re B (Contact: Child Support)* [2006] EWCA Civ 1574, [2007] 1 FLR 1949. Here Wilson LJ stated that it would be “positively unlawful” to consider the consequences of statutory provisions regarding the payment of child support when making orders for contact or residence, “because it would be to introduce a consideration unrelated to the child’s welfare”.
- 5.164 The panel agrees that every child has the right to contact with both parents and to be financially supported by both parents. A child should not be penalised through losing contact with a parent if they fail to pay maintenance, nor should they be denied maintenance where contact is not considered appropriate for safety reasons. The panel is clear that both parents have full responsibility to ensure their children are financially and emotionally supported.

The implicit argument in the Green Paper is that the prospective loss to a child of contact with the other parent should weigh more heavily than the withdrawal of child maintenance. We would warn strongly against going down this road. The emotional and financial well-being of a child should not be traded one against the other.

Gingerbread, call for evidence submission

- 5.165 The panel also heard concerns that linking the two issues together could fuel animosity, leading to more entrenched positions and greater (and longer) litigation, all of which would potentially harm the child. Linking contact and maintenance would raise considerable challenges in practical terms, both in complexity of adjudication and the repeated need to negotiate both contact and financial orders when circumstances change.
- 5.166 We do, however, recognise the distress and sense of unfairness felt by parents who are continually refused contact by their former partner and yet have to pay maintenance. Courts can order unpaid work, fines and imprisonment where contact is refused, as noted above. We have concluded that courts should be able also to order reductions or suspensions in maintenance payments via CMEC, where this is in the best interests of the children.
- 5.167 Equally one parent may give no financial support, even when the other parent encourages contact. This is clearly wrong. The evidence shows, however, that children benefit from continuing contact with both their parents. So we have concluded that it would not be in the interests of children to deny them contact with one of their parents because that parent has failed to pay maintenance.
- 5.168 Although the Child Maintenance and Enforcement Agency’s remit extends to Scotland, our recommendations relate to England and Wales only.

Money and property

5.169 People in dispute about money or property (known as ancillary relief) should be expected to access the information hub and be assessed for mediation before application to court, in the way set out earlier.

5.170 Changes to the substance of the law in relation to ancillary relief were outside the scope of this Review. But evidence suggested that legislative change, to establish a codified framework, could reduce the need for judicial intervention.

Case study: division of property in Sweden

In Sweden, court disputes over division of financial assets and liabilities are rare. Where disagreements do arise, these are usually resolved via an administrator (who is often a Swedish attorney). This is ascribed largely to the principles and provisions set out in law following the dissolution of marriage.

Maintenance: After divorce, each spouse is responsible for his or her own support. Where one spouse requires financial support for his or her maintenance for a transitional period, they are entitled to an allowance from the other spouse according to what is reasonable, having regard to the latter's capacity and other circumstances. A maintenance allowance may be considered necessary to support readjustment, such as for example to enable the spouse in need to have an opportunity to undertake training in order to obtain employment. In exceptional circumstance there is scope for more long term maintenance to be paid. Where a spouse's circumstances change (for example, through remarriage or cohabiting with a new partner) the maintenance may be reassessed.

Debt: Each of the spouses is personally responsible for his or her debts. Thus a spouse's creditors are not entitled to obtain payment out of the property of the other spouse, irrespective of whether the property comprises marital property or is the spouse's separate property.

Division of assets: there is a clear distinction made in law between marital property and private property.

- Marital property – the most common and applies to all property unless something else has been especially decided and the property becomes separate.
- Private property – property can be separated from marital property and become private by a marital property agreement, made either prior to or during a marriage, whereby both spouses agree that certain or all of their property should be separate. Property can also become separate by conditions attached to a gift, conditions attached to a will and other specific circumstances.

The main rule following the dissolution of a marriage is that marital property should be divided equally between spouses. Each spouse may deduct the value from his or her marital property as corresponds to the other spouse's debts. Further, in the case of division of property owing to divorce, the main rule is that a pension right under private pension insurance or a pension under a pension earnings agreement under the Individual Pensions Savings Act should be included in the division. There are also rules to deter giving away property prior to divorce.

- 5.171 There is, in our view, greater scope for disputes over ancillary relief to be resolved outside court through Dispute Resolution Services. However, the complex legislation that governs ancillary relief and the large associated case law make it hard to envisage a significant reduction in litigation through reform to process alone. The complexity of the position on money and property creates great uncertainty and adds to both animosity and legal expense.
- 5.172 We are not equipped to comment further on this issue, but recommend that ancillary relief be separately reviewed. This review should also take into account the recent consultation on marital property agreements that the Law Commission launched in January 2011.

Divorce processes

- 5.173 The current process for divorce requires judicial time even though there are usually few legal aspects to consider. In addition many applicants find the process confusing with many making administrative errors – such as supplying incorrect dates – that result in the applications being rejected.
- 5.174 There is scope to make more use of administrators in the courts to reduce these burdens on judges, although there should be referral to a judge where the grounds are contested. This is likely to be only in the minority of cases: only about 2% of divorces fall into this category, and the numbers that are contested through to final hearing is likely to be a small proportion of that.²²³
- 5.175 Without changing the grounds for divorce we propose changes to administrative processes designed to reduce cost to the applicant and the state. The full proposed process and diagram is set out at Annex R.

Notice of divorce

- 5.176 The panel proposes removing the current two-stage process of decree nisi/decree absolute, replacing this with a single notice of divorce. We have heard anecdotal evidence that some couples do not realise that they are still legally married until they received their decree absolute, even where they have their decree nisi. A small but significant number of applicants fail to apply for their decree absolute after obtaining their decree nisi. The notice of divorce will inform parties that they will automatically be divorced six weeks following the date of the notice of divorce, unless they appeal against the determination. Following this time period, a final statement of divorce will be issued. It should also be possible to place restrictions on the notice of divorce so that it does not automatically become final, ensuring time for religious procedures to be completed, where this is necessary.
- 5.177 As in the proposed divorce process, non-contested nullity and judicial separation should be processed administratively. Where nullity and judicial separation are contested the case would be referred to a judge to make a determination.

²²³ HMCS FamilyMan data, unpublished – see footnote 194

Fees

- 5.178 At all stages of intervention, we believe that those parties who require additional support to resolve disputes should in principle be responsible for the financial costs of those services. Parties should therefore be required to pay fees reflecting the full cost of the services they use.
- 5.179 We recognise that fees can be a deterrent for some in attempting Dispute Resolution Services or making court applications, so any fee increases would need careful consideration. This recommendation will also depend on achieving a better understanding of costs. There should be a clear and transparent remissions policy to support those who need it. Further, more should be done to share the costs more fairly between parties where appropriate. In the majority of cases, the applicant must bear the full cost of the court application, even though the respondent may be behaving unreasonably.
- 5.180 We recognise that this is a complex area and that careful consideration must be given to any changes in fee levels for private law cases. We aim to carry out further work at the next stage.

Consultation questions

17. Do you agree there is a need for legislation to more formally recognise the importance of children having a meaningful relationship with both parents, post-separation?
18. Do you agree with the proposals to remove the terms 'contact' and 'residence' and to promote the use of Parenting Agreements?
19. Do you agree that there should be a requirement to consider Dispute Resolution Services prior to making an application to court?
20. Do you agree with the processes we outline for the resolution of private law disputes?
21. Which urgent and important circumstances should enable an individual to be exempt from the assessment process for Dispute Resolution Services?
22. What do you think are the core skills required for mediators undertaking an assessment?
23. Is there any merit in introducing penalties, through a fee charging regime, to reflect a person's behaviour in engaging with Dispute Resolution Services, including the court?
24. Do you have any other comments you wish to make on our proposals for private law?

6. Financial implications and implementation

Financial implications

- 6.1 This package of proposals will, if implemented, substantially change family justice in England and Wales, delivering real improvements for those who use the system as well as those who work in it. Our aim is that these proposals lead to better outcomes for children and families. But costs matter, particularly now.
- 6.2 The unit costs in the current system are largely a mystery and this has made it impossible to cost our proposals at this stage. Work is in hand in the Ministry of Justice to help make progress on this for our final report. However, even then, some proposals will require more detailed specification to analyse the likely benefits and costs.
- 6.3 The potential benefits of our proposals include:
- a Family Justice Service to manage system performance and reduce inefficiency and duplication through a joined up approach to service provision;
 - changes to public law which should reduce case duration and cost to all participants; and
 - a web portal, with case management functionality, for both public and private cases which will particularly reduce administrative costs associated with private law cases.
- 6.4 An initial, qualitative assessment of the main proposals is set out below. The assessment will be further developed for the final report.

System reform

- 6.5 Our core recommendation is the creation of a Family Justice Service. There will be transitional costs associated with this, including the need for much better IT capability. In the medium to longer term, we expect significant savings from efficiency changes and reduced burdens on local authorities.

Proposal	Likely Costs	Likely Benefits
Creation of a Family Justice Service	Costs arising from developing IT systems, estates, staffing and training costs	<p>Efficiency savings from reduced duplication in Cafcass, Cafcass Cymru, HMCS and LSC</p> <p>The ability to coherently plan estates policies to support court users and increased IT usage within the service, speeding up processes</p> <p>Reduced administrative costs associated with supporting the system through more proportionate and joined up working practices</p>

More flexible use of estates	<p>Possible costs from use of other buildings</p> <p>Costs in creating appropriately flexible family hearing centres</p>	<p>Savings from using facilities outside the current court estate</p> <p>Shorter case durations and reduced delays if cases can be heard more quickly</p> <p>Flexible facilities that are more appropriate for children and families</p> <p>A better service for families</p>
Integrated and improved management information	<p>IT development and running costs</p> <p>Possible increased time required from court staff to input data</p>	<p>Efficiency savings from reduced duplication by Cafcass, HMCS and LSC</p> <p>Possible benefits from the identification of good practice and consistency in case processing and progression</p> <p>Improved resource allocation through an understanding of what things really cost</p> <p>Swifter processes with fewer errors, leading to fewer delays</p>
Judicial management, including a presiding judge for family work	Time costs from taking on additional case management responsibilities	More effective case management and an ability to manage judicial workload through accurate information
Judicial continuity	<p>Potential delays if cases have to wait for a specific judge to become available</p> <p>Likely to reduce the number of cases that can be heard by magistrates, placing additional demands on full-time judiciary</p>	<p>More efficient use of judicial time</p> <p>Greater efficiencies in processing cases with reduced judicial reading time and greater familiarity with case particulars</p>
Judicial specialism	Likely increased training costs	Could increase the number of judges available for family cases, which would decrease delay

Public Law

6.6 Our recommendations on public law aim to achieve shorter cases and fewer hearings. Any transitional costs are unlikely to be significant in comparison to the savings that may be possible.

Proposal	Likely Costs	Likely Benefits
Rebalance the role of courts and local authorities in care plan scrutiny	Possible increase in disputes over the threshold criteria leading to more hearings	Possible savings for Cafcass, Cafcass Cymru, HMCS, local authorities and LSC through shorter cases Savings for local authorities if cases are heard faster and children are in temporary care for shorter periods
Timetabling	If case durations – but not the number of hearings – are reduced, HMCS may require additional resources to meet shorter timescales If a timeline is set in legislation there may be increased costs resulting from litigation, should the timeline be exceeded Local authorities may require additional resources to meet the shorter timescales	Shorter care and supervision proceedings, with possible savings for Cafcass, Cafcass Cymru, HMCS, local authorities and LSC Quicker decisions made for children in care proceedings, reducing uncertainty and instability
Remove the requirement for ICO renewals	Fewer chances for parties to dispute the ICO	Savings through a reduction in hearings Savings in judicial time and court administrative processes
More proportionate use of tandem model	Children in some care proceedings may receive less support from Cafcass guardians, however this should be limited to cases where little guardian support is required	Reduced demand pressures on court social work
Restrict commissioning of expert reports	There is a risk that judges will have less information to base their decisions on	Reduced local authority and LSC costs

Private law

- 6.7 These proposals look for more proportionate and flexible resolution of cases, enabling greater efficiency. Individuals will be able more easily to resolve their disputes and information and tools to do so will be made available. There will be transitional costs, linked to the development of web-based services and the need to build capacity in the mediation sector.
- 6.8 Currently, the government is considering removing legal aid provision for most private law cases. On this basis we have not included reference to legal aid in court proceedings.

Proposal	Likely Costs	Likely Benefits
Information hub	Set-up and maintenance costs, dependent on the specification. Integrating with other government online services (for example CMEC) could reduce these costs	Self-resolution of disputes may reduce demand on the courts and court social work services Couples and families will 'own' their decisions and be better placed to self-manage their relationships in the future. They may also face lower legal costs if they can resolve their disputes informally
Compulsory assessment for mediation and attendance at a PIP	Likely set-up costs to include training and accreditation. There will also be continuing costs to individuals and legal aid from increased use of mediation	Savings for court social work and support services resulting from a decrease in the numbers of cases, if cases are diverted from court Individuals may face lower legal and court costs if they are able to reach agreement earlier. This may also lead to better and more stable outcomes
Process non-contested divorce administratively	Set-up costs in establishing a central processing centre and IT capability	Processing efficiencies through centralising processing activities Reduced judicial and administrative time processing divorce applications
Cost recovery to apply to all services, with appropriate exemptions available	Increased fees for those using family resolution services Some people may decide not to go to court because of the fee	More cases resolved independently or with more proportionate involvement of family resolution services Reduced government subsidy of the family court

Implementation

- 6.9 The package of proposals we have put forward is complex. Some recommendations will need primary legislation; others can be implemented quite quickly.
- 6.10 This will not be an easy task and should not be rushed. Clear direction and leadership of a phased and medium-term work plan will be important. But where the ability to rapidly consolidate functions can be achieved this should be pursued ambitiously.
- 6.11 We aim, in our final report, to set out views on how implementation should be handled and we welcome feedback from experience. We therefore pose a final question as part of our consultation.

Consultation question

25. Do you have any comments about how these proposals might best be implemented?

Annexes

- A. Terms of reference**
- B. Panel biographies**
- C. Call for evidence questions**
- D. List of people/organisations met**
- E. List of visits undertaken**
- F. Estimated costs of the system**
- G. Current system governance map**
- H. Delivery chain map**
- I. Inter-disciplinary Alliance for children model**
- J. Terms of Reference of the Family Justice Council**
- K. Extract from the Family Procedure Rules 2010**
- L. List of data gaps**
- M. Current tiers of courts**
- N. Types of orders that can be made in public law proceedings**
- O. The Family Drug and Alcohol Court**
- P. Consideration of legislating for a presumption of shared parenting**
- Q. Judicial expectations statement**
- R. Proposed divorce process**

Annex A – Terms of Reference

The Secretaries of State for Justice and Education and the Welsh Assembly Government Minister for Health and Social Services have commissioned a review of the family justice system in England and Wales.

The following guiding principles have been identified which are intended to provide a framework within which the Review's work should be undertaken:

- The interests of the child should be paramount in any decision affecting them (and, linked to this, delays in determining the outcome of court applications should be kept to a minimum).
- The court's role should be focused on protecting the vulnerable from abuse, victimisation and exploitation and should avoid intervening in family life except where there is clear benefit to children or vulnerable adults in doing so.
- Individuals should have the right information and support to enable them to take responsibility for the consequences of their relationship breakdown.
- The positive involvement of both parents following separation should be promoted.
- Mediation and similar support should be used as far as possible to support individuals themselves to reach agreement about arrangements, rather than having an arrangement imposed by the courts.
- The processes for resolving family disputes and agreeing future arrangements should be easy to understand, simple and efficient and be transparent both to those involved and wider society.
- Conflict between individuals should be minimised as far as possible.

The review should assess how the current system operates against these principles and make recommendations for reform in two core areas: the promotion of informed settlement and agreement; and management of the family justice system.

Specifically, this will include examination of the following issues.

- The extent to which the adversarial nature of the court system is able to promote solutions and good quality family relationships in private law family cases and what alternative arrangements would be more effective in fostering lasting and positive solutions.
- Examination of the options for introducing more inquisitorial elements into the family justice system for both public and private law cases.
- Whether there are areas of family work which could be dealt with more simply and effectively via an administrative, rather than court-based process, and the exploration of what that administrative process might look like.
- How to increase the use of mediation when couples separate as a preferred alternative to court processes.
- How to promote further contact rights for non-resident parents and grandparents.
- Examination of the roles fulfilled by all of the different agencies and professionals in the family justice system, including consideration of the extent to which governance arrangements, relationships and accountabilities are clear and promote effective collaboration and operational efficiency. This will include looking at the roles carried out by Cafcass in England and by Cafcass Cymru.

The review will be conducted by a panel, comprising independent representatives and senior representatives from Ministry of Justice, Department for Education and the Welsh Assembly Government (as relevant for devolved matters).

In examining these matters the panel will be required to obtain and consider the views of key stakeholders, including children and families, the judiciary, family lawyers, Cafcass practitioners and social workers. The Review will also be expected to engage in wide consultation, to draw on relevant family justice research studies and literature, consider available qualitative and quantitative data and take into account international comparisons.

The Review should take account of value for money issues and resource considerations in making any recommendations. Recommendations should be costed and have regard to affordability.

A final report setting out the Review's findings is expected to be submitted to the Secretary of State for Justice, the Secretary of State for Education and the Welsh Assembly Government Minister for Health and Social Services in 2011.

Annex B – Panel biographies

David Norgrove

Chair of the Low Pay Commission and Deputy Chair of the British Museum. Former Chair of the Pensions Regulator, Director of Marks and Spencer, Private Secretary to the Prime Minister and Treasury official. Trained as an economist.

John Coughlan CBE

Director of Children's Services, Hampshire County Council. John is a respected Director of Children's Services and was influential in establishing the Association of Directors of Children's Services (ADCS). He formerly represented ADCS on the Ministerial Group on Care Proceedings.

Mr Justice Andrew McFarlane

Currently the Family Division Liaison Judge for the Midlands, McFarlane J has been a judge of the High Court, Family Division since 2005.

Dame Gillian Pugh OBE

Chair of the National Children's Bureau. Formerly Chief Executive of Coram Family, Gillian is also a member of the Children's Workforce Development Council, a Board member of the Training and Development Agency for Schools and has held numerous advisory positions to government departments.

Keith Towler

Current Children's Commissioner for Wales following his appointment in 2007. He has previously worked at Save the Children in Wales and NACRO. He will represent children's interests and will also provide a Welsh perspective on the panel's work.

Baroness Shireen Ritchie

Lead member for children for the Royal Borough of Kensington and Chelsea. She is Chair of the Children and Young People Board at the Local Government Association and is a member of the board of Cafcass.

Government representatives

Sarah Albon

Director, Justice Policy Group, Ministry of Justice

Shirley Trundle CBE

Director, Families Group, Department for Education

Robert Pickford

Director of Social Services, Department of Health and Social Services, Welsh Assembly Government

Annex C – Call for Evidence Questions

Call for Evidence – Family Justice Review

The panel would, in particular, welcome evidence and views on the following questions. Given the broad nature of the Review, respondents should not feel they need to supply comments for every question, but only those for which they have experience:

Overarching issues and the case for change

The Review panel would like to hear evidence about the family justice system as a whole. The family justice system is a vast and complex area which helps to resolve wide ranging issues. The impact of the decisions it takes are amongst the most serious and have the greatest impact on the lives of families and children. This first section asks questions about the system as a whole. The sections which follow ask for your evidence and views on more specific issues.

1. What does the family justice system mean to you? What should the purpose of the family justice system be? What should not be included in the family justice system?
2. What should the role of the state be when dealing with family-related disputes that do not concern the protection of children or vulnerable adults? To what extent should the state fund this?
3. How effectively does the current family justice system meet the needs of its users? For example:
 - a. Does it have the capacity to deal with all cases comprehensively?
 - b. How could capacity in the system be increased?
 - c. How efficient is the system?
 - d. Does the system ensure equality and diversity?

Better courts and alternatives to legal processes

Courts play a central role in the family justice system, and the very nature of family justice cases means that they often deal with highly complex and volatile situations. Families who need to use the courts may be particularly vulnerable and in need of support and may have little prior experience of the court process. Furthermore, some families may find themselves using the courts where there may be more effective alternatives. Alternative Dispute Resolution (ADR) such as mediation and collaborative law have proved effective for many in resolving issues, and negating the need for court involvement. The Review panel is interested in exploring the strengths and weaknesses of the current court processes and where these can be improved. In addition, it would like to understand whether there are some elements of the current system that could be safely resolved outside the court arena.

4. Are there areas within the current system where we could adopt a more inquisitorial approach, whereby the court actively investigates the facts of the case as opposed to an adversarial system where the role of the court is primarily that of an adjudicator between each side? What are the options, and advantages and disadvantages, for:

- a. Private disputes arising from divorce or separation?
 - b. Public matters, where the state intervenes to ensure the protection of children?
5. How far are users able to understand the processes and navigate the family justice system themselves?
 - a. Are there clear signposts throughout the system?
 - b. Do users know how and where to access accurate and timely information and advice? Is it readily available?
 - c. What are the options to support/enable people to resolve these issues without recourse to legal processes?
 6. How best can we provide greater contact rights to non-resident parents and grandparents?
 7. How effective is alternative dispute resolution (ADR), such as mediation, collaborative law and family group conferencing? What types/models of ADR are more effective and for which circumstances? Does this differ according to cases? How could we improve it and incentivise its use and what safeguards need to be put in place?
 8. To what extent do issues around enforceability of court orders motivate decisions to go to court? To what extent does it affect decisions within and outcomes of cases?
 9. Are there elements of cases which could be considered outside of a court setting and if so by whom? For what type of cases would this be appropriate and what sort of settings might be suitable alternatives? What are the benefits and disadvantages?
 10. Would adding a triage stage, whereby cases are assessed as to the appropriate course of action, make the system more efficient; i.e. by speeding processes up, ensuring resource could be allocated appropriately etc? In what areas might this be appropriate?

Governance and management

The family justice system encompasses a large number of different organisations and individuals e.g. the judiciary, legal practitioners, social workers, Cafcass guardians, experts, administrators, IROs and court staff. Activity starts before cases reach the court arena and often extends well beyond the conclusion of a case in court. Effective case resolution and good outcomes for children and families depends on efficient running of the system and strong partnership working amongst all those involved. In our Review we want to look at the different responsibilities of each of the different parts of the FJS.

11. Do you think the family justice system is well organised and managed? What are the strengths and weaknesses of the current governance and management structures? Who should take responsibility for the decision-making process? Who should be responsible for the administrative running of the system?
12. What systems issues are there? Eg how could things like IT, filing and administrative processes be improved?

13. Who should take ownership of cases when they are in the family justice system? Who is the case manager? And at which point do and should they relinquish responsibility?
14. How can we ensure that there is sufficient and appropriate accountability throughout the system?
15. How well do different organisations/partners in the family justice system communicate, share information and work together to resolve cases?
16. How clear are the different roles and responsibilities of those who are involved in the family justice system (such as the judiciary, legal practitioners, social workers, Cafcass officers, expert witnesses, administrators, IROs, court staff)? Are all these roles necessary? How effectively are these roles fulfilled?

Finance and funding

We are all acutely aware that savings in public expenditure must be found. The family justice system will not be exempt from the need to examine carefully the amount of funding supplied to the system, and how it is applied. The Review will need to consider, as part of its work, how family justice can be delivered better in a less costly way

17. Where do you think there is scope to make efficiency savings within the family justice system?
18. What improvements to funding arrangements and mechanisms could be made?

Workforce development

The family justice system is made up from practitioners from a wide range of professional areas, and is not limited to those who work within courts on a daily basis. Work undertaken in family law is often complex, sensitive and judgement based, requiring highly skilled and confident practitioners.

19. Please tell us about your role in the family justice system. What value does this add to the family justice system?
20. What qualifications and experience should be required for the different roles of those who work in the family justice system? What should be included in initial training and continuous professional development?
21. Are there sufficient performance management and feedback mechanisms throughout the system as a whole?

A more user friendly and child focused system

Ensuring that the family justice system remains focused on the needs of the children and families who use it is a clear priority for us. We want to ensure that children and vulnerable adults are protected from harm. We also want to minimise distress and conflict wherever possible.

22. How could the system be improved to ensure it meets the needs of users and secures positive outcomes for children?

23. How can we ensure sufficient protection is afforded to vulnerable adults through the system?
24. In what types of cases is it important to hear the voice of the child to assist with decision making? How should the child's voice be heard in the family justice system?
25. How effective are Cafcass and Cafcass Cymru? What should their role and remit be in the future?

And finally

26. What has guided your response to the questions posed above, e.g. personal experience, feedback from the public, specific research or evidence?
27. What can be learned from the way in which other sectors work which could be transferred to the family justice system?
28. Do you know of any good and innovative practice in the UK that the Review panel should consider? What wider services could be tapped into (especially in the children's sector) to support the family justice system?
29. Is there anything we can learn from international examples?
30. What question would you have liked us to ask that we haven't posed and what would your response be?

The panel recognises that the questions posed in this document cannot fully cover every aspect of the family justice system. We welcome any further information and evidence that you feel relevant to the Review.

Annex D – List of People / Organisations Met

List of people and organisations met by the panel during the course of the Review

Action for Children
All-Party Parliamentary Group on Family Law
Association of Directors of Children's Services
Association of Directors of Social Services in Wales
Association of District Judges
Association of Lawyers for Children
Barnardo's
Baroness Shackleton
British Association of Social Workers
Cafcass
Cafcass Cymru
Cafcass Young People's Board
Centre for Social Justice
Children's Commissioner for England
Children in Wales
Children's Rights Alliance England
Children's Rights Director
Children's Workforce Development Council
Citizens Advice Bureau
College of Mediators
Council of Circuit Judges
Dame Sally Davies, Chief Medical Officer
Dr Hamish Cameron
Dr Roger Kennedy
Eileen Munro
Families Need Fathers
Family Justice Council
Family Law Bar Association
Family Mediation Council
Family Mediators' Association
Family Rights Group
Fatherhood Institute
Fathers for Justice
Francis Plowden
General Social Care Council
Gingerbread
Grandparents Association
Grandparents Plus
Her Majesty's Courts Service
Independent Social Work Associates
John Eekelaar
Judith Masson
Justices' Clerks Society
Kids in the Middle
Law Commission
Law Society
Legal Services Commission
Liz Trinder
Lord Chief Justice, Lord Judge

Lord Justice Thorpe
Lord Laming
Lord Phillips and Baroness Hale
Magistrates' Association
Mavis Maclean
Mervyn Murch
Mr Justice Ryder
National Assembly for Wales all-party group on looked after children in Wales
National Assembly for Wales Children & Young People Committee
National Assembly for Wales Health & Wellbeing Committee
National Association of Probation Officers
National Bench Chairmans' Forum
National Society for the Prevention of Cruelty to Children
National Youth Advocacy Service
Network on Family, Regulation and Society
Office for the Children's Rights Director
Office of the Children's Commissioner for Wales
Officials in the Department for Education, Ministry of Justice and Welsh Assembly
Government
Oliver Cyriax
President of the Family Division (including attendance at the President's annual
conference)
Relate
Resolution
Royal College of Paediatrics and Child Health
Rt. Hon. David Blunkett MP
Rt. Hon. John Hemming MP
Rt. Hon. Sir Alan Beith MP
Senior Presiding Judge, Lord Justice Goldring
Sir Mark Potter
Social Work Reform Board
Society of Expert Witnesses
Solicitors in Local Government Child Care Lawyers Group
Voices from Care Cymru
Welsh Local Government Association
Women's Aid

Annex E – List of visits undertaken

Dates	Country	Locations/Organisations
April 2010	England and Wales	Inner London Family Proceedings Court
May 2010	England and Wales	Principal Registry of the Families Division Arena Mediation The Nuffield Foundation Ipswich County Court Oxfordshire Family Mediation Chelmsford County Court Hampshire Local Authority
June 2010	England and Wales	Family Drug and Alcohol Court
July 2010	England and Wales	HMCS staff event
Sept 2010	England and Wales	Family Law in Partnership
Oct 2010	France	Members of the Barreau de Paris Tribunal de Grande Instance Ministere de la Justice Affaires familiales et educatives, Direction de l'Action sociale, de l'Enfance et de la Sante
Oct 2010	Sweden	British Ambassador to Sweden Ministry of Justice and the Ministry of Social Affairs Children's Ombudsman Faculty of Law, Stockholm University Stockholm District Court Family unit of the Social Services, Östermalm Stockholm Administrative Court, Förvaltningsrätten
Oct 2010	Scotland	Glasgow Sheriff Court Meeting with a selection of Legal Practitioners Scottish Children's reports Administration hearing centre, Glasgow
Nov 2010	England and Wales	Islington Children's Services Coram seminar, 'Listening to children and the Family Justice Review' Gingerbread and One Plus One conference on shared parenting
Nov 2010	Australia	Attorney General's Department Australian Institute of Family Studies Chief Justice Bryant Department of Families, Housing, community Services and Indigenous Affairs Family Relationship Centres in Chadstone and Melbourne Federal Magistrates and court staff, Dandenong Family Magistrates Court of Australia

		<p>Family Law Pathways Network Family consultants and a registrar from the Family Court of Australia Lawyers – private and publically funded Professor Richard Chisholm, author of a report on family violence Dr Jen McIntosh, Child psychologist Researchers from University of Melbourne Victorian Law Reform Commission Victoria Legal Aid</p>
Nov 2010	England and Wales	<p>Manchester Civil Justice Centre Cafcass Office – Manchester HMCS staff event</p>
Jan 2011	England and Wales	<p>Sheffield County Court Family Drug and Alcohol Court</p>
Feb 2011	England and Wales	<p>Fathers 4 Justice local surgery, Hampshire Stratford magistrates' court Stephen's Place Children's Centre, Contact Centre, Hammersmith Oxford Family Court Business Committee</p>

Annex F – Estimated costs of the system

Estimated costs of the family justice system

This is a rough attempt to estimate the cost to the government of the family justice system. We have no reliable information on the costs to individuals of using the system and so these costs are not included here. Our estimates make a series of assumptions (these are detailed below) and are uncertain. They are only an indication of the costs of the family justice system.

Organisation	Public Law Cost (£m's)	Private Law Costs (£m's)	Total Cost (£m's)
Cafcass and Cafcass Cymru	80	60	140
HMCS	50	170	220
Local authority (legal proceedings and social worker costs for care proceedings)	490		490
Legal Services Commission	330	320	650
TOTAL	960	550	1510

Numbers are rounded to the nearest £10m. Totals may not sum due to rounding.

Cafcass estimates

Cafcass costs are based on published accounts in 2009/10. These costs include estimates for both staff costs and overhead costs (such as estates costs). A rough estimate of the split between all public and all private law work (60% public law and 40% private law) has been made based upon current business volumes and relative work effort involved in public and private law cases. Cafcass Cymru expenditure figures were provided by Welsh Assembly Government. The same principles have been applied as for the Cafcass cost calculations for the apportionment of spend between public and private law.

HMCS estimates

The costs to HMCS are based on the published figures recorded in the 2009/10 Annual Accounts. The costs are taken from actual expenditure posted in the general ledger and include staff and judicial costs as well as overhead costs (e.g. estates, shared services). The cost is split between family (both public and private law), civil, probate and magistrates' civil and family based on the total time taken to complete the work using actual volumes and current timings, mainly from Business Management Systems (BMS). The costs presented here take no account of the fees received by HMCS. In 2009/10 the full cost of family business was £221m, with a cost recovery of 50% (shortfall of £111m). Net income collected was £94m and income foregone to fee remissions was £15m. Private law cases recover approximately 40% of the cost (£171m) and nearly 100% (£50m) of the costs for public law are recovered. The

majority of public law fee charges are paid for by the local authorities; this still represents a cost to the government, whilst private law fee charges are paid for by individuals.

Local authority costs

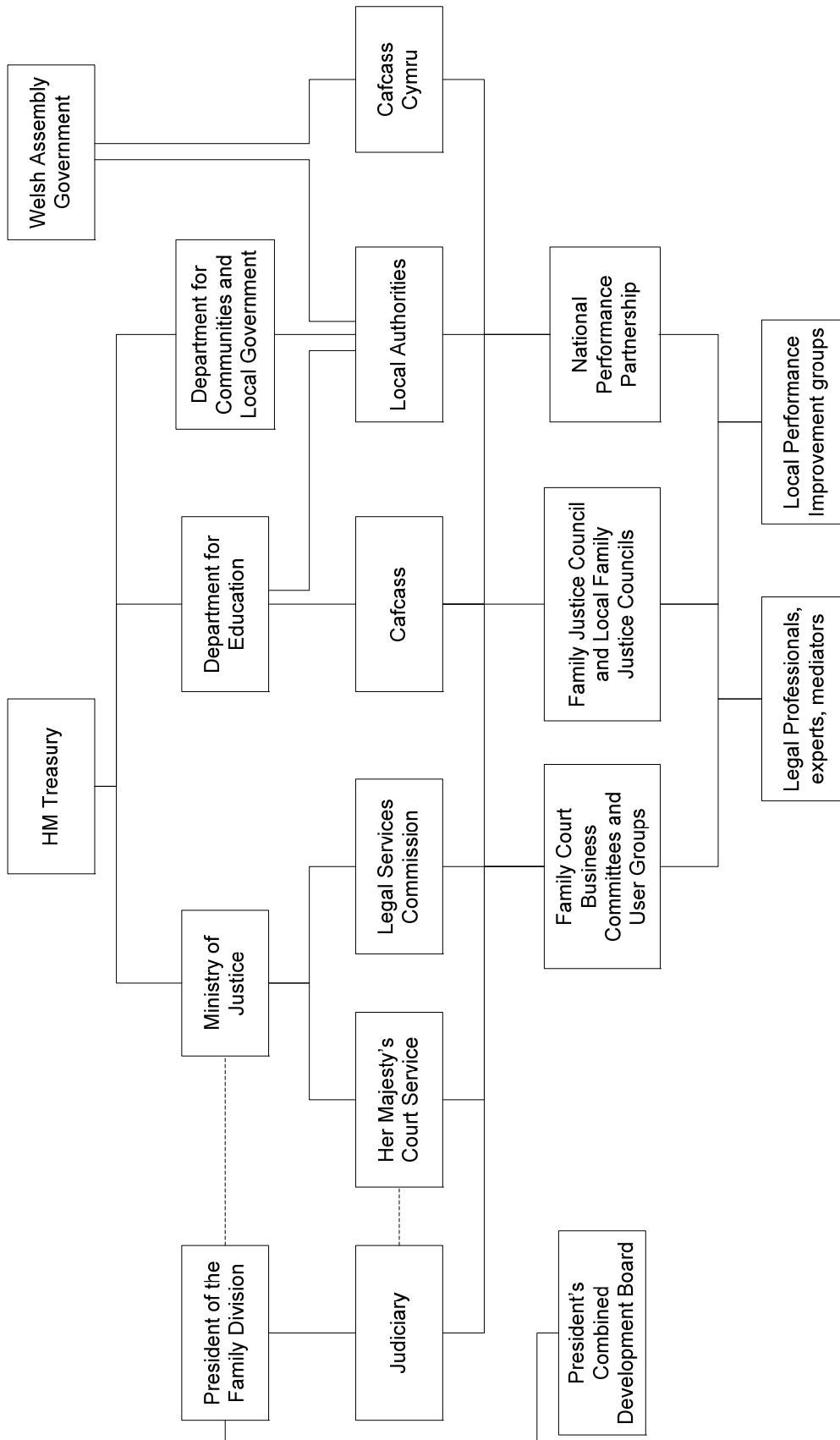
Local authority legal costs are estimated from the survey work undertaken for the Plowden Review in 2008/09. The average annual cost was calculated to be approximately £14,000 per care proceedings case. This captures the cost for legal staff and disbursements (including expert assessments), but does not include any cost for court fees. It does not include any estimate of overhead costs such as estates costs. This estimate is based on a very small sample for one year; there was considerable variation in the reported average costs and therefore this estimate should be considered uncertain. The average case cost has then been applied to volumes of care proceedings in 2009-10 taken from Cafcass statistics.

Local authority social work costs are based upon the work done by the Centre of Child and Family Research, Loughborough University and their cost calculator for Children's Services. These estimates attempt to capture the cost to social services for children with a care order or a placement order or who were detained for child protection on entering care. Five key social work processes have been used for this costing exercise, defining the social worker costs from determining a child's first placement, care planning and review of the case, the social worker and their manager's preparation for court proceedings and work during court proceedings and the cost associated with maintaining the child's placement (including social care support and the fee or allowance paid for the placement). These costs are based on volumes and costs from 2008-09. The cost estimates are high-level, indicative estimates based on a series of assumptions including the characteristics of these children and the type of placement they are in. Some of the assumptions made are likely to lead to the costs being underestimated.

Legal Services Commission

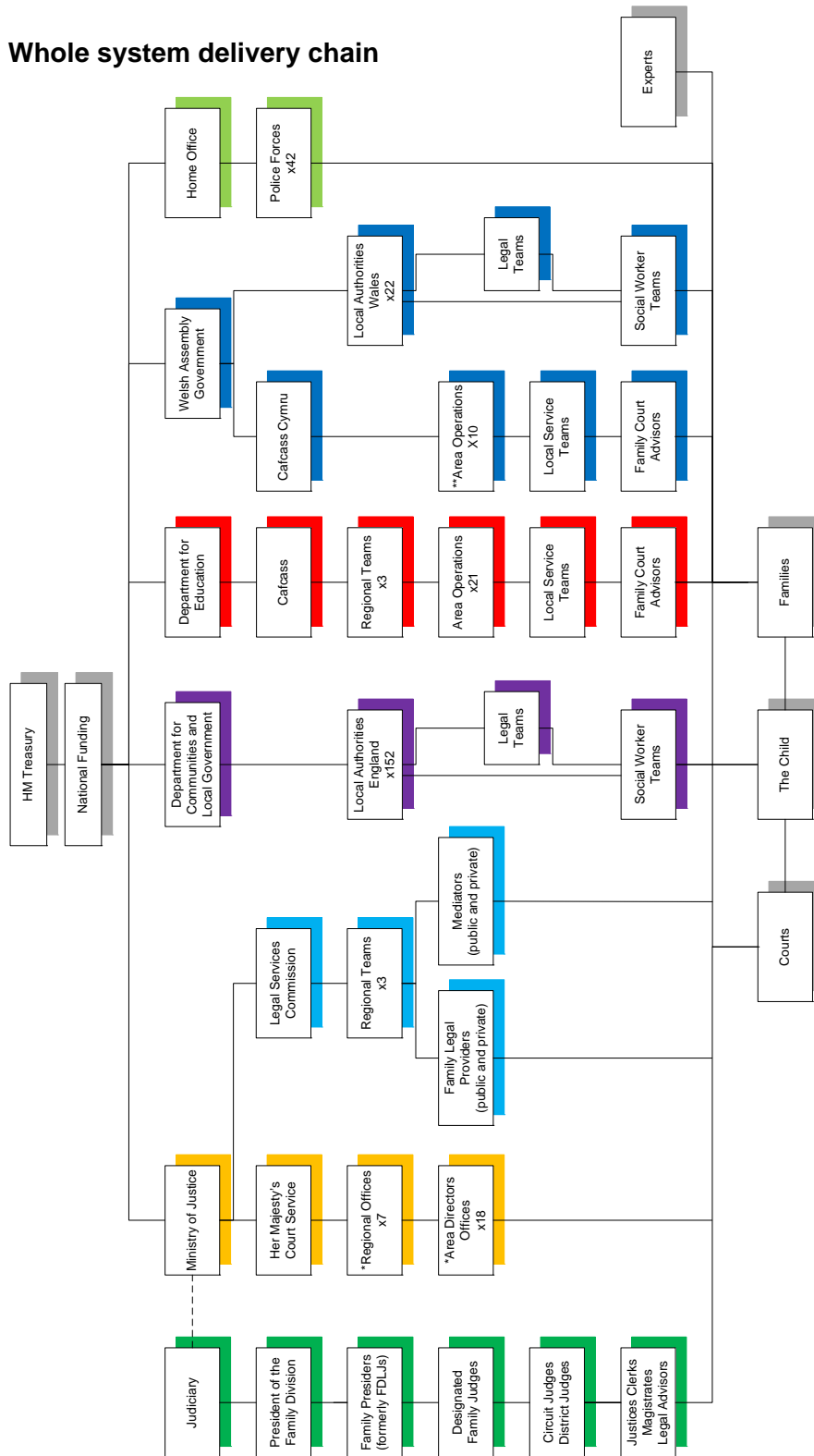
LSC costs are the legal aid spend in 09/10 on controlled, licensed and mediation work. This estimate is net of any income received by the LSC from family work. These costs do not include any costs for telephone advice provided in family cases or the standard monthly payment made to some providers for controlled work, as such they will underestimate the total cost of legal aid. We have also included a very rough estimate for the central operating costs of the LSC. This is based upon the volume of work for 09/10.

Annex G – Current system governance map



Annex H – Delivery chain map

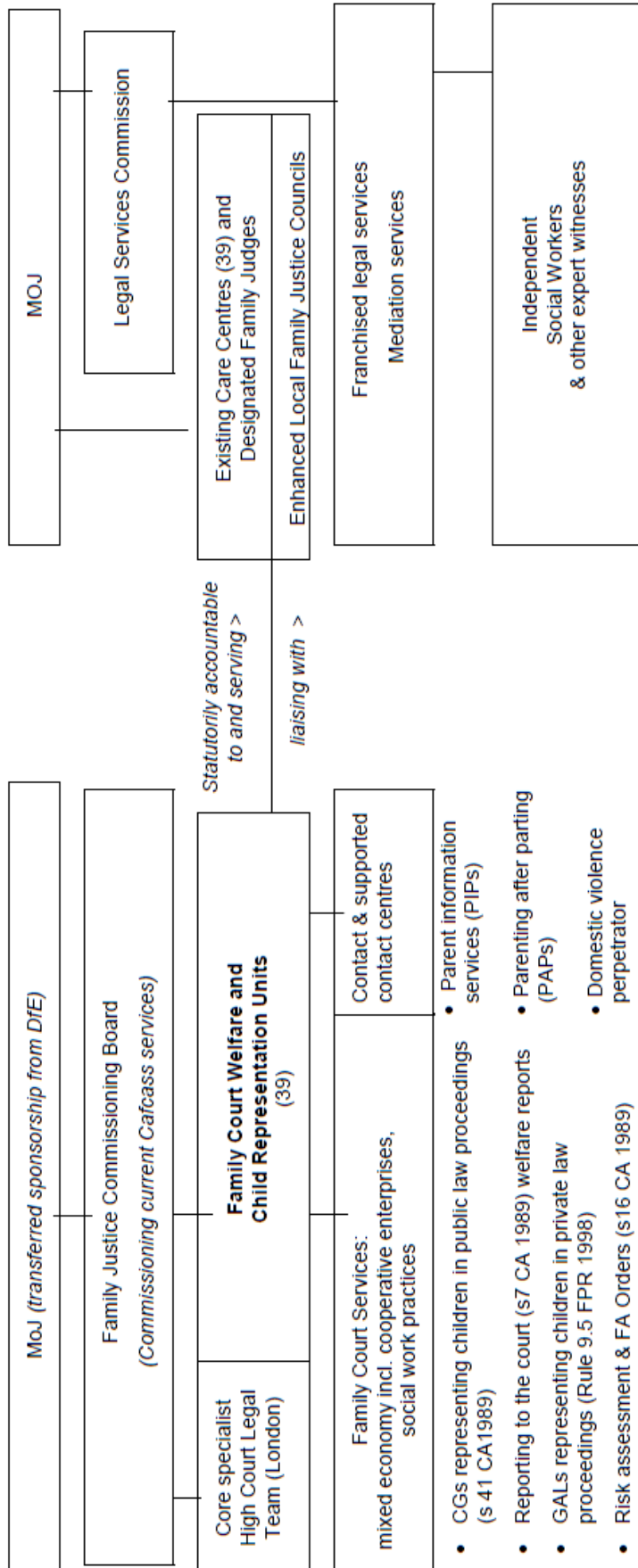
Whole system delivery chain



* HMCS structure as at March 2011, prior to creation of Her Majesty's Courts and Tribunal Service (HMCTS)
 ** Cafcass Cymru structure as at March 2011, currently consulting on structural review during 2011

Annex I – Inter-disciplinary Alliance for children model

Diagram. Draft proposal: Alternative model for delivery of court services to children in family proceedings in England



Statutory accountability is to the courts. Professional accountability is to GSCC, which regulates social workers, and its successors that will use standards set by the UK College of Social Work Regulation and Inspection by a new independent social work inspectorate to replace Ofsted.

Annex J – Terms of Reference of the Family Justice Council

The Council's key roles are to:

- promote an inter-disciplinary approach to family justice;
- monitor how effectively the system delivers the service the government and the public need; and
- advise on reforms necessary for continuous improvement.

It is specifically charged with:

- promoting improved inter-disciplinary working across the family justice system through discussion and co-ordination between all agencies;
- identifying and disseminating best practice throughout the family justice system by facilitating an exchange of information between local family justice councils and the national Council, and by identifying priorities for, and encouraging the conduct of, research;
- providing guidance and direction to achieve consistency of practice throughout the family justice system and submitting proposals for new practice directions where appropriate; and
- providing advice and making recommendations to government on changes to legislation, practice and procedure, which will improve the workings of the family justice system.

Annex K – Extract from the Family Procedure Rules 2010

The overriding objective

- 1.1. (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
- (2) Dealing with a case justly includes, so far as is practicable —
- (a) ensuring that it is dealt with expeditiously and fairly;
 - (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
 - (c) ensuring that the parties are on an equal footing;
 - (d) saving expense; and
 - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application by the court of the overriding objective

- 1.2. The court must seek to give effect to the overriding objective when it —
- (a) exercises any power given to it by these rules; or
 - (b) interprets any rule.

Duty of the parties

- 1.3 The parties are required to help the court to further the overriding objective.

Court's duty to manage cases

- 1.4. (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes —
- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
 - (b) identifying at an early stage —
 - (i) the issues; and
 - (ii) who should be a party to the proceedings;
 - (c) deciding promptly —
 - (i) which issues need full investigation and hearing and which do not; and
 - (ii) the procedure to be followed in the case;

- (d) deciding the order in which issues are to be resolved;
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
- (f) helping the parties to settle the whole or part of the case;
- (g) fixing timetables or otherwise controlling the progress of the case;
- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
- (i) dealing with as many aspects of the case as it can on the same occasion;
- (j) dealing with the case without the parties needing to attend at court;
- (k) making use of technology; and
- (l) giving directions to ensure that the case proceeds quickly and efficiently.

Annex L – List of data gaps

The list below sets out the data gaps we have so far identified. This builds on a similar list published with the *Review of the Child Care Proceedings System in England and Wales* in 2006.²²⁴

General

- Demographic data on families involved in the family justice system
- Information about hearings, including length and whether they went ahead as planned
- Court room usage
- The unit costs of different types of cases in the family justice system
- The costs to parties involved in cases before the family justice system
- The number and type of expert witnesses involved in any one case
- Information about flows through the system, e.g. the extent to which there might have been local authority involvement in advance of care proceedings, whether parties might have considered mediation in private law, and whether they have previously been involved in the family justice system
- Legal aid costs per case
- Actual family sitting days
- Reasons for applications being withdrawn

Public law

- The length of time and type of engagement local authorities have with a family or a child ahead of proceedings
- Assessments completed by local authorities ahead of court proceedings
- The outcomes of care proceedings, including the final plan for the child
- The reasons for care proceedings
- Post-order data such as placement as per agreed care order and stability of the placement
- The extent to which care plans change after care proceedings have concluded

Private law

- Outcomes and sustainability of agreements reached in mediation
- Outcomes and sustainability of decisions made in court
- Suitability of different types of intervention for different individuals
- Final settlements/agreements in ancillary relief cases
- If orders are made by consent, the stage at which consent is reached
- Use of contact activity directions, and their impact on case resolution
- Numbers of cases which raise safeguarding concerns
- Extent to which wider family members are awarded contact
- Provision and capacity of mediation services

²²⁴ Department for Constitutional Affairs (2006) *Child Care Proceedings Review, Desk Research Report*, London, Department for Constitutional Affairs

Annex M – Current tiers of courts

Work in the family justice system is allocated to different levels of court and, within each court, to different levels of judiciary or different individual judges depending upon the authorisation that each judge may have to hear a particular category of case. The lowest level of court is the Family Proceedings Court, above it is the county court and above that is the High Court, Family Division. Cases are allocated to a particular court in accordance with the Allocation and Transfer of Proceedings Order 2008²²⁵ and the *Practice Direction: Allocation and Transfer of Proceedings*.²²⁶

Family Proceedings Courts:

A Family Proceedings Court (FPC) is a magistrates' court. This is a court of first instance that deals with most types of family proceedings except for divorce and ancillary relief (marital property) cases. All public law cases (with few exceptions) must be commenced in a FPC. Cases are either heard in front of a bench of lay magistrates or a District Judge (magistrates' court). Legal advisers, employed by Her Majesty's Courts Service, advise magistrates in these courts and assist with the formulation and recording of reasons. Legal advisers also have powers to deal with some straight forward matters on their own. In accordance with the Allocation Order and the *Practice Direction* the FPC will transfer to the local family county court any case which is not appropriate for hearing in a FPC.

County Court:

Not all county courts can deal with all types of family matters. Different county courts have different jurisdictions in relation to family work. Circuit and District Judges deal with the work in the county courts. Recorders (part-time Circuit Judges) and Deputy District Judges (part-time District Judges) also sit in the county court. A county court hears appeals from the FPC. A circuit judge in the county court hears appeals from a district judge of that court. In accordance with the Allocation Order and the *Practice Direction* a county court will transfer to the High Court any case which is not appropriate for hearing at county court level; equally, a county court may transfer to its local FPC any case proceeding at county court level which is more appropriate for determination by the FPC. Appeals from a circuit judge in a county court are heard by the Court of Appeal, Civil Division.

Type of county court	Jurisdiction
Non-divorce county courts	Domestic violence injunctions
Divorce	Divorce and non-contested private law matters
Family hearing centre	Divorce and private law
Adoption centre	Divorce, private law and adoptions
Care centre	Divorce, private law, adoptions and public law

High Court of Justice:

The most complex cases are heard in the Family Division of the High Court. In addition the High Court hears all cases of international child abduction. Outside the statutory scheme for family law (for example the Children Act 1989), the inherent jurisdiction of

²²⁵ SI 2008/2836

²²⁶ [2009] 1 FLR 365.

the High Court is available for family and private law issues which require determination but are not directly covered by the statutory scheme (for example vital decisions concerning medical treatment or, until recently, protection from forced marriage). Appeals from the High Court, Family Division are heard by the Court of Appeal, Civil Division.

Annex N – Types of orders that can be made in public law proceedings

Care order section 31 Children Act 1989

An order placing a child in the care of the designated local authority. Once a care order is made the child is looked after by the local authority. The order lasts until the child reaches the age of 18. The effect of a care order is that the local authority has parental responsibility for the child and has an overriding power to determine how parental responsibility is to be exercised and can, for example, remove a child from the family home if it considers it is appropriate to do so.

Supervision order section 31 Children Act 1989

A supervision order does not give the local authority parental responsibility for the child, but places the child under the supervision of the designated local authority. The order gives the authority an extended range of powers with regard to the child. The designated local authority then allocates a supervisor whose duty it is to advise, assist and befriend the child. The supervisor will be from the local authority and has the power to direct the person responsible for the child (e.g. the child's parent) to take certain action, for example to attend or take reasonable steps to ensure the child attends meetings or courses. A supervision order can last for 12 months and be renewed for up to 3 years.

Interim care and supervision orders section 38 Children Act 1989

The court can make an interim care or an interim supervision order during proceedings where it has reasonable grounds for believing that the threshold criteria for care and supervision orders are made out. Such orders have the same effect as full orders but are time limited and subject to court review. The first interim order may last for anything up to eight weeks, but then second and subsequent orders can only be made for up to four weeks at a time.

Contact and residence orders section 8 Children Act 1989

Section 8 [of the Act] gives the court powers to make orders dealing with residence and contact arrangements for children, amongst other orders. These powers are primarily used in a private law context – for example, the orders are used to settle the arrangements as to the person with whom a child is to live and contact arrangements for children whose parents are separating and cannot agree such arrangements. However, local authorities may become involved, for example in relation to finding a suitable friend or relative to care for the child and to apply for a residence order – sometimes with the local authority's financial support – in circumstances where their parents are unable to care for them. A section 8 contact order cannot be made in respect of a child who is the subject of a care order.

Section 34 contact order section 34 Children Act 1989

These orders apply only to children who are the subject of a care order.

Special guardianship sections 14A – 14F Children Act 1989, inserted by the Adoption and Children Act 2002

A special guardianship order gives the applicant parental responsibility for the child until the child is 18. Unlike adoption orders, these orders do not remove parental responsibility from the child's birth parents but they are entitled (subject to any other orders which may be in force) to exercise parental responsibility to the exclusion of any other person with parental responsibility. They cannot, however, consent to placement for adoption. The special guardian has 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.

Emergency protection section 44 Children Act 1989

Emergency protection orders are granted when a child is at risk of significant harm if not removed immediately to accommodation provided by the authority. Guidance indicates that applications and orders should only be made in 'genuine emergencies'. An emergency protection application may be made without notice (but notice should usually be given) and lasts for eight days, with the option for it to be renewed once for a maximum of a further seven days. The making of the order can be challenged by the parents. These orders can also be used if section 47 enquiries are being frustrated and the authority believes that it needs urgent access to the child in order to complete them.

Placement section 21 Adoption and Children Act 2002

This order authorises a local authority to place a child for adoption. A placement order can only be made where the child is subject to a care order or the threshold criteria are met. The parent must consent or their consent be dispensed with. A placement order gives the local authority parental responsibility for the child. A care order does not have any effect at any time a placement order is in force. Any section 8 orders cease to have effect and there are restrictions on what orders can be applied for.

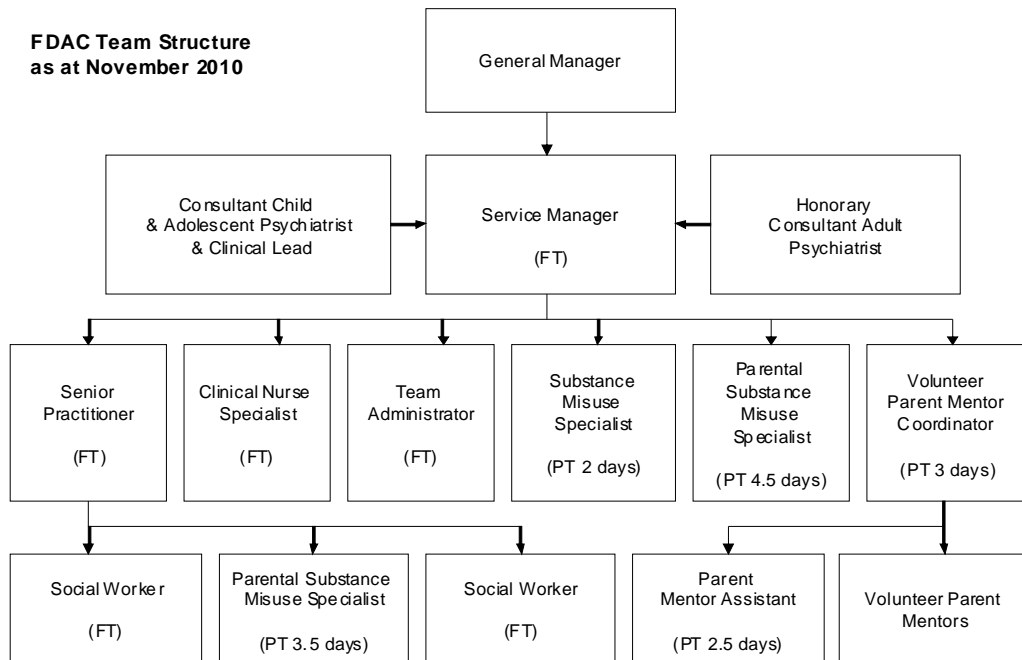
Annex O – The Family Drug and Alcohol Court

1. The Family Drug and Alcohol Court (FDAC) is a pilot project funded through local and central government. Specialist drug and alcohol courts are used widely across the USA, where early findings point to success in enabling more children in care to return home following their parents' engagement with substance misuse services.
2. The aim of FDAC is to help parents stabilise, stop using drugs and/or alcohol and, where possible, keep families together. It operates as a specialist problem-solving court within the framework of care proceedings. Several key features distinguish FDAC from standard proceedings:
 - judicial continuity provided by two dedicated District Judges;
 - frequent non-lawyer review hearings in which the judges encourage and motivate parents to engage with services;
 - a multi-disciplinary specialist team attached to the court, providing speedy expert assessment, support to parents and links to relevant local services, and regular progress reports to the court and parties. The team's emphasis is on direct work with parents, not just assessment (see below);
 - parent mentors (non-professionals) to support parents and act as positive role models on the basis of their own life experience;
 - a team of children's guardians allocated to FDAC cases;
 - a problem solving court which encourages honesty, transparency and child-centre thinking about the plans for the family; and
 - a rapid co-ordinated and supportive treatment and assessment intervention.
3. FDAC therefore has a fundamentally different function from a conventional court in that it is concerned with providing a therapeutic intervention for parents with a clear focus on rehabilitation. This involves co-ordinating a range of services so that the family's needs, concerns and strengths are all taken into account, with everyone working towards the best possible outcome for the children - a stable and safe family which is able to stay together or, if not, for quicker permanency decisions to be made for children where they cannot return home.
4. As soon as a family is identified for FDAC, within a week of the first hearing the parents and child are brought in for a comprehensive first assessment. The team read the court bundle and carry out a multi-disciplinary assessment of the parents and child with a view to answering two basic questions.
 - 1) Can the parents achieve lasting control of their substance misuse in an appropriate timeframe?
 - 2) Can the parents create a safe enough environment for their child in an appropriate timeframe?
5. Working to these broad questions allows the FDAC team to focus on the particular needs of the parent(s) and child and formulate their own judgements about how best to progress the case.

6. A series of court appearances follow, usually one every two weeks, where the judge will work with the parents to ensure that they can access a range of services, as well as monitoring their progress with regard to their substance misuse treatments and assessments. The aim is to complete cases in about 9 – 12 months.
7. If, throughout the process, it becomes clear the parent is not responding to treatment and reunification will not be possible, cases are 'exited' from FDAC into normal public law Children Act proceedings, where an application will be made to remove the child permanently from the care of the parent(s). Cases that exit from FDAC take an average of 21 weeks from exit to conclusion.
8. FDAC is run by a partnership consisting of the Tavistock and Portman NHS Foundation Trust, the children's charity Coram, the Inner London Magistrates' Court at Wells Street and Camden, Islington and Westminster local authorities. This partnership approach is essential to the FDAC model as the process involves elements of local authority, health and justice based work.

The FDAC Team

9. One distinct feature of FDAC is the team that coordinates and carries out the treatment and Intervention Plan. It is multi-disciplinary and includes a service manager, a clinical nurse, substance misuse specialists, senior practitioners and social workers. Families also have access to sessions with a child and adolescent psychiatrist, an adult psychiatrist and a family therapist. There are also named links in the Housing and Domestic Violence Teams within the local authorities. The full FDAC team structure is shown below.



10. Members of the team are recruited through the NHS and Coram. Whilst some have previously worked in child protection, many of the substance misuse specialists had no child protection experience before joining the team. In addition, practitioners and specialists are predominantly recruited below consultant level. This enables the team

to play an important role in widening the pool of medical practitioners as well as allowing better cost control. It is an equally important feature of the team that these more junior staff feel supported enough to appear in court and assume the role of expert in a way that evidence suggests these levels of staff working alone do not.

11. The FDAC team is funded by a service level agreement under which they provide services for a specific number of cases per year. This year it is 50 cases funded from Camden, Islington and Westminster Councils, as well as the Department of Health, Department for Education and Ministry of Justice. Having a service level agreement allows a level of control over budgets not found with the conventional commissioning of experts, which is essentially demand led.
12. The FDAC team make decisions as to whether extra expert evidence is needed. When commissioning extra experts from outside the team, the FDAC model offers two distinct benefits.
 - 1) The team can make use of the links they have with local NHS services to identify a suitable expert.
 - 2) The team will instruct the expert, ensuring that the questions are tightly focused on the particular assessment need and ensuring there is no duplication of work already done through FDAC.
13. Additional costs of assessments that are required from outside the FDAC team are either funded through the FDAC budget or funded through conventional methods by the LSC depending on the type of assessments required. (Forensic psychologist assessments for example will be funded through the LSC.)

Potential costs and benefits: Findings from the FDAC evaluation project*

14. Early independent evaluation by Brunel University, funded by the Nuffield Foundation and Home Office, shows 18% more FDAC family reunifications than in comparison cases. The children of 39% of FDAC mothers were living at home at final order compared with the children of 21% of comparison mothers. So more children remain with their parents and there are cost savings to local authorities from having fewer looked after children.
15. The average length of cases was roughly the same as in conventional public law proceedings, with some reunification taking longer than the comparison sample. This mirrors research done in the United States on family treatment drug courts. However, it can be argued that this is not 'delay' but simply the time it takes for substance misuse and parenting interventions to take place. Two points to consider when looking at the time taken in FDAC are:
 - 1) the higher likelihood of reunifications between parent and child under FDAC; and
 - 2) shorter out-of-home placements than for conventional comparators, with the average number of days in out-of-home placements in FDAC at 153 days under half that for comparators (348 days). This equates to average costs for out of home placements at £7,875 for FDAC children against £12,068 for non-FDAC children.
16. The average number of hearings in FDAC was 14 while in comparison cases it was 10. However, the average length of hearings was significantly longer in the comparison cases - an average of 56 minutes per review hearing in comparison

sites, compared to 21 minutes in FDAC. This meant that the average cost saving of FDAC in comparison to normal proceedings in relation to attendance at court hearings for local authorities was £677 (£285 - £962) per family. Attendance figures for professionals other than social workers were not available.

17. The average costs of the FDAC team per family are £5,852 for the first six months of the case and £8,740 overall, from the start of the case to the point when the parents graduate or otherwise leave the FDAC process (the level of input required from the team diminishes over time, so the first six months are the most expensive).
18. Although the team appears to be a significant extra cost, some elements of FDAC's work (assessment, report writing and appearing at court) are similar to the work done by expert witnesses in standard care proceedings. The average cost of these FDAC activities was £784 per family. However, additional expert evidence, from a professional outside the FDAC team, was requested in some cases and the average expenditure on this was £390. Adding both elements together, the cost of the expert evidence element of the work of the FDAC team is £1,174 per family. In comparison, in the non-FDAC local authorities, the average expenditure on expert evidence is £2,389 per family.
19. All comparisons must be treated with caution for three reasons:
 - 1) these findings are based on a very small sample size (56 children from 41 families in FDAC and 26 children from 19 families in conventional courts);
 - 2) no work has been done on the long-term outcomes of the children returned home and how many placements break down as parents return to drugs and/or alcohol; and
 - 3) full costings, taking into account all costs and benefits to all of the participants over the long term, have not yet been commissioned.

Family Justice Review conclusion

20. The initial evaluation of FDAC shows that it is popular with both the professionals and the parents who use it and has greater potential than conventional proceedings to realise better outcomes for children and families struggling with drug and alcohol misuse.
21. The evaluation justifies a further, limited roll-out although extension across the country should be subject to a comprehensive cost benefit analysis.

* FDAC Research Team, Brunel University: Professor Judith Harwin, Mary Ryan, Jo Tunnard, Bachar Alrouh, Dr Carla Matias, Dr Sharon Momenian-Schneider and Dr Subhash Pokhrel.

Annex P – Consideration of legislating for a presumption of shared parenting

In 2004 Hunt summarised the position of non-resident parents often expressed by father's rights groups, that:

- women typically get residence and thereafter control the extent of the father's involvement;
- while legal remedies are available, fathers are discouraged by costs; deterred by legal advice about the prospects of success and disadvantaged by having to represent themselves against a legally aided mother;
- the slow legal system allows a status quo to be established which it is hard to overturn;
- contact orders provide for insufficient meaningful contact; courts are too ready to limit contact; and
- mothers can easily flout court orders; courts do not act decisively to ensure compliance.²²⁷

It is apparent from the evidence received that these views are still held by many people.

The family justice system means (to me) an essentially well meaning process, which fails in it's endeavours due to a myopic, and frankly sexist, approach which consistently places greater emphasis upon the mother's wishes over the children's needs.

Father, call for evidence submission

The basis for these statements is discussed in the main report.

One proposed solution is that there should be a presumption of equal or shared time set out in legislation and we received many submissions proposing this. Common themes were that this would reduce applications and court time, would follow in the steps of other jurisdictions, and would uphold the rights of both parents and children, with many feeling it would put right what they saw as a bias in favour of the resident parent:

Enshrine a presumption of shared parenting in law ... Stop protecting the resident parent, and establish systematic equality.

Individual, call for evidence submission

If that [presumption of shared parenting] is the fair "starting point" parents will be discouraged to start children's applications and are more likely to resolve time share arrangements in the best interest of the children according to their unique situation.

Individual, call for evidence submission

²²⁷Hunt, J & Roberts, C (2004) *Child contact with non-resident parents* Family Policy Briefing, 3. Department of Social Policy and Social Work, University of Oxford.

The intention is that the court's starting point, when considering living arrangements for the child, should be to provide for equal time with both resident and non-resident parent. This is commonly known as a movement for 'shared parenting', and has been described as a global phenomenon with many comparable jurisdictions considering the issue following campaigning. It may also be described as shared care or shared residence, or shared parenting time, though those terms do not necessarily imply equality of time.

The panel recognises the importance of shared parenting post-separation. The issue here is the whether there should be a particular presumption in legislation about sharing of time.

Current legislative position

When parents seek an order of the court to determine the child's living arrangements, most do so by making an application for contact. There is no statutory presumption of shared contact between parents following separation: the child's welfare is the court's paramount consideration.

Parental responsibility (PR) is recognised in legislation, with the Children Act 1989 describing it as 'all the rights, duties, powers, responsibilities and authority, which by law a parent has in relation to the child and the administration of his or her property'. PR continues following separation or divorce.

The courts are able to make a shared residence order (SRO). An agreement for shared residence will often mean that children spend substantial (but not necessarily equal) amounts of time with both of their parents, who will be actively involved in key decisions about the child/ren's upbringing. While the precise role played by each parent will be determined by individual circumstance, it will usually involve the child/ren having overnight contact with both parents, and joint involvement by both parents in decisions about education, health (other than in emergencies), religious observance, hobbies and activities.

Courts have been reluctant to make SROs in high conflict cases (given the high degree of parental co-operation needed to make a SRO work) but recent case law has seen the courts recognise that SROs are no longer exceptional. Contact orders are often seen as more appropriate because they provide a structure for shared parenting arrangements, rather than the division of time depending only on parental cooperation.

The report describes evidence the panel received of the great difficulties faced in contact issues by some parents, usually by fathers. The panel can well understand why there is pressure for a presumption of shared or equal time.

This issue has also taxed successive governments. It was discussed in research commissioned by the Ministry of Justice (Hunt and Macleod, 2008, noted above). It was also considered during the course of the Family Law Bill in 1996, following the report *Making Contact Work*²²⁸ and again in 2004 in *Parental Separation: Children's Needs and Parent's Responsibilities*. This concluded:

²²⁸ This was a report to the Lord Chancellor from the Advisory Board on Family Law, on the facilitation of arrangements for contact between children and their non-residential parents and the enforcement of court orders for contact. <http://www.dca.gov.uk/family/abfla/mcwrep.pdf>, last accessed 17/03/11.

*The government does not ... believe that an automatic 50:50 division of the child's time between the two parents would be in the interests of most children. In many separated families, such arrangements would not work in practical terms, owing to living arrangements or work commitments. Enforcing this type of arrangement through legislation would not be what many children want and could have a damaging impact on some of them. Children are not a commodity to be apportioned equally after separation. The best arrangements for them will depend on a variety of issues: a one-size-fits-all formula will not work. The assumption that both parents have equal status and value as parents is enshrined in current law. The actual arrangements made by courts start from this position.*²²⁹

The Centre for Social Justice in 2010 reached a similar conclusion. A Private Members' Bill, scheduled for Second Reading in July 2011 will again bring the issue forward for Parliamentary scrutiny.

It will be apparent that the panel has reached the same conclusion as the previous government in 2004, reinforced in this view by evidence from countries that have created a presumption of shared time in legislation. The panel's aim is to shift debate away from apportionment of time to a more constructive approach based on PR and co-operative parenting post-separation. We do however propose to place in legislation a reference to the child's right to a meaningful relationship with both parents. The remainder of this annex discusses the background to these conclusions in more detail than is given in the main report.

Evidence from cases in England and Wales

Submissions made to the panel pointed out that the starting point for the judge, for those cases that do come to court, is to try to come to an agreement between the parents whereby children should and will have contact with both post-separation, unless there are obvious reasons that mitigate against this. A pro-contact stance is implicit in one of the key concepts of the legislation, that of continuing, shared, PR following separation, and it is generally recognised that decisions in leading court cases have resulted in the starting point of an assumption that there should be contact.²³⁰

*The courts naturally start with the view that in most cases contact between the child and the non-resident parent is desirable both for the child and for the parent.*²³¹

A case file analysis carried out by Hunt and Macleod found there was no evidence that non-resident parents are systemically and unreasonably treated by the family courts.²³² The study showed courts start from the position that contact is generally in the interests of the child, that they make great efforts to achieve this, and in most instances they are successful.

²²⁹ DCA, DfeS, and DTI Cm 6273 London: HMSO, 2004

²³⁰ Hunt, J and Roberts, C. (2004)

²³¹ Butler-Sloss, Dame Elizabeth (2001) 'Contact and Domestic Violence'. *Family Law*, 31, May, 335-8.

²³² Hunt J and Macleod, A (2008) *Outcomes of applications to court for contact orders after parental separation or divorce* London MOJ,

Key findings from Hunt and Macleod.

- Outcomes of contact applications were typically agreed, it was rare for the court to have to make a final ruling, and most cases ended with face-to-face contact. Contact typically involved overnight stays, at least fortnightly, with some children having additional visiting contact. Visiting contact was usually weekly or more and was almost always unsupervised.
- Non-resident parents were largely successful in getting direct contact where there had been none and in getting the type of contact sought, while those who achieved staying contact usually got the amount they sought, those with visiting contact mainly did not.
- Applications to enforce previous orders were unusual and rarely wholly successful.
- Non-resident parents were almost twice as likely to succeed in getting the type of contact they wanted as resident parents who initially opposed staying, unsupervised contact or any contact.
- Four in five resident parents who opposed unsupervised contact raised serious welfare concerns. The initial position of the resident parent and whether they raised serious welfare issues were significantly related to outcome, as was the age of the child, whether there was any contact at the point the application was made and the interval since the child was last seen.

Views of academics and national support organisations

We were urged to rely on evidence.

High pressure groups argue that family courts are biased against fathers and grandparents; it is important that policy makers do not adopt uncritically the terms of campaigners. Nor should they develop policy simply as a response to the postbag of a small number of Members of Parliament, or indeed personal experiences in the absence of independent research about the nature and extent of claims.

Julia Brophy, call for evidence submission

Academics and national support organisations opposed a presumption. They argued that contact is a right of the child, not the parent or grandparent, and that the role of the parents, and also the court, is to uphold that right following separation where it is safe. Many respondents then went on to rebut calls for any presumption that would interfere with the principle of considering contact rights from the best interests of the child.

The Children's Society advise against any change to law or guidance which would make it possible for a child's best interest to be compromised in favour of any concept of the rights of mothers, fathers, or grandparents to future involvement.

Children's Society, call for evidence submission

Despite our belief that too many children are missing out on a relationship with their non-resident parent, and the family court system currently does not do much to remedy this, we do not support a change in the law to provide 'greater contact rights' to non-resident parents and grandparents

*(Question 6). Indeed, we feel this language is extremely misplaced, and does not correspond to language within the existing legislation ... **children** have rights (including the right to a relationship with both parents, wherever this is safe) and parents have **responsibilities** to uphold these rights.*

Relate, call for evidence submission

Experiences of other jurisdictions

Sweden

Sweden is often cited as a positive example of a presumption of shared parenting in legislation. In Sweden shared parenting (or 'alternating parenting') is relatively common.²³³

Legislation on custody, residence and contact is set out in the Children and Parents Code (the Code).²³⁴ The Code dictates that all decisions about custody and contact must take a child-centred approach with the principle of the child's best interests at the centre. The Code also emphasises the child's right to be heard and directs that decisions must have regard to their wishes.

Following public debate, the Code was amended in 1998 to promote joint custody. This enabled the courts to order that custody be shared between both parents, even where one was explicitly opposed to this. There were clear limitations to this power: the overarching principle of the child's best interests remained, and the court could not order joint custody where both parents opposed it. This reform was strengthened the following year through a judgment by the Supreme Court, which directed that the law should be interpreted to mean that sole custody should be given to one of the parents only where particular circumstances prevented joint custody. In practice this gave rise to a presumption of joint custody. The 1998 reform also enabled the court to decide upon alternating residence against the wishes of one parent.

These reforms led to a marked increase in joint custody orders, including those opposed by one parent. The result was widely criticised, with fears that joint custody was being ordered where this was not in the best interests of the child. In particular, where joint custody was imposed on one parent, good parental cooperation proved difficult with the child suffering. The backlash against this reform was so great that in 2006 the Swedish Government changed the law again. The Code now states that when assessing the best interests of the child the social committees and courts must take into account, in particular, the risk of the child or any other family member being abused, or of the child being unlawfully abducted, retained or otherwise being harmed. A provision stating that the courts should pay particular attention to the parents' ability to cooperate before deciding on joint custody was intended to limit the use of joint custody where this would not be appropriate.

²³³In 2008, 92 per cent of all children between 1 and 17 years old had shared parenting. For 7 per cent of children the mother had sole custody and for 1 per cent of children, the father had sole custody.

²³⁴The Swedish concept of custody involves certain obligations such as ensuring that a child is cared for and safe, and is accompanied by rights and obligations to decide in matters concerning the child's personal affairs, such as upbringing and education. Where parents are married (either at the time of a child's birth or subsequently) joint custody is automatic, otherwise it must be applied for from court. In Sweden, where parents are not married, 95% obtain joint custody.

Australia

In Australia, as the UK, the central principle underpinning the law on private law parenting disputes is that the child's best interests are the paramount consideration.

The law changed substantially in 2006 as part of a major reconstruction of the entire family law system including procedural changes such as the introduction of compulsory pre-filing mediation and new 'less adversarial' court processes.

An inquiry in 2003 to consider joint custody recommended against the introduction of a presumption of equal time parenting. However, the influence of father's groups saw the 2006 changes introducing a presumption that equal shared parental *responsibility* is in the best interests of children. The presumption does not apply in cases involving family violence or child abuse, and can be rebutted by evidence that equal shared PR would not be in the child's best interests. When a court decides to make an order for equal shared PR, it must also consider whether it would be in the best interests of the child and 'reasonably practicable' to order *equal time* or *substantial and significant time* with both parents.²³⁵

Research on outcomes for children

Key findings from research on outcomes for children in relation to contact show:

- There is a general consensus that it is good for children to maintain continuing and frequent contact with both parents when they cooperate and communicate and have low levels of conflict.
- There is no empirical evidence showing a clear linear relationship between shared time and improving children's outcomes.
- The best interests of children are most strongly connected to the quality of parenting they receive, the quality of the relationship between their parents, and practical resources such as adequate housing and income – not any particular pattern of care or amount of time.

Amato and Gilbreth's (1999) statistical review of 63 studies on parent-child contact and children's well-being found that the *quality* of contact is more important than the *amount* of contact. Good outcomes for children were more likely when non-resident parents had positive relationships with their children and had an 'active parenting' approach, including both warmth and boundary setting.

Felthberg's key findings in relation to the post-2006 Australian changes were:

- there was a marked increase in judicially imposed shared time;
- complex legislation led to professional and community misunderstanding that the law says, 'The starting point is shared time'. This has encouraged: (a) increased focus on parents' (especially fathers') rights over children's best interests; and (b) increased reluctance to disclose violence and abuse; and

²³⁵ Note that fathers' groups influenced the shape of the legislation in the final stages of the parliamentary process, with the result that the shared time provisions went further than had been originally recommended on the basis of the substantial evidence (including research evidence) gathered by the parliamentary inquiry process.

- there are very mixed messages about parents' and children's experiences of shared time arrangements.²³⁶

Research by McIntosh on shared time arrangements has identified a number of outcomes for children:

- where mothers report safety concerns, child well-being is lower regardless of the care arrangement, and the position is worse for children in shared time arrangements than more traditional arrangements.
- shared care has special risks for children under four years of age – “regardless of socio-economic background, parenting or inter-parental co-operation, shared overnight care for children under four years of age had an independent and deleterious impact”²³⁷

The McIntosh et al study also found that children in shared time arrangements reported higher levels of parental conflict than other children. They were more likely to report feeling caught in the middle. Across this high conflict sample, children in shared time arrangements were least happy with their parenting arrangements and most likely to want to change them.

There is research evidence that the most workable shared care arrangements are those that parents agree themselves. McIntosh et al found that families exercising shared care pre-mediation were more than twice as likely to maintain this pattern as parents who moved to shared care after mediation. It has been suggested that the increase in judicially imposed share time arrangements is of concern, due to the high levels of conflict associated with fully litigated cases and research consensus that shared time is more workable where parents have cooperative, flexible arrangements.

*Any parenting arrangement can be good or bad for children, depending on the circumstances. There is mounting evidence, however, that shared time is more risky for children than other parenting arrangements where there are safety concerns, where there is deeply entrenched inter-parental conflict and/or when children are very young. These circumstances are likely to be evident in cases where legislation needs to be used to make a decision. Ironically, legislation promoting shared time seems likely to be most directly applied in contexts where shared time is least likely to be beneficial for children.*²³⁸

²³⁶ Felhberg, B *Caring for children after parental separation: would legislation for shared parenting time help children?* Family Policy Policy Briefing 7, Department of Social Policy and Intervention, University of Oxford [forthcoming].

²³⁷ McIntosh, J et al (2010) Post-separation parenting arrangements and developmental outcomes for infants and children. Collect reports. Three reports prepared for the Australian Government Attorney General's Department.

²³⁸ Felhberg, B.,[forthcoming].

Annex Q – Judicial expectations statement



JUDICIARY OF
ENGLAND AND WALES

MIDLAND REGION FAMILY JUDGES AND MAGISTRATES

What the Family Courts expect from Parents

The courts consider that these guidelines apply to all children and all parents. Please don't think that your case is an exception.

Are you a parent thinking of asking for a court order?

The court wants you to think about these things first:

- As parents, you share responsibility for your children and have a duty to talk to each other and make every effort to agree about how you will bring them up;
- Even when you separate this duty continues.
- Try to agree the arrangements for your child. If talking to each other is difficult, ask for help. Trained mediators can help you talk to each other and find solutions, even when things are hard. The court staff can give you details.
- If you cannot agree you can ask the court to decide for you. The law says that the court must always put the welfare of your child first. What you want may not be the best thing for your child. The court has to put your child first, however hard that is for the adults.
- Experience suggests that court-imposed orders work less well than agreements made between you as parents.

The court therefore expects you to do what is best for your child:

- Encourage your child to have a good relationship with both of you.
- Try to have a good enough relationship with each other as parents, even though you are no longer together as a couple.
- Arrange for your child to spend time with each of you.

Remember, the court expects you to do what is best for your child even when you find that difficult:

- It is the law that a child has a right to regular personal contact with both parents unless there is a very good reason to the contrary. Denial of contact is very unusual and in most cases contact will be frequent and substantial.
- The court may deny contact if it is satisfied that your or your child's safety is at risk.
- Sometimes a parent stops contact because she/he feels that she/he is not getting enough money from the other parent to look after the child. This is not a reason to stop contact.

Your child needs to:

- Understand what is happening to their family. It is your job to explain.

- Have a loving, open relationship with both parents. It is your job to encourage this. You may be separating from each other, but your child needs to know that he/she is not being separated from either of you.
- Show love, affection and respect for both parents.

Your child should not be made to:

- Blame him/herself for the break up.
- Hear you running down the other parent (or anyone else involved).
- Turn against the other parent because they think that is what you want.

You can help your child:

- Think about how he or she feels about the break up.
- Listen to what your child has to say:
- About how he/she is feeling
- About what he/she thinks of any arrangements that have to be made.
- Try to agree arrangements for your child (including contact) with the other parent.
- Talk to the other parent openly, honestly and respectfully.
- Explain your point of view to the other parent so that you don't misunderstand each other.
- Draw up a plan as to how you will share responsibility for your child.
- When you have different ideas from the other parent, do not talk about it when the children are with you.

If you want to change agreed arrangements (such as where the child lives or goes to school):

- Make sure the other parent agrees.
- If you cannot agree, go to mediation.
- If you still cannot agree, apply to the court.

If there is a court order in place:

- You must do what the court order says, even if you don't agree with it. If you want to do something different you have to apply to the court to have the court order varied or discharged.

Annex R – Proposed divorce process

Where a person seeks a divorce they should go first to the information hub, where they will access an online divorce portal. This will explain the process and the possible grounds for divorce, together with application forms. The person initiating divorce will complete the application online.²³⁹ The system will have in built checks to prevent now frequent administrative errors.²⁴⁰ The party will also be prompted to consider arrangements for children, financial and/or religious issues and be directed to other information and support services.

The online form will then be submitted to a centralised processing centre along with approved identification documents and a fee for consideration and processing. The application will not be processed unless it is accompanied by a fee or a remissions form and verification, and approved identification documents, such as an original copy of marriage certificate.

The application will be received by an administrator who will check the application has been filled out correctly, acknowledge receipt and serve the application on the other party. The other party will then return the forms to the processing centre indicating whether or not they contest the divorce or whether they wish to make a cross application.

Where the ground for divorce is uncontested the administrator will issue both parties with a notice of divorce. Where the application indicates unresolved issues around arrangements for children and/or financial arrangements the administrator will issue the notice for divorce and also direct parties to appropriate information and support services to resolve any outstanding issues.

Where the ground for divorce is contested: if the other party wishes to contest that the marriage has irretrievably broken down, they should indicate this when returning the divorce application. The processing officer will transfer the application to the applicant's local court for judicial consideration. The judge will then examine the case and determine whether the notice of divorce should be issued.

²³⁹ There will also be the option for couples to make a joint application.

²⁴⁰ These changes are designed to operate in so far as practicable through an online system. However, the panel accepts that provisions will need to accommodate the needs of all users, which may include submission in hard copy and software such as BrowseAloud.

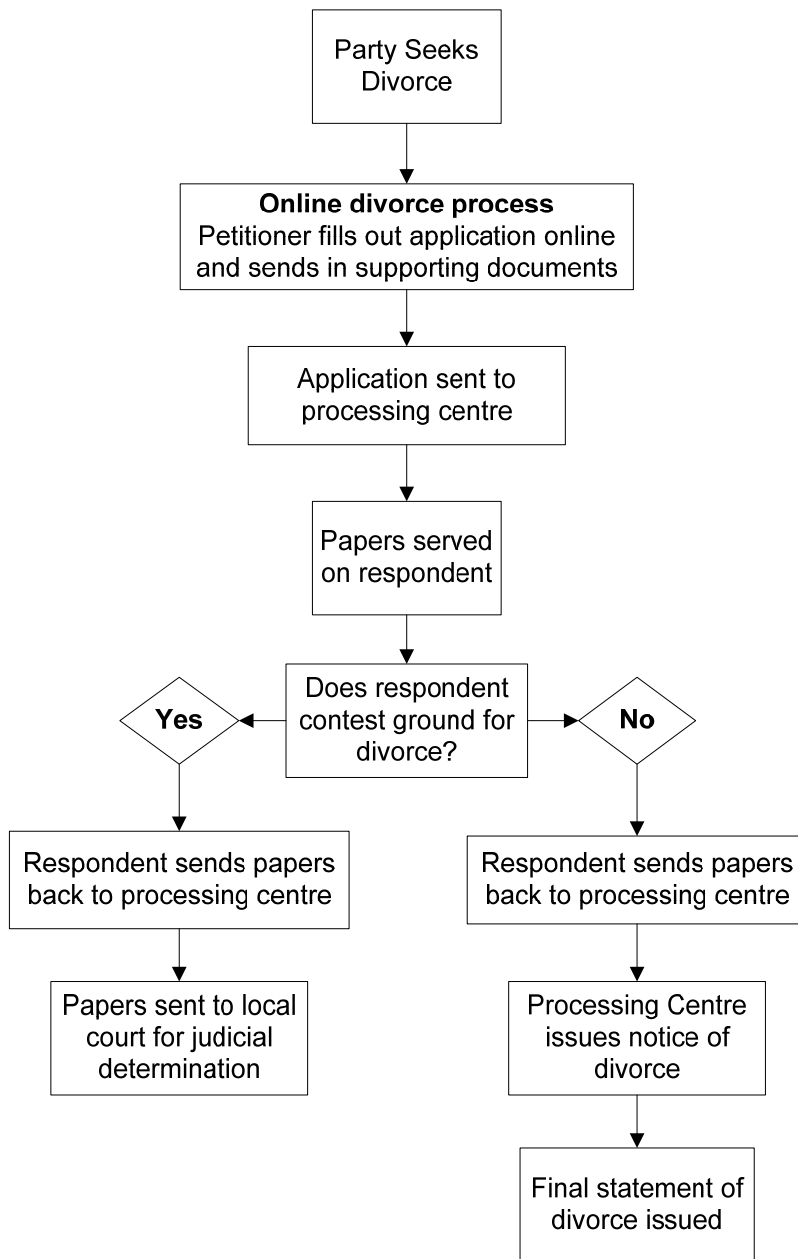


Fig x – Diagram of proposed divorce process

Further information available by emailing familyjusticereview@justice.gsi.gov.uk

Published on behalf of the Family Justice Review Panel by the Ministry of Justice,
the Department for Education and the Welsh Assembly Government

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