

Family Justice Review

Final Report

November 2011

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

The range and depth of responses to our interim report shows again people's strength of feeling about family justice as well as the commitment of all who work in it. On behalf of the panel I want to thank the many who responded so thoroughly and thoughtfully to our consultation.

We found general agreement with our diagnosis: a system that is not a system, characterised by mutual distrust and a lack of leadership, by incoherence and without solid evidence based knowledge about how it really works. The consequence for children is unconscionable delay that has continued to increase since we began our work. The average care case in county courts now takes over 60 weeks and many take much longer – an age in the life of a child. These delays contribute to the 2 years 7 months it takes on average for a child to be adopted. With 20,000 children now waiting for a decision, delay is likely to rise further.

Many of our recommendations are unchanged from the interim report. Others have changed as a result of the consultation and our own further work. But the thrust is the same. We see a need for stronger leadership and coordination of the organisations and people involved in family cases and have proposed structural changes designed progressively to achieve this. We aim to strengthen the voice of children. We recommend changes in legislation, regulations and processes in public law aimed at putting the needs of children first and with tighter attribution of responsibility to the different actors in a case. And in private law we recommend a series of changes aimed at helping more people to sort out their affairs for themselves while protecting the interests of their children.

We are though fully aware that changes in structures, rules and processes will not by themselves measure up to the scale of the strains and problems we diagnosed in our interim report. Much of the improvement for children will have to come from change in the way people choose to work, from change to the culture of family justice, and from change to the culture of delay.

Here all the dedication to family justice can harm children, not help them. Having read dozens of replies to our consultations I was struck by the way in which almost every group thought things would be better were they allowed to do more, including judges, magistrates, social workers and expert witnesses. Hardly anyone thought they themselves should do less. There is no doubt an element of self-protection in this. But it often comes at least as much from a belief that other people are not doing their jobs for children as well as they should be done.

The reality of course is that time and money spent on one child means less time and money available to help another. We heard in evidence of enormous expenditure on some individual cases (over £300,000 on residential assessment in one). But the point applies to all. Dedication to achieving the best possible result for one child comes at the hidden expense of another whose case is delayed or whose social worker has to come again to court when they might have been working to help another child to remain safely with their birth family.

Distrust of other parts of the system is not always well founded. Prejudice against care as an option for children and distrust of local authorities are fuelling delays in the system. It is of course right that we endeavour to keep families safely together but we must also be quicker to recognise when this is not possible. Research shows that the majority of maltreated children who are looked after by authorities will do better in terms of their wellbeing and stability than those who remain living at home. Courts need to recognise the limits of their ability to foresee and manage what will happen to a child in the future. They must also learn to trust local authorities more.

In private law we of course believe strongly that most children benefit from a relationship with both parents post separation. The question is how best to achieve this. Shared parenting should be encouraged where this is in the child's interests. In our view the best way to achieve this is through parental education and information combined with clear, quick processes for resolution where there are disputes.

We are aware that some will be disappointed by our decision to recommend against a legal presumption around shared parenting and to step back even from the recommendations we made in this respect in our interim report. The evidence we received showed the acute distress experienced by parents who are unable to see their children after separation. This is an issue we know countries around the world try to tackle, and fail. Our conclusion was reached reluctantly but clearly. The law cannot state a presumption of any kind without incurring unacceptable risk of damage to children. Progress depends on a general social expectation of the full involvement of both parents in the lives of their children before separation, not on changes in the law.

Again, I wish finally to thank my fellow panel members for their huge and creative commitment. And on their behalf and my own I thank most warmly Jodie Smith and the secretariat for their knowledge, thought, judgement, graft and patience. It has been a pleasure to work with you all.

ii Executive Summary

1. We published our interim report in March. This is our final report, which reflects our conclusions following well over 600 responses to our consultation and input from meetings in many parts of the country. We have also had the benefit of the Justice Select Committee's report on the operation of the family courts, published in July.
2. This final report aims to be a free standing document but does not analyse the issues facing the family justice system in the detail of the interim report. It sets out our final recommendations for reform, highlighting where these have changed and where they have not. It also includes expanded sections on the involvement of children and on workforce development.

Why change is needed

3. The family justice system deals with the failure of families, of parenting and of relationships, often involving anger, violence, abuse, drugs and alcohol. The decisions taken by local authorities and courts have fundamental long term consequences for children, parents and for society generally.
4. There was general agreement that the legal framework is robust. We should be proud of this and in particular the core principle that the welfare of the child should be the paramount consideration in all decisions affecting them.
5. But the family justice system also faces immense stresses and difficulties. Some apply only in public law or private law but others are more systemic. Respondents to the consultation shared our deep concern about the way the system currently operates, and there was widespread agreement about our diagnosis.
 - Cases take far too long. With care and supervision cases now taking on average 56 weeks (61 weeks in care centres) the life chances of already damaged children are further undermined by the very system that is supposed to protect them. And in private law, an average of 32 weeks allows conflict to become further entrenched and temporary arrangements for the care of children to become the default.
 - The cost both to the taxpayer and often the individual is high. Many respondents saw a need for increased spending. But we are not convinced that current resources are spent in the most efficient and effective way.
 - Both children and adults are often confused about what is happening to them. The need to address this will rise with the likely increase in the number of people who represent themselves in private law cases.
 - Organisational structures are complicated and overlapping, with no clear sense of leadership or accountability. No one looks at the performance of the system as a whole.
 - Individuals and organisations across different parts of the family justice system too often do not trust each other.

- There is no set of shared objectives to bind agencies and professionals to a common goal and to support joint working and planning between them.
- Morale can be low and the status of those working in some parts of the system does not match the levels of skill and commitment.
- Information and IT are wholly inadequate to support effective management and processes.

The family justice system

6. These issues show a set of arrangements in a slow building crisis. Family justice does not operate as a coherent, managed system. In fact, in many ways, it is not a system at all. Our proposals aimed to address this and focus on:
 - ensuring the voices of children and young people are heard, and that they understand the decisions that affect them;
 - the creation of a dedicated, managed Family Justice Service;
 - the need for improved judicial leadership and a change in judicial culture;
 - improvements to case management;
 - ensuring the way in which the courts are organised is streamlined and more effective; and
 - ensuring there is a competent and capable workforce, through effective workforce development.
7. Our proposals are designed to work in tandem with the reforms to child protection practice recommended by Professor Eileen Munro and with the work of the Social Work Reform Board.

The child's voice

8. Children's interests are central to the operation of the family justice system. Decisions should take the wishes of children into account and children should know what is happening and why. People urged us to consider the need to take great care in consulting children, and for this to be handled sensitively and to take into account the child's age and understanding.
9. **Children and young people should be given age appropriate information to explain what is happening when they are involved in cases. They should as early as possible be supported 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.**
10. The work needs skilled professional support. **The Family Justice Service** (see paragraphs 13 to 25) **should take the lead in developing and disseminating national standards and guidelines on working with children and young people in the family justice system.**

11. We were also impressed by the work undertaken by the Cafcass Young People's Board. This work should be maintained through a **Young People's Board for the Family Justice Service**.
12. Recent developments in Wales to introduce the **Rights of Children and Young Persons Measure (Wales) 2011** should be closely monitored.

A Family Justice Service

13. The need for leadership and coordination of family justice was widely recognised by respondents to the consultation. The best way to achieve this has been debated since our interim report was published. To create a new organisation both to take over some existing functions and also to coordinate and influence others is complicated and affects established interests. There are financial issues. Some have raised concerns about a possible effect on judicial independence. We also accept that we were ambiguous in a number of areas in the interim report. So we have revisited the objectives and possible models for management of the system.
14. The core aim should be to support delivery of the best possible outcomes for children who come into contact with the family justice system, with a particular focus on reducing delay. Our intention is not to recommend structural change for the sake of it. The need is a central resource to identify, suggest and where appropriate deliver practical ways to improve the way the system works.
15. All options to achieve this need to be assessed against their ability to deliver a range of functions to:
 - provide appropriate leadership nationally and locally;
 - agree national standards against which those operating at national and local level are measured;
 - ensure clarity of accountability nationally and locally, and between individual agencies and services;
 - ensure incentives align with strategic priorities;
 - ensure there is capability and capacity nationally and locally to enable the system to operate effectively and efficiently, including the generation of management information and support for training within a responsibility for workforce strategy;
 - optimise the use of resources nationally and locally to secure value for money;
 - enable and drive continuous improvement; and
 - be able to respond to change.
16. A further key criterion is whether a new organisation would have the position (status, legal role, or budget) to be taken seriously even where it cannot give instructions.

17. There is a range of possible models. The government will need to give detailed consideration to the feasibility and implications of these options. Any structural change will require investment. We understand that no new money is available to fund change before 2014/15.
18. Our view is that **a Family Justice Service should be established, sponsored by the Ministry of Justice (MoJ), with strong ties at both Ministerial and official level with the Department for Education (DfE) and Welsh Government. As an initial step, an Interim Board should be established, which should be given a clear remit to plan for more radical change on a defined timescale towards a Family Justice Service.**¹
19. This would provide a focal point and leadership to address the issues the family justice system faces as a whole. The Family Justice Service would have responsibility for court social work services, provision of mediation and out of court resolution services. It would also have a role in setting quality standards and monitoring spend in relation to expert witnesses. There is potential in due course for the Service to manage more directly the supply of expert witnesses, as well as solicitors for children. To bring these services together would have benefits in itself and would ensure the Family Justice Service had a budget and hands on experience of delivery.
20. **The Family Justice Service should have strong central and local governance arrangements. The roles performed by the Family Justice Council will be needed in any new structure but they will need to be exercised in a way that fits with the final design of the Family Justice Service (and Interim Board).**
21. **The Family Justice Service should be responsible for the budgets for court social work services in England, mediation, out of court resolution services and, potentially over time, experts and solicitors for children.**
22. In our view the policy that public bodies should charge each other for the services they provide does not make sense in family justice: either they change behaviour, in which case they risk damage to children, or they do not, in which case they are pointless. **Charges to local authorities for public law applications and to local authorities and Cafcass for police checks in public and private law cases should be removed.**
23. To ensure the interests of children are central, **a duty should be placed on the Family Justice Service to safeguard and promote the welfare of children in performing its functions. An annual report should set out how this duty has been met.**
24. Current IT systems are wholly inadequate. **An integrated IT system should be developed for use in the Family Justice Service and wider family justice**

¹ In references to the Family Justice Service, we envisage these functions initially being performed by the Interim Board.

agencies. This will need investment. In the meanwhile there should be an urgent review of how better use could be made of existing systems.

25. The Family Justice Service will also have a role in promoting continuous improvements in practice amongst family justice professionals. **The Family Justice Service should develop and monitor national quality standards for system wide processes, based on local knowledge and the experiences of service users. There should be a coordinated and system wide approach to research and evaluation, supported by a dedicated research budget** (amalgamated from the different bodies that currently commission research). **The processes by which research is transmitted around the family justice system should also be reviewed and improved.**

Judicial leadership and culture

26. Our recommendations here are addressed mostly to the judiciary not to government.
27. Improvements to the family justice system cannot be achieved through organisation and governance alone. Changes to the way people do things are essential, and here the judiciary are key. 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 proposed action is in the best interests of their children. But changes are needed to address the variety in ways of working in different courts and areas of the country.
28. Stronger leadership and management arrangements for the judiciary should support consistency, improved performance and culture change. Some feared this might reduce judicial independence, but there are many, including some of the most senior judges, who share our view that management of judges by judges, supported by effective measurement and job descriptions, is entirely compatible with it.
29. **A Vice President of the Family Division should support the President of the Family Division in his leadership role, monitoring performance across the family judiciary. Family Division Liaison Judges should be renamed Family Presiding Judges, reporting to the Vice President of the Family Division on performance issues in their circuit.**
30. **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. Information on key indicators for courts and areas should be made available to the Family Justice Service. Information on key indicators for individual judges should be available to those judges as well as judges with leadership responsibilities. The judiciary should agree the key indicators.**
31. Some Designated Family Judges are unclear about whether their leadership responsibilities extend to Family Proceedings Courts. **Designated Family Judges should have leadership responsibility for all courts within their**

area. They will need to work closely with Justices' Clerks, family bench chairmen and judicial colleagues.

32. Nearly everyone has told us at every stage how important it is to have the same judge throughout a case. **The aim should be judicial continuity in all family cases.** We recognise that to achieve continuity will need changes to the work patterns of some judges. **A willingness to adapt work patterns to be able to offer continuity should be a condition for the ability to take family work.** If some courts can achieve continuity it should be possible in all.
33. There are practical barriers to immediate implementation in the High Court, but **the President of the Family Division should consider what steps should be taken to allow judicial continuity to be achieved in the High Court. In Family Proceedings Courts judicial continuity should if possible be provided by all members of the bench and a legal adviser. If this is not possible, the same bench chair, a bench member and a legal adviser should provide continuity.**
34. Those who spend a minority of their time on family matters lack the confidence for tight case management and will have difficulty in achieving judicial continuity. **Judges and magistrates should be enabled and encouraged to specialise in family matters. Appointment to the family judiciary should include consideration of a willingness to specialise in family matters.** We have heard representations from magistrates that the limitation on the number of days they may sit is unnecessary and prevents specialisation in family matters. **The restriction on magistrate sitting days should be reviewed.**
35. Stronger case management is the partner of judicial continuity. Everyone in the system must play his or her part to support effective case progression. Support to case progression is an essential part of the functions that Her Majesty's Courts and Tribunals Service (HMCTS) should provide to the judiciary. The judiciary also need to take an active role ensuring matters are followed up effectively when parties do not progress the case as expected. **HMCTS and the judiciary should review and plan how to deliver consistently effective case management in the courts.**

The courts

36. Recent years have seen closer working between the three different types of family court. But difficulties and inconsistencies remain, with wide variations nationally in how different cases are allocated to different courts. The current family court structure is also quite rigid. **A single family court, with a single point of entry, should replace the current three tiers of court. All levels of the family judiciary (including magistrates) should sit in the family court and work should be allocated according to case complexity.**
37. To remove the distinctions between different types of District Judge would enable greater flexibility in a single family court. **The roles of District Judges working in the family court should be aligned.** In addition to increased flexibility in how the judiciary are deployed, **there should be flexibility for legal advisers to conduct work to support judges across the family court.**

38. The position of the High Court should not be undermined in creating a single family court. **The Family Division of the High Court should remain, with exclusive jurisdiction over cases involving the inherent jurisdiction and international work that have been prescribed by the President of the Family Division as being reserved to it. All other matters should be heard in the single family court, with High Court judges sitting in that court to hear the most complex cases and issues.**
39. The provision of court facilities should also be more flexible. **Routine hearings should use telephone or video technology wherever appropriate. Hearings that do not need to take place in a court room should be held elsewhere. Court buildings should be as family friendly as possible** to overcome the common complaint that the courts are daunting and intimidating places for families.
40. Capital investment will be needed in the longer term if there are to be dedicated family court buildings. Even without this **HMCTS should review the estate for family courts 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.** The needs of London require particular attention. **The operation and arrangement of the family courts in London should be subject to further review by the judiciary and HMCTS.**

Workforce

41. The skills and attitudes of people are at least as important as legislation and process in supporting reform of the family justice system. Since our interim report was published we have met training bodies and sector skills councils, gathering among other things information on recruitment requirements, learning and development offers and performance management schemes, to compare provision and identify areas for improvement.
42. We have identified a lack of opportunity for people to learn together, to gain mutual clarity about roles and responsibilities and to work together to overcome problems. **The Family Justice Service should develop a workforce strategy along with an agreed set of core skills and knowledge. There should also be an inter-disciplinary induction course** for all those who come to work in the family justice system.
43. Continuing professional development (CPD) is clearly important to keep people up to date with changes in law, practice and the latest research. **Professional bodies should review CPD schemes to ensure their adequacy and suitability in relation to family justice.**
44. Although some joint training exists, its quantity and quality are variable. **The Family Justice Service should develop annual inter-disciplinary training priorities for the workforce to guide the content of inter-disciplinary training locally.**

45. Review after review of child protection has emphasised the importance of information sharing between agencies and practitioners. The same is true of family justice but progress is hampered by a lack of qualitative discussion and feedback to inform practice improvements. **A pilot should be established in which judges and magistrates would learn the outcomes for children and families on whom they have adjudicated. There should also be a system of case reviews of process to help establish reflective practice in the family justice system.**
46. We welcome the establishment of the Judicial College. At present it seems that each jurisdiction has separate training. It may be preferable to have a core set of training that is common to all areas and then separate modules for the different jurisdictions. **The Judicial College should review training delivery to determine the merits of providing a core judicial skills course for all new members of the judiciary. Training should also be developed to assist senior judges with carrying out their leadership responsibilities.**
47. Whatever the structure of training, **judicial training for family work should include greater emphasis on child development and case management.** The manner of training is also important. **Induction training for judges should include visits to relevant agencies involved in the system** to gain experience of other areas. **There should be an expectation that all members of the local judiciary, including the lay bench and legal advisers involved in family work, should join together in training activities.**
48. The judicial hierarchy is increasingly and rightly also becoming a management hierarchy. **The President's annual conference should be followed by circuit level meetings between the Family Presiding Judges and the senior judiciary in their areas to discuss the delivery of family business. Designated Family Judges should undertake regular meetings with the judges for whom they have leadership responsibility.**
49. We are aware that family work can create huge emotional strain, with damage to health and mental wellbeing. **Judges should be encouraged and given the skills to provide each other with greater peer support.**
50. We also recommend some changes to the training of family magistrates and their legal advisers even though training and management of magistrates is ahead of that of the judiciary, having as they do a regular appraisal and mentoring scheme. **Induction training for new family magistrates should include greater focus on case management, child development and visits to other agencies involved in the system. Legal advisers should also receive focused training on case management.**
51. Lawyers play an important role in ensuring the speedy resolution of cases, in supporting families to negotiate settlements and narrowing issues where matters are contested. We have however received evidence that the guidance in the Family Procedure Rules 2010 is not always followed when solicitors instruct expert witnesses. **Solicitors' professional bodies, working with representative**

groups for expert witnesses, should provide training opportunities for solicitors on how to draft effective instructions for expert evidence.

52. Social workers should be taught about relevant legal process and procedure and in particular what the court expects them to present and how to present it. **The College of Social Work and Care Council for Wales should consider issuing guidance to employers and higher education institutions on the teaching of court skills, including how to provide high quality assessments that set out a clear narrative of the child's story. They should also consider with employers whether initial social work and post qualifying training includes enough focus on child development, for those social workers who wish to go on to work with children.**
53. We know that some Directors of Children's Services in England may not themselves have practised as social workers. **The Children's Improvement Board should consider what training and work experience is appropriate for Directors of Children's Services who have not practised as social workers.**

Transparency and public confidence

54. We briefly discussed in the interim report the question of media access to family courts though this was not within our terms of reference. This is a complex area, which requires further consideration by government. We welcome the Justice Select Committee's recommendation that the scheme to increase media access to the courts contained in Part 2 of the Children, Schools and Families Act 2010 should not be implemented.

Public law

Why change is needed

55. Public law proceedings are the mechanism through which the state can intervene in family life to protect children. They can be complex and riven with acute conflict. The system is under great and increasing pressure – the number of applications has increased as has the time taken to dispose of them. An average case length of over a year is not acceptable.
56. Delay really matters and damages children. Delay in proceedings:
- may deny children a chance of a permanent home, particularly through adoption;
 - can have harmful long term effects on a child's development;
 - may expose children to more risk; and
 - causes already damaged children distress and anxiety.
57. The system struggles to cope with the weight of its responsibilities. Understandable sympathy for parents and an acute awareness of the enormity of the decisions encourages a wish to explore every avenue. The idea of a proportionate approach comes across as seeming to risk denial of the parent's

right to a fair hearing. We were told and we agree that the right of the parents to a fair hearing has come too often to override the paramount welfare of the child.

58. Our proposals aim to put the child's interests back at the heart of the process and to deliver a system which:
- is resolutely child focused;
 - refuses to accept delay as commonplace;
 - takes responsibility for the use of resources, to make best use of every pound;
 - operates in a collaborative way across agencies;
 - is consistent in its delivery; and
 - respects parents' rights, and offers them effective support.

The role of the court

59. We propose that **courts must continue to play a central role in public law in England and Wales**. The framework created by the Children Act 1989 is sound. This imposes different responsibilities on the courts and local authorities. It is for courts to decide who should exercise parental responsibility for a child. If that is to be the local authority then they should do so normally without further involvement of the court.
60. There is little doubt that since 1989 courts have progressively extended their scrutiny of the care plan proposed by the local authority. This causes duplication and delay.
61. We believe this court scrutiny goes beyond what is needed to determine whether a care order is in the best interests of a child. Care plans are likely to need to change over time. Courts are not well equipped to scrutinise care plans and their involvement is not a guarantee of success. We also need to set against the possible benefit the cost and time it takes.
62. So we recommend that **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. When determining whether a care order is in a child's best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead **the court should consider only the core or essential components of a child's plan. We propose that these are:**
- **planned return of the child to their family;**
 - **a plan to place (or explore placing) a child with family or friends;**
 - **alternative care arrangements; and**
 - **contact with birth family to the extent of deciding whether it should be regular, limited or none.**

63. The courts should have jurisdiction over contact issues and we believe there may be a case to extend the court's powers in respect of sibling contact. **We recommend that government consult on whether section 34 of the Children Act 1989 should be amended to promote reasonable contact with siblings, and to allow siblings to apply for contact orders without leave of the court.**
64. Nevertheless, court is not the best place for contact issues to be resolved and we would expect section 34 to be used only by exception.

Relationship between courts and local authorities

65. Responses to our consultation as well as recent research revealed a sometimes deep rooted distrust of local authorities and unbalanced criticism of public care. This needs to be addressed and courts and local authorities should work together to tackle their at times dysfunctional relationship. **There should be a dialogue both nationally and locally between the judiciary and local authorities. The Family Justice Service should facilitate this. Designated Family Judges and Directors of Children's Services / Directors for Social Services should meet regularly to discuss common issues.**
66. **Local authorities and the judiciary need to debate the variability of local authority practice in relation to threshold decisions and when they trigger care applications.** This again requires discussion at national and local level. **Government should support these discussions through a continuing programme of analysis and research.**
67. Evidence also suggests that local authorities can wait too long before they start proceedings and are not always sufficiently focused on children's timescales, underestimating the impact of long term neglect and emotional abuse. **The revised Working Together and relevant Welsh guidance should emphasise the importance of the child's timescales and the appropriate use of proceedings in planning for children and in structured child protection activity.**

Case management

68. Robust judicial case management is important to reduce delay. Case duration statistics and research show that case management across the country is not sufficiently robust or consistent. Reform to judicial training and development needs to emphasise understanding of child development and how it affects children's timescales and consequently case management decisions. Judges should receive regular information about the latest findings from research on these and other relevant issues. This training also needs to support judges in understanding the value (or not) of particular types of expert assessment.
69. The judiciary should be more consistent in their approach to case management. **Different courts take different approaches to case management in public law. These need corraling, researching and promulgating by the judiciary to share best practice and ensure consistency.**

70. This alone is not enough to tackle delay. Cases take far too long and previous attempts to tackle it have not succeeded. A firm approach is needed.
Government should legislate to provide a power to set a time limit on care proceedings. The limit should be specified in secondary legislation. The time limit for the completion of care and supervision proceedings should be set at six months. There should be transitional provisions.
71. We acknowledge that a time limit would not of itself guarantee success but it would give a strong focus to the wide ranging programme of fundamental reform that is required. It should in particular help to break what has been described as an accepted culture of delay.
72. It would be the responsibility of the trial judge to achieve the time limit. Extensions to the six month deadline would be allowed only by exception. A trial judge proposing to extend a case beyond six months would need to seek the agreement of the Designated Family Judge/Family Presiding Judge as appropriate.
73. **Judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales. There is a strong case for this responsibility to be recognised explicitly in primary legislation.**
74. Implementation of a statutory time limit would require thorough and extensive preparation, debate, and training. This would take time and there would be a need to trial and pilot new approaches. It could not happen in isolation. It would need successful delivery of the other changes we propose. Judicial continuity in particular is essential.
75. Delivery of time limited care cases would require significant improvement to process and procedure. **The Public Law Outline (PLO) provides a solid basis for child focused case management. Inconsistency in its implementation across courts is not acceptable and we encourage the senior judiciary to insist that all courts follow it.**
76. **The introduction of time limits and other changes described in this report would require the PLO to be remodelled. The judiciary should consult widely with all stakeholders to inform this remodelling. The changes give an opportunity to test new approaches, on the timing of the finding of threshold for example.**
77. **The requirement to renew Interim Care and Supervision Orders after eight weeks and then every four weeks should be amended. Judges should be allowed discretion to grant interim orders for the time they see fit subject to a maximum of six months and not beyond the time limit for the case. The court's power to renew should be tied to their power to extend proceedings beyond the time limit.**
78. Scrutiny by adoption panels of a permanence plan for the child duplicates work that will be done by the court. **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. We believe that the court's detailed scrutiny of these cases should be sufficient.

Local authority practice

79. Local authorities are critical to proceedings. A major change programme is now beginning in England and Wales to reduce bureaucracy and refocus social work practice onto direct work with families. The wider family justice system will need to keep pace with this reform through training for judges, lawyers and court social workers. Strong local partnerships need to be developed where practice can be discussed and learning shared. Local authority leaders need to take a direct and assertive approach to the oversight of local authority practice and performance with regard to public law cases.
80. One of the first priorities for local authorities and the judiciary is to address the reluctance of courts to rely on local authority assessments. Assessments and reports need to be appropriately detailed, evidence based and clear in their arguments. **We propose that the judiciary led by the President's office and local authorities via their representative bodies should urgently consider what standards should be set, and should circulate examples of best practice.**
81. Pre-proceedings work has value and **we encourage use of the 'Letter Before Proceedings'.** **We recommend that its operation be reviewed once research is available about its impact.**
82. The role of Independent Reviewing Officer (IRO) is important to local authorities and they would very likely recreate it were it removed from them. The priority should be to improve the quality of the function and ensure its effectiveness and visibility. **We recommend that local authorities should review the operation of their IRO service to ensure that it is effective. In particular they should ensure that they are adhering to guidance regarding case loads.**
83. **We recommend that the Directors of Children's Services / Directors for Social Services and Lead Member for Children receive regular reports from the IRO on the work undertaken and its outcomes. Local Safeguarding Children Boards should also consider such reports.**
84. **Courts would benefit from this information too alongside outcomes of care cases. The pilot recommended earlier (see paragraph 45) should include information from the IRO.**
85. **The courts and IROs need to develop more effective links. Guardians and IROs should strengthen their working relationship.**

Expert witnesses

86. Expert evidence is often necessary to a fair and complete court process. But growth in the use of experts is now a major contributor to unacceptable delay. The child's timescales must exert a greater influence over the decision to commission reports and judges must order only those reports strictly needed for

determination of the case. **We recommend that primary legislation should reinforce that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should assert that expert testimony should be commissioned only where necessary to resolve the case. The Family Procedure Rules would need to be amended to reflect the primary legislation.**

87. **The court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved in proceedings. Independent social workers should be employed only exceptionally** as, when instructed, they are the *third* trained social worker to provide their input to the court.
88. We remain concerned about the value of residential assessments of parenting capacity, particularly when set against their cost and lack of clear evidence of their benefits. **Research should be commissioned to examine the value of residential assessments of parents.**
89. In line with our case management recommendations **judges must direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management.** This responsibility should not in effect be delegated to the representatives of the parties, as is often the case currently. More judicial control needs to be exercised over letters of instruction that are often too long and insufficiently focused on the determinative issues. **In the order giving permission for the commissioning of the expert witness the judge should set out the questions on which the expert should focus.** This will normally be done following discussions with parties.
90. Experts are too often not available in a timely way, and the quality of their work is variable. **The Family Justice Service should take responsibility and work with the Department of Health and others as necessary to improve the quality and supply of expert witness services.** There are a number of options to be considered and trialled.
91. The Legal Services Commission (LSC) knows little about the use and cost of the expert witnesses for whom it pays. **The LSC should routinely collate data on experts per case, type of expert, time taken, cost and any other relevant factor, by court and area.**
92. A recent Family Justice Council report examined a sample of expert psychological reports. It identified serious issues with their quality and the qualifications of those carrying them out. Further studies of this type are needed. **We recommend that the Family Justice Service commission studies of the expert witness reports supplied by various professions. Agreed quality standards for expert witnesses in the family courts should be developed.** Meeting the standards could be a requirement for payments to experts to be approved.
93. Multi-disciplinary teams have the potential to provide a better service of expert assessment to the courts but the original pilot did not provide a basis for full roll out. **A further pilot of multi-disciplinary expert witness teams should be**

taken forward, building on lessons from the original pilot. Successful engagement of the NHS is key.

94. There is discontent over the way experts are remunerated. The Family Justice Service **should review the mechanisms available to remunerate expert witnesses, and should in due course reconsider whether experts could be paid directly.** It is too early to conclude that the recent 10% reduction in expert witness rates will have an effect on the supply of experts, but the government should monitor this.

Representation of children

95. The tandem model provides children in proceedings with representation through both a solicitor and an experienced social worker (known as a guardian). This is widely supported. **The tandem model is an important safeguard and should be retained with resources carefully prioritised and allocated.** The independence of the guardian in the individual case must be maintained. It remains a requirement that the delivery of court social work services and guardians should be properly managed.
96. Other ways of working should be explored. **The merit of using guardians pre-proceedings and of an in-house tandem model need to be considered further. In relation to in-house solicitors the wider effects on the availability of solicitors in family work would be a particular factor to consider.**

Alternatives to conventional court proceedings

97. Alternative processes aimed at avoiding proceedings or resolving difficulties between local authorities and families outside the court room may reduce distress and promote better support to families. Their potential should be explored further but care must be taken that further delay is not the result.
98. **The benefits of Family Group Conferences should be more widely recognised and their use should be considered before proceedings. More research is needed on how they can best be used, their benefits and the costs.**
99. Mediation also has potential and **a pilot on the use of formal mediation approaches in public law proceedings should be established.**
100. **The Family Drug and Alcohol Court (FDAC) in Inner London Family Proceedings Court shows considerable promise. There should be further limited roll out to continue to develop the evidence base.** This should be supported by research on the overall costs to users and long term outcomes for children and families.
101. There is currently little support for parents after proceedings. **Proposals should be developed to pilot new approaches to supporting parents through and after proceedings.** Later distress, damage and expense could be mitigated with support from health professionals and others.

Private law

Why change is needed

102. The issues that arise when families separate are usually complex and emotionally charged. Those who use private law are struggling with all the turmoil of separation. The risk is that the legal process of separating can itself cause further harm. Arrangements imposed by court may be inflexible and may sooner or later fail.
103. Most separating couples make their own arrangements for the care of their children and division of their assets, without resort to court proceedings. Others need more support, whether from dispute resolution services or by judicial determination.
104. Generally it seems better that parents resolve things for themselves if they can. They are then more likely to come to an understanding that will allow arrangements to change as they and their children change. Most people could do with better information to help this happen. Others need to be helped to find routes to resolve their disputes short of court proceedings. There needs to be a high quality service that is also capable of dealing appropriately with any risks to them and their children. And if that fails they need access to court processes that they and their children can understand, and that resolve conflicts as fast as possible and without inflaming matters further.
105. Our current processes fall short in many ways.
 - Many parents do not know where to get the information and support they need to resolve their issues without recourse to court.
 - There is limited awareness of alternatives to court, and a good deal of misunderstanding.
 - Too many cases end up in court, and court determination is a blunt instrument.
 - The court system is hard to navigate, a problem that is likely to become even more important as proposed reductions in legal aid mean more people represent themselves.
 - There is a feeling (which may or may not be right) that lawyers generally take an adversarial approach that inflames rather than reduces conflict.
 - Cases are expensive and take a long time.
106. There are more fundamental issues that go beyond process.
 - Children say they do not understand what is going on and do not have enough opportunity to have their say.
 - There is a lack of understanding about parental responsibility, both legally and more generally: some mistakenly think the balance of parental responsibility shifts following separation, with one parent assuming full responsibility for their child.

- This goes with the difficulty for all involved in assuring that children retain a relationship with both parents, and others, including grandparents, after separation where this is safe. Some have a perception that the system favours mothers over fathers.

The way forward

107. Our recommendations aim to address these issues, to set out a clear process for separation that emphasises shared parental responsibility, provides information, manages expectations and helps people to understand the costs they face at each stage. The emphasis throughout is on enabling people to resolve their disputes safely outside court wherever possible.
108. The nature of parental responsibility needs to be better understood. More needs to be done generally to promote and support the concept and implications of parental responsibility. **Government should find means of strengthening the importance of a good understanding of parental responsibility in information it gives to parents.** One step could be giving parents a short leaflet when they register the birth of their child, to give them an introduction to the meaning and practical implications of parental responsibility. This is often a time when families receive a variety of information to support them in the upbringing of their children, for example *The Pregnancy Book* produced by the Department for Health; wherever possible these materials should also include information on parental responsibility.
109. The child's welfare should be the court's paramount consideration, as required by the Children Act 1989. No change should be made that might compromise this principle. Accordingly, **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.** For that reason and taking account of further evidence we also do not recommend a change canvassed in our interim report that legislation might state the importance to the child of a meaningful relationship with both parents after their separation where this is safe. While true, and indeed a principle that guides court decisions, we have concluded that this would do more harm than good.
110. **The need for grandparents to apply for leave of the court before making an application for contact should remain.** This prevents hopeless or vexatious applications that are not in the interests of the child. We note that it does not, contrary to some views, lead to a need to pay two sets of fees.
111. To support shared parental responsibility separating parents should be encouraged, in consultation with their children, to develop flexible agreements to fit their circumstances. **Parents should be encouraged to develop a Parenting Agreement to set out arrangements for the care of their children post separation. Government and the judiciary should consider how a signed Parenting Agreement could have evidential weight in any subsequent parental dispute.**

112. **We recommend government should develop a child arrangements order, which would set out arrangements for the upbringing of a child when court determination of disputes related to the care of children is required.** The new order would move away from loaded terms such as residence and contact which have themselves become a source of contention between parents, to bring greater focus on practical issues of the day to day care of the child. **Government should repeal the provision for residence and contact orders in the Children Act 1989. Prohibited steps orders should be retained to ensure a child’s protection and welfare. Specific issues orders should be retained for discrete issues.**
113. **The new child arrangements order should be available to fathers without parental responsibility, as well as to those who already hold parental responsibility, and to wider family members with the permission of the court.**
- Where a father would require parental responsibility to fulfil the requirement of care as set out in the order, the court would also make an order of parental responsibility.
 - Where the order requires wider family members to be able to exercise parental responsibility, the court would make an order that that person should have parental responsibility for the duration of the order.
 - The facility to remove the child from the jurisdiction of England and Wales for up to 28 days without the agreement of all others with parental responsibility or a court order should remain.
 - The provision restricting those with parental responsibility from changing the child’s surname without the agreement of all others with parental responsibility or a court order should also remain.
114. Turning to the process for separation, parents should have ready access to a wide range of information and direction to any further support they might need. **Government should establish an online information hub and helpline to give information and support for couples to help them resolve issues following divorce or separation outside court.** The information hub and helpline should bring together and expand other government websites directed to separating parents. The importance of shared parental responsibility should be emphasised.

115. It should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service. To reinforce the primary nature of these services **'alternative dispute resolution' should be rebranded as 'Dispute Resolution Services', in order to minimise a deterrent to their use. Where intervention is necessary, separating parents should be expected 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.
116. These initial assessments are known as Mediation Information and Assessment Meetings (MIAMs).
117. **The mediator tasked with the initial assessment will need to be the key practitioner until an application to court is made.** This person would need to track progress to make sure that one party was not stringing things out for whatever reason. A certificate for court should be issued in that event. There would also need to be a range of exemptions for those for whom an application to court was urgent, or for whom dispute resolution services were clearly inappropriate at the outset. **The regime would allow for emergency applications to court and the exemptions should be as in the current Pre-Application Protocol.**
118. **Those parents who were still unable to agree should next attend a Separated Parent Information Programme (PIP) and thereafter if necessary mediation or other dispute resolution service.** PIPs are designed to help parents learn more about the challenges of post separation parenting, including the effects on children of continuing conflict.
119. Attendance at a MIAM and PIP should be required of anyone wishing to make a court application (subject to relevant exemptions). This cannot be required, but should be expected, of respondents. **Judges should retain the power to order parties to attend a mediation information session and a PIP and may make cost orders where it is felt that one party has behaved unreasonably.** Judges could help drive a general expectation that separating parents should attempt dispute resolution before applying to court.
120. We believe that many parents would benefit from attempting mediation. However we do not propose that this should be compulsory for either party. Parents who have attended a MIAM and PIP should be able to choose the service they think would be most helpful to them. **Where agreement could not be reached at this stage, having been given a certificate by the mediator, one or both the parties would be permitted to apply to court.**

121. All mediation should be centred on the best interests of the child. This and the other tasks of mediators are demanding. The assessment of risks to the parties in the MIAM is difficult and important. **Mediators should at least meet the current requirements set by the LSC. 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.**
122. **Government should closely watch and review the progress of the Family Mediation Council to assess its effectiveness in maintaining and reinforcing high standards. The FMC should if necessary be replaced by an independent regulator.**
123. Where a court application is made, **the Family Justice Service should ensure for cases involving children that safeguarding checks are completed at the point of entry into the court system. The First Hearing Dispute Resolution Appointment (FHDRA) should be retained. Parenting Agreements could also be helpful at this stage. HMCTS and the judiciary should establish a track system according to the complexity of the case. At the FHDRA, the judge should allocate the case to a simple or complex track. The simple track should determine narrow issues where tailored case management rules and principles would apply. As in other areas of family law, judicial continuity is essential. The judge who is allocated to hear the case after a FHDRA must remain the judge for that case.**
124. **Children and young people should be given the opportunity to have their voices heard in cases that are about them, where they wish it.** The key needs within the Family Justice Service and private law generally are to:
- give clarity to the child about the process, their options for involvement and the likelihood of their view being taken into account;
 - raise parental awareness, through education and support, of the effect disputes can have on their children;
 - support parents to communicate with their children; and
 - ensure consistency of approach and materials throughout the process – via the hub, mediators, legal practitioners, PIPs and in court.
125. **The government and the judiciary should actively consider how children and vulnerable witnesses may be protected when giving evidence in family proceedings.**
126. Swift enforcement is important where court orders are breached. This will help prevent an arrangement that has been determined to be in the child's best interests from being ignored and a less beneficial alternative becoming the norm. It will also enable adjustments to be made where necessary. It is essential that where a court order is breached the case quickly returns to court, to the same judge, to enforce the child's right to have a relationship with both their parents where this is safe.

127. **Where an order is breached within the first year, the case should go straight back to court to the same judge to resolve the matter swiftly. 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.**
128. However, where an order breaks down after 12 months, we think it would be right for parents to attempt first to resolve the issue independently. **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.**
129. Parents often make in their own minds a link between contact and maintenance (no contact so no maintenance, or no maintenance so no contact). We have concluded that to introduce any connection in law between the two, even at the discretion of a judge, would risk reinforcing this. The existence of a power could also undermine private arrangements and encourage litigation. The focus should be on the right of children to be supported by both their parents emotionally, financially and practically, and parents have a responsibility to provide this. **We recommend there should be no link of any kind between contact and maintenance.**
130. **People in dispute about money or property should be expected to access the information hub and should be required to be assessed for mediation.** Evidence we received in our call for evidence suggested that legislative change, to establish a codified framework, could reduce the need for judicial intervention. **Government should establish a separate review of financial orders to include examination of the law.**
131. **The process for initiating divorce should begin with the online hub and should be dealt with administratively by the court, unless the divorce is disputed.**
132. **Where possible all issues in dispute following separation should be considered together whether in all issues, mediation or consolidated court hearings. HMCTS and the judiciary should consider how this might be achieved in courts. Care should be taken to avoid extra delay particularly in relation to children.**
133. In principle we believe that fees in private law should reflect the cost of providing the service. But the panel had little evidence about the cost of private law proceedings, and we make no recommendations, recognising that we could not assess the likely level of the fees and their effect on families and children. Any fee increases would need careful consideration. Further, there should be a clear and transparent remissions policy to support those who need it.
134. We note with concern the potential impact of the proposed changes to legal aid. **The MOJ and the LSC should carefully monitor the impact of the reforms carefully. The supply of properly qualified family lawyers is vital to the protection of children.**

iii Family Justice Review – List of recommendations

The Family Justice System

Where we refer to the Family Justice Service, we envisage that these functions would be performed initially by an Interim Board (see discussion at paragraph 2.56).

The child's voice: pages 45-49

These recommendations aim to ensure that children's interests are truly central to the operation of the family justice system.

- Children and young people should be given age appropriate information to explain what is happening when they are involved in public and private law cases.
- 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.
- The Family Justice Service should take the lead in developing and disseminating national standards and guidelines on working with children and young people in the system. It should also:
 - ensure consistency of support services, of information for young people and of child-centred practice across the country; and
 - oversee the dissemination of up to date research and analysis of the needs, views and development of children.
- There should be a Young People's Board for the Family Justice Service, with a remit to consider issues in both public and private law and to report directly to the Service on areas of concern or interest.
- The UK Government should closely monitor the effect of the Rights of Children and Young Persons Measure (Wales) 2011.

Family Justice Service: pages 49 - 63

These recommendations outline the proposals connected to the creation of a Family Justice Service.

- A Family Justice Service should be established, sponsored by the Ministry of Justice, with strong ties at both Ministerial and official level with the Department for Education and Welsh Government. As an initial step, an Interim Board should be established, which should be given a clear remit to plan for more radical change on a defined timescale towards a Family Justice Service.
- The Family Justice Service should have strong central and local governance arrangements.
- The roles performed by the Family Justice Council will be needed in any new structure but government will need to consider how they can be exercised in a way that fits with the final design of the Family Justice Service (and Interim Board).

- The Family Justice Service should be responsible for the budgets for court social work services in England, mediation, out of court resolution services and, potentially over time, experts and solicitors for children.
- Charges to local authorities for public law applications and to local authorities and Cafcass for police checks in public and private law cases should be removed
- A duty should be placed on the Family Justice Service to safeguard and promote the welfare of children in performing its functions. An annual report should set out how this duty has been met.
- An integrated IT system should be developed for use in the Family Justice Service and wider family justice agencies. This will need investment. In the meanwhile government should conduct an urgent review of how better use could be made of existing systems.
- The Family Justice Service should develop and monitor national quality standards for system wide processes, based on local knowledge and the experiences of service users.
- The Family Justice Service should coordinate a system wide approach to research and evaluation, supported by a dedicated research budget (amalgamated from the different bodies that currently commission research).
- The Family Justice Service should review and consider how research should be transmitted around the family justice system.

Judicial leadership and culture: pages 63 - 70

These recommendations seek to ensure that there is robust judicial leadership to support the culture change amongst the family judiciary. They are made mostly to the judiciary themselves, not to government.

- A Vice President of the Family Division should support the President of the Family Division in his leadership role, monitoring performance across the family judiciary.
- Family Division Liaison Judges should be renamed Family Presiding Judges, reporting to the Vice President of the Family Division on performance issues in their circuit.
- 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.
- HMCTS should make information on key indicators for courts and areas available to the Family Justice Service. Information on key indicators for individual judges should be made available to those judges as well as judges with leadership responsibilities. The judiciary should agree key indicators.
- Designated Family Judges should have leadership responsibility for all courts within their area. They will need to work closely with Justices' Clerks, family bench chairmen and judicial colleagues.
- The judiciary should aim to ensure judicial continuity in all family cases.
- The judiciary should ensure a condition to undertake family work includes willingness to adapt work patterns to be able to offer continuity.

- The President of the Family Division should consider what steps should be taken to allow judicial continuity to be achieved in the High Court.
- In Family Proceedings Courts judicial continuity should if possible be provided by all members of the bench and the legal adviser. If this is not possible, the same bench chair, a bench member and a legal adviser should provide continuity.
- Judges and magistrates should be enabled and encouraged to specialise in family matters.
- The Judicial Appointments Commission should consider willingness to specialise in family matters in making appointments to the family judiciary.
- The Judicial Office should review the restriction on magistrate sitting days.

Case management: pages 71 - 72

- HMCTS and the judiciary should review and plan how to deliver consistently effective case management in the courts.

The courts: pages 72 - 79

These recommendations aim to ensure that the courts are as efficient and user friendly as possible.

- A single family court, with a single point of entry, should replace the current three tiers of court. All levels of family judiciary (including magistrates) should sit in the family court and work should be allocated according to case complexity.
- The roles of District Judges working in the family court should be aligned.
- There should be flexibility for legal advisers to conduct work to support judges across the family court.
- The Family Division of the High Court should remain, with exclusive jurisdiction over cases involving the inherent jurisdiction and international work that has been prescribed by the President of the Family Division as being reserved to it.
- All other matters should be heard in the single family court, with High Court judges sitting in that court to hear the most complex cases and issues.
- HMCTS and the judiciary should ensure routine hearings use telephone or video technology wherever appropriate.
- HMCTS and the judiciary should consider the use of alternative locations for hearings that do not need to take place in a court room.
- HMCTS should ensure court buildings are as family friendly as possible.
- HMCTS should review the estate for family courts 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.
- HMCTS and the judiciary should review the operation and arrangement of the family courts in London.

Workforce: pages 79 - 89

These recommendations aim to ensure that the people who work in the family justice system have the skills and knowledge they need.

- The Family Justice Service should develop a workforce strategy.
- The Family Justice Service should develop an agreed set of core skills and knowledge for family justice.
- The Family Justice Service should introduce an inter-disciplinary family justice induction course.
- Professional bodies should review continuing professional development schemes to ensure their adequacy and suitability in relation to family justice.
- The Family Justice Service should develop annual inter-disciplinary training priorities for the workforce to guide the content of inter-disciplinary training locally.
- The Family Justice Service should establish a pilot in which judges and magistrates would learn the outcomes for children and families on whom they have adjudicated.
- There should be a system of case reviews of process to help establish reflective practice in the family justice system.
- The Judicial College should review training delivery to determine the merits of providing a core judicial skills course for all new members of the judiciary.
- The Judicial College should develop training to assist senior judges with carrying out their leadership responsibilities.
- The Judicial College should ensure judicial training for family work includes greater emphasis on child development and case management.
- The Judicial College should ensure induction training for the family judiciary includes visits to relevant agencies involved in the system.
- There should be an expectation that all members of the local judiciary including the lay bench and legal advisers involved in family work should join together in training activities.
- The President's annual conference should be followed by circuit level meetings between Family Presiding Judges and the senior judiciary in their area to discuss the delivery of family business.
- Designated Family Judges should undertake regular meetings with the judges for whom they have leadership responsibility.
- Judges should be encouraged and given the skills to provide each other with greater peer support.
- The Judicial College should ensure induction training for new family magistrates includes greater focus on case management, child development and visits to other agencies involved in the system.
- The Judicial College should ensure legal advisers receive focused training on case management.

- Solicitors' professional bodies, working with representative groups for expert witnesses, should provide training opportunities for solicitors on how to draft effective instructions for expert evidence.
- The College of Social Work and Care Council for Wales should consider issuing guidance to employers and higher education institutions on the teaching of court skills, including how to provide high quality assessments, that set out a clear narrative of the child's story.
- The College of Social Work and Care Council for Wales should consider with employers whether initial social work and post qualifying training includes enough focus on child development, for those social workers who wish to go on to work with children.
- The Children's Improvement Board should consider what training and work experience is appropriate for Directors of Children's Services who have not practised as social workers.

Public law

The role of the court: pages 94 - 101

These recommendations seek to refocus the court on the core issues of the care plan.

- Courts must continue to play a central role in public law in England and Wales.
- 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.
- When determining whether a care order is in a child's best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead the court should consider only the core or essential components of a child's plan. We propose that these are:
 - planned return of the child to their family;
 - a plan to place (or explore placing) a child with family or friends;
 - alternative care arrangements; and
 - contact with birth family to the extent of deciding whether that should be regular, limited or none.
- Government should consult on whether section 34 of the Children Act 1989 should be amended to promote reasonable contact with siblings, and to allow siblings to apply for contact orders without leave of the court.

The relationship between courts and local authorities: pages 101 - 103

These recommendations are intended to improve the relationship between local authorities and courts so that the different components of the system operate better together.

- There should be a dialogue both nationally and locally between the judiciary and local authorities. The Family Justice Service should facilitate this. Designated Family Judges and the Director of Children's Services / Director of Social Services should meet regularly to discuss issues.

- Local authorities and the judiciary need to debate the variability of local authority practice in relation to threshold decisions and when they trigger care applications. This again requires discussion at national and local level. Government should support these discussions through a continuing programme of analysis and research.
- The revised Working Together and relevant Welsh guidance should emphasise the importance of the child's timescales and the appropriate use of proceedings in planning for children and in structured child protection activity.

Case management: pages 103 - 112

These recommendations seek to promote and improve robust judicial case management. They are intended to tackle delay by time limiting cases and reforming process.

- Different courts take different approaches to case management in public law. These need corraling, researching and promulgating by the judiciary to share best practice and ensure consistency.
- Government should legislate to provide a power to set a time limit on care proceedings. The limit should be specified in secondary legislation to provide flexibility. There should be transitional provisions.
- The time limit for the completion of care and supervision proceedings should be set at six months.
- To achieve the time limit would be the responsibility of the trial judge. Extensions to the six month time limit will be allowed only by exception. A trial judge proposing to extend a case beyond six months would need to seek the agreement of the Designated Family Judge / Family Presiding Judge as appropriate.
- Judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales. There is a strong case for this responsibility to be recognised explicitly in primary legislation.
- The Public Law Outline provides a solid basis for child focused case management. Inconsistency in its implementation across courts is not acceptable and we encourage the senior judiciary to insist that all courts follow it.
- The Public Law Outline will need to be remodelled to accommodate the implementation of time limits in cases. The judiciary should consult widely with all stakeholders to inform this remodelling. New approaches should be tested as part of this process.
- The requirement to renew interim care orders after eight weeks and then every four weeks should be amended. Judges should be allowed discretion to grant interim orders for the time they see fit subject to a maximum of six months and not beyond the time limit for the case. The court's power to renew should be tied to their power to extend proceedings beyond the time limit.
- 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.

Local authority practice: pages 112 - 117

These recommendations focus on improving the quality of local authority social services and their engagement in proceedings.

- The judiciary led by the President's office and local authorities via their representative bodies should urgently consider what standards should be set for court documentation, and should circulate examples of best practice.
- We encourage use of the Letter Before Proceedings. We recommend that its operation be reviewed once full research is available about its impact.
- Local authorities should review the operation of their Independent Reviewing Officer service to ensure that it is effective. In particular they should ensure that they are adhering to guidance regarding case loads.
- The Director of Children's Services / Director of Social Services and Lead Member for Children should receive regular reports from the Independent Reviewing Officer on the work undertaken and its outcomes. Local Safeguarding Children Boards should consider such reports.
- There need to be effective links between the courts and Independent Reviewing Officer and the working relationship between the guardian and the Independent Reviewing Officer needs to be stronger.

Expert witnesses: pages 117 - 126

These recommendations intend to reduce the reliance on expert witnesses and improve their supply and quality.

- Primary legislation should reinforce that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case. The Family Procedure Rules would need to be amended to reflect the primary legislation.
- The court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved. Independent social workers should be employed only exceptionally.
- Research should be commissioned to examine the value of residential assessments of parents.
- Judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out in the order giving permission for the commissioning of the expert witness the questions on which the expert witness should focus.
- The Family Justice Service should take responsibility for work with the Department for Health and others as necessary to improve the quality and supply of expert witness services. This will involve piloting new ideas, sharing best practice and reviewing quality.

- The Legal Services Commission should routinely collate data on experts per case, type of expert, time taken, cost and any other relevant factor. This should be gathered by court and area.
- We recommend that studies of the expert witness reports supplied by various professions be commissioned by the Family Justice Service.
- Agreed quality standards for expert witnesses in the family courts should be developed by the Family Justice Service.
- A further pilot of multi-disciplinary expert witness teams should be taken forward, building on lessons from the original pilot.
- The Family Justice Service should review the mechanisms available to remunerate expert witnesses, and should in due course reconsider whether experts could be paid directly.

Representation of children: pages 126 - 129

These recommendations are intended to promote the value and effective operation of the tandem model of children's representation.

- The tandem model should be retained with resources carefully prioritised and allocated.
- The merit of using guardians pre-proceedings needs to be considered further.
- The merit of developing an in-house tandem model needs to be considered further. The effects on the availability of solicitors locally to represent parents should be a particular factor.

Alternatives to conventional court proceedings: pages 129 - 132

These recommendations encourage the development of approaches and programmes that better support families while avoiding or reducing the need for distressing and costly court cases.

- The benefits of Family Group Conferences should be more widely recognised and their use should be considered before proceedings. More research is needed on how they can best be used, their benefits and the cost.
- A pilot on the use of formal mediation approaches in public law proceedings should be established.
- The Family Drug and Alcohol Court in Inner London Family Proceedings Court shows considerable promise. There should be further limited roll out to continue to develop the evidence base.
- Proposals should be developed to pilot new approaches to supporting parents through and after proceedings.

Private law

Making parental responsibility work: pages 134 - 150

These recommendations are intended to enable parents to reach agreements following separation, while ensuring that the child's welfare remains paramount.

- Government should find means of strengthening the importance of a good understanding of parental responsibility in information it gives to parents.
- 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.
- The need for grandparents to apply for leave of the court before making an application for contact should remain.
- Parents should be encouraged to develop a Parenting Agreement to set out arrangements for the care of their children post separation.
- Government and the judiciary should consider how a signed Parenting Agreement could have evidential weight in any subsequent parental dispute.
- Government should develop a child arrangements order, which would set out arrangements for the upbringing of a child when court determination of disputes related to the care of children is required.
- Government should repeal the provision for residence and contact orders in the Children Act 1989.
- Prohibited steps orders and specific issue orders should be retained for discrete issues where a child arrangements order is not appropriate.
- The new child arrangements order should be available to fathers without parental responsibility, as well as those who already hold parental responsibility, and to wider family members with the permission of the court.
- Where a father would require parental responsibility to fulfil the requirement of care as set out in the order, the court would also make a parental responsibility order.
- Where the order requires wider family members to be able to exercise parental responsibility, the court would make an order that that person should have parental responsibility for the duration of the order.
- The facility to remove the child from the jurisdiction of England and Wales for up to 28 days without the agreement of all others with parental responsibility or a court order should remain.
- The provision restricting those with parental responsibility from changing the child's surname without the agreement of all others with parental responsibility or a court order should remain.

A coherent process for dispute resolution: pages 150 - 172

These recommendations are intended to enable people to resolve their disputes safely outside of court, wherever possible.

- Government should establish an online information hub and helpline to give information and support for couples to help them resolve issues following divorce or separation outside court.
- 'Alternative dispute resolution' should be rebranded as 'Dispute Resolution Services', in order to minimise a deterrent to its use.
- Where intervention is necessary, separating parents should be expected 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.
- The mediator tasked with the initial assessment (Mediation Information and Assessment Meeting) would need to be the key practitioner until an application to court is made.
- The regime would allow for emergency applications to court and the exemptions should be as in the Pre-Application Protocol.
- Those parents who were still unable to agree should next attend a Separated Parents Information Programme and thereafter if necessary mediation or other dispute resolution service.
- Attendance at a Mediation Information and Assessment Meeting and Separated Parent Information Programme should be required of anyone wishing to make a court application. This cannot be required, but should be expected, of respondents.
- Judges should retain the power to order parties to attend a mediation information session and Separated Parents Information Programmes, and may make cost orders where it is felt that one party has behaved unreasonably.
- Where agreement could not be reached, having been given a certificate by the mediator, one or both of the parties would be able to apply to court.
- 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.
- Government should closely watch and review the progress of the Family Mediation Council to assess its effectiveness in maintaining and reinforcing high standards. The Family Mediation Council should if necessary be replaced by an independent regulator.
- The Family Justice Service should ensure for cases involving children that safeguarding checks are completed at the point of entry into the court system.

- HMCTS and the judiciary should establish a track system according to the complexity of the case. The simple track should determine narrow issues where tailored case management rules and principles would apply.
- The First Hearing Dispute Resolution Appointment should be retained. Parenting Agreements could also be helpful at this stage. Where further court involvement is required after this, the judge should allocate the case to either the simple or complex track according to complexity.
- The judge who is allocated to hear the case after a First Hearing Dispute Resolution Appointment must remain the judge for that case.
- Children and young people should be given the opportunity to have their voices heard in cases that are about them, where they wish it.
- The government and the judiciary should actively consider how children and vulnerable witnesses may be protected when giving evidence in family proceedings.
- Where an order is breached within the first year, the case should go straight back to court to the same judge to resolve the matter swiftly. 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.
- There should be no link of any kind between contact and maintenance.

Divorce and financial arrangements: pages 172 - 178

These recommendations are intended to enable divorcing couples to dissolve their marriage efficiently and, wherever possible, to reach an agreement on financial arrangements without using the court.

- The process for initiating divorce should begin with the online hub and should be dealt with administratively by the courts, unless the divorce is disputed.
- People in dispute about money or property should be expected to access the information hub and should be required to be assessed for mediation.
- Where possible all issues in dispute following separation should be considered together whether in all issues mediation or consolidated court hearings. HMCTS and the judiciary should consider how this might be achieved in courts. Care should be taken to avoid extra delay particularly in relation to children.
- Government should establish a separate review of financial orders to include examination of the law.
- The Ministry of Justice and the Legal Services Commission should carefully monitor the impact of legal aid reforms. The supply of properly qualified family lawyers is vital to the protection of children.

1. About the Family Justice Review

Background to the Review

- 1.1. The Family Justice Review (FJR) began work in March 2010 and is jointly sponsored by the Ministry of Justice (MoJ), the Department for Education (DfE), and the Welsh Government. It was established in recognition of increasing pressure on the family justice system alongside concerns about delay and effectiveness. There was a widely held view that the time was right to take a look at the system as a whole. The Review's terms of reference can be found in Annex A.
- 1.2. A panel of six independent members and four director-level civil service representatives has conducted the Review. Biographies can be found in Annex B. David Norgrove was appointed as the chair of the panel and the other independent members were drawn from across the family justice system. The full panel membership is:
 - David Norgrove (Chair)
 - John Coughlan CBE, Director of Children's Services in Hampshire
 - Lord Justice Andrew McFarlane, a Court of Appeal judge
 - 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 (Her Majesty's Courts and Tribunal Service)
 - Catherine Lee (Ministry of Justice)
 - Rob Pickford (Welsh Government)
 - Shirley Trundle CBE (Department for Education)

Progress since our interim report

- 1.3. The panel published an interim report and recommendations in March this year, which drew on evidence from over 700 individuals and organisations. The panel took oral evidence and travelled both in England and Wales and to other countries to meet those involved in family justice and children and adults affected by it.
- 1.4. There has been a substantial response to the interim report. A 12 week consultation on the proposals ended in June with 628 replies. Individual respondents included parents and grandparents as well as professionals. Organisations included children's charities, parental rights groups, local authorities, government departments, academics, professional bodies and law firms. Summaries of the key issues they raised are included in the body of this report and a more detailed discussion is included in Annex C.

- 1.5. During the consultation period the panel held public events in Birmingham, Cardiff, London and Manchester. Over 250 people attended these. We have met organisations and individuals involved in the family justice system to explore particular issues and recommendations.
- 1.6. We have had the benefit of the Justice Select Committee's report on the operation of the family courts, published in July.²
- 1.7. Two panel members attended the Family Justice Council's Dartington conference, which was led by Lord Justice Thorpe. The time spent there along with frequent contact with the Family Justice Council greatly helped the panel's work.

Data and research

- 1.8. Analysts in MoJ and DfE have supported the panel with reviews of relevant data and management information (such as there is), research literature and international experience.
- 1.9. They conducted three particular research projects to support our work. These reports will be published alongside the review. The reports are:
 - 'Outcomes in family justice children's proceedings - a review of the evidence'.³ This study summarises evidence on the outcomes of public and private law family proceedings involving children.
 - 'Family justice and children's proceedings - a review of public and private law case files in England and Wales'.⁴ This study analyses a sample of closed family cases in 2009 and aims to gain a better understanding of how public and private law cases involving children progress through the family justice system.
 - 'Sustainability of mediation and legal representation in private family law cases - analysis of legal aid administrative datasets'.⁵ This study analysed legal aid administrative data from October 2004 to July 2010 to examine outcomes from and repeat use of family legal aid services, in particular mediation and legal representation, in private family law disputes.

² *Operation of the Family Courts Sixth Report of Session 2010-12, Volume I* (2011) House of Commons Justice Committee.

³ Giovannini, E. (2011) *Outcomes of Family Justice Children's Proceedings – A Review of the Evidence* Ministry of Justice.

⁴ Cassidy, D., and Davey, S. (2011) *Family Justice and Children's Proceedings – Review of Public and Private Law Case Files in England and Wales* Ministry of Justice.

⁵ Quartermain, S. (2011). *Sustainability of Mediation and Legal Representation in Private Family Law Cases - Analysis of Legal Aid Administrative Datasets* Ministry of Justice.

The final report

- 1.10. Our final report aims to be a freestanding document but does not analyse the issues facing the family justice system in the detail of the interim report.⁶ It is also more concise in the discussion of recommendations where the consultation showed no disagreement or wish for amendment. We highlight in particular where our recommendations have changed and where they have not. The report includes expanded sections on the involvement of children and on workforce development.

⁶ *Family Justice Review Interim Report* (2011) Ministry of Justice, Department for Education, and Welsh Assembly Government.

2. The family justice system

Introduction

- 2.1 The family justice system deals with the failure of families, of parenting and of relationships.⁷ The cases often involve anger, violence, abuse, and drugs and alcohol. The decisions taken by local authorities and courts have fundamental long term consequences for children and parents and for society generally.
- Public law cases are the typical means by which children are removed from their parents, through care proceedings. These are hugely painful experiences for 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.
 - Private law cases deal with the consequences of relationship breakdown. Those involved 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. The problems faced by families in these circumstances can be so severe that they raise child protection concerns.
- 2.2 The Children Act 1989 is the foundation for family law as it applies to children. Its core principles remain strong:
- (i) *Paramountcy* – the child's welfare must be the court's 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 that, 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.
- 2.3 There was general agreement in the consultation that the legal framework is robust and that the welfare of children must be the paramount consideration in all decisions affecting them.

I...agree that the Children Act 1989 represents “the most comprehensive and far reaching reform of child law” and that it remains “the overarching legal framework for family law as it applies to children”. I welcome and agree with the Report’s positive attitude to the Act.

President of the Family Division, consultation response

⁷ See fuller discussion of issues facing the family justice system in our interim report, *Family Justice Review Interim Report* (2011) paragraphs 2.1 – 2.7.

- 2.4 The United Nations Convention on the Rights of the Child also makes explicit the importance of children's rights being considered and upheld in the family justice system. Article 12 of the Convention makes it clear that children have the right to have their voices heard in decisions that affect their lives.
- 2.5 The focus on children and the need for the family justice system to achieve solutions for the future, rather than simply determining past events, distinguishes this from other jurisdictions.

The [family justice system] is, first and foremost, a justice system. The scope for adopting practices from outside the justice system is limited. But it is also different from other justice systems, in that it is not looking to punish or compensate for past wrongs: it is looking to make arrangements for the family's future, preferably to arrange a better future than they would otherwise have. This requires services which other sectors do not require (Cafcass, mediators, contact centres, etc), specialist expertise in courts and practitioners, 'equality of arms' in a field where inequality is common, and a greater sensitivity to welfare and emotional issues.

Lord Phillips and Lady Hale, Supreme Court, call for evidence submission

- 2.6 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.

Why change is needed

- 2.7 We found a family justice system facing immense stresses and difficulties. Some apply only in public law or private law and are considered in those sections. Other issues are wider and highlight difficulty in the way the system operates more generally.

The family justice system is failing families. Notwithstanding the expertise and dedication of those working within it, the system is flawed.

Law Society, consultation response

- 2.8 The issues described briefly here were discussed in greater detail in our interim report.⁸

⁸ *Family Justice Review Interim Report* (2011) paragraphs 2.27 – 2.60.

Delay

- 2.9 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. The longer the case the greater the stress, both for children and adults.

We accept that the delays in resolving disputes concerning children in the courts are 'shocking' and are pleased that the Panel has not pulled its punches in describing the failure of the 'system' as 'little short of scandalous'. Only through facing up to the problems in this way will attention be paid to the problems.

Family Law Bar Association, consultation response

Professionals working within the family justice system need to be aware of the urgency of children's developmental timeframes. Very young children are more likely to develop secure attachments to permanent carers before the age of one. If they are left too long in abusive or neglectful families whilst the decision-making process runs its course, they may suffer a double jeopardy. Their long-term wellbeing may be compromised by the far-reaching consequences of maltreatment and they may suffer from the rupturing and loss of secure attachments made with temporary carers. They will also become more difficult to place in permanent placements as they grow older. Early and decisive action is needed and acceptable timescales need to be agreed and widely disseminated.⁹

- 2.10 At the time of publication of the interim report in March, the average care and supervision case took 53 weeks: 57 weeks in care centres and 46 weeks in the Family Proceedings Courts. This has since increased to 56 weeks on average: 61 weeks in the care centres and 48 weeks in the Family Proceedings Courts.¹⁰ To take on average more than a year to deal with these cases is unacceptable. The harm caused to a child in this period of uncertainty cannot be justified other than in the most exceptional circumstances. These delays are affecting 20,000 children who are waiting for a decision in public law, an increase from 11,000 at the end of 2008.¹¹ We have been unable to project how much further delays will increase, but they will.
- 2.11 Delay also remains an issue in private law. We reported in our interim report that the average case duration was 32 weeks in 2010 and this has not changed. The

⁹ Department for Education Research Brief, *Safeguarding Children Across Services: Messages from research on identifying and responding to child maltreatment* (2011) Department for Education.

¹⁰ Statistics from January to June 2011. Based on HMCTS FamilyMan data for 2011. 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-and-data/courts-and-sentencing/index.htm. As such this data set is not subject to the same levels of quality assurance.

¹¹ HMCTS FamilyMan data (2011).

longer these cases take to resolve, the more entrenched and embittered the dispute is likely to become. It is also more likely that default contact arrangements will become the norm for a child in longer cases, which may not be in their interests.

Cost

- 2.12 This all comes at a high financial cost both to the taxpayer and the individual. The estimate of the overall system cost to the public purse in 2009/10 is now put at £1.6 billion (Annex D).¹² We are not convinced these resources are spent in the most efficient and effective way. And with no more money to be had it is all the more important to use resources to best effect.

Confusion for children and adults

- 2.13 Children and families often do not understand what is happening to them. As the availability of legal aid is limited in private law proceedings the number of people who represent themselves will increase and this issue will become more acute.
- 2.14 More should be done to allow children to have a voice in proceedings. Even though a child's view may be different from the judgement of a professional on what is in their best interests, children need 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.

Complicated and overlapping organisational structures

- 2.15 The current organisational structures are complicated, accountabilities and responsibilities are far from clear and arrangements for coordination are too often ad hoc. Many of the same people are often involved in Local Family Justice Councils, Family Court Business Committees and Local Performance Improvement Groups.

Lack of trust

- 2.16 Individuals and organisations across different parts of the family justice system too often do not trust each other. This has been exacerbated by rising tension from increased pressure of work.

Lack of shared objectives and control

- 2.17 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.
- 2.18 Opportunities for those involved in the system to engage in mutual learning, development and feedback are too few. Learning and systematic review of

¹² See *Family Justice Review Interim Report* (2011) paragraph 2.37 for estimates made in our interim report.

performance is seldom undertaken and we have not found examples of learning from case studies.

Morale is low

- 2.19 Morale is too often low, a consequence of pressure and mistrust, and sometimes, perhaps particularly for social workers, a status that does not match the level of skill and commitment.

Lack of IT and management information

- 2.20 We have been astonished by the system's lack of worthwhile management information. The IT of each component part of the system does not communicate and information flows around the system largely on paper. We are not alone in our view.

...the absence of any solid or reliable data anywhere in the system is a major issue in identifying a starting point for improvement or understanding where gains can be made. The comparison with the criminal justice system is striking. There, statistical and management information descending to the trivial, is readily accessible, enabling problems to be identified, sensible comparisons to be drawn between courts, the proper allocation of resources and improvements in efficiency.

Family Sub Committee of the Council of Her Majesty's Circuit Judges,
consultation response

Views on our assessment

- 2.21 There was widespread agreement that our diagnosis was right.

We consider this Interim Report to be very good in many ways. It goes to the roots of the family justice system itself and is unflinching in its condemnation of the delays, failings and shortcomings of the system, experienced by practitioners daily. It makes it clear that the primary victims of its inadequacy are the children who should be its priority. It exposes failings in the IT systems, management, co-working of organisations and professionals and in the complete absence of any reliable indicators of performance and costings.

Centre for Social Justice, consultation response

The need for an effective system

- 2.22 Taken together, these issues show a set of arrangements in a slow building crisis despite the efforts of all those involved. Family justice does not operate as a coherent, managed system. In fact, in many ways, it is not a system at all. Our interim report pointed out that there had been seven reviews since the Children Act 1989 with no sustained improvement in performance, and argued that this was substantially the result of a lack of leadership and management. For any improvements to the family justice system to be sustainable and successful, these systemic issues must also be tackled. Only through fundamental reform do we think improvements in outcomes for children and families will be possible.

- 2.23 We made proposals in the interim report aimed at addressing the lack of coherence. These focused on:
- ensuring the voices of children and young people are heard, and that they understand the decisions that affect them;
 - creating a dedicated, managed Family Justice Service;
 - improving judicial leadership and supporting a change in judicial culture;
 - improving case management;
 - ensuring the way in which the courts are organised is streamlined and more effective; and
 - ensuring there is a competent and capable workforce, through effective workforce development.

The child's voice

2.24 The panel's interim proposals were built on the need to ensure that children's interests are truly central to the operation of the family justice system. We strongly support the rights that children have both as individuals and as participants in decisions that affect them. Decisions should take the wishes and feelings of children into account and children should know what is happening and why. We proposed:

- *the Family Justice Service should ensure that the interests of children and young people are at the heart of its operation;*
- *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; and*
- *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.*

2.25 There was overwhelming support that the interests of the child should be at the heart of the Family Justice Service (discussed at paragraphs 2.38 – 2.105 below) and that children should be given the opportunity to make their voice heard, where they wish to do so.

We welcome the Panel's clear endorsement of the Children Act 1989's underlying principles. This is key to ensuring that children's welfare continues to be at the heart of any new or substantially reformed system.

Cafcass, consultation response

Offering children and young people opportunities for their voices to be listened to shows respect for them as individuals with rights and needs of their own, instead of treating them as possessions or objects of care.

Family Justice Council, consultation response

2.26 Respondents asked for more detail, particularly about how children would be heard within the different processes of public and private law. This is discussed in the relevant chapters. People also rightly urged the need for great care in consulting children, for this to be handled sensitively and to take into account the child's age and understanding.

2.27 The proposal to offer a menu of options to children, laying out the ways in which they could be heard should they wish, was supported. It should be offered in a consistent, structured way and be age appropriate.

We consider that giving children and young people options on how they can make representations to the courts will empower them to have an input into the decisions made about them, provided that their voices are given adequate weight and attention.

Women's Aid, consultation response

2.28 We agree with those who pointed to the need to give the child a voice without putting them in the position of decision maker.

Research has long indicated that children wish their views to be heard on matters that affect them... However the adults in their lives (including the judge if their parents cannot agree) retain the responsibility for making decisions in their best interests. It must be made clear to children as early as possible in the process that this burden will not be put on their shoulders.

Association of District Judges, consultation response

2.29 Responses from children and young people stressed the importance they put on feeling that they have been listened to and understood, while recognising that this needs time and skill.

Ask the child how they feel in a way that is not scary and by a person who understands the worries children have. It may take lots of times to get all that the children think.

Young person, consultation response

2.30 The need for skilled professional support was reinforced in relation to very young children.

It should also be recognised that a very high percentage of the children whose parents become involved in the [family justice system] are pre-schoolers without the ability to make an informed choice about such matters and will necessarily require skilled professionals to enable them to express their wishes in a way that can be understood in the [family justice system].

Professor Judith Masson, consultation response

- 2.31 Some respondents were concerned about the risk of manipulation by parents, other family members or family justice professionals, speaking often from personal experience.

It is upsetting to the children and they will be manipulated by the parents and family breakdown practitioners to voice other concerns to the detriment of their (the children's) own mental health.

Father, consultation response

- 2.32 The necessary skills and culture should be promoted at a national level, to be put into practice at the local level. Appropriate training and understanding of child development will be key for all practitioners, including judges, in this area as in others. We discuss this below at paragraphs 2.215, 2.221 and 2.227.

- 2.33 There should also be consistency of support services and information for young people and child-centred practice across England and Wales.

The creation of the Family Justice Service does, in our view, provide an excellent opportunity to appoint a person at a senior level within the organisation to ensure that children's rights are indeed at the heart of the new service, and to play a key role in disseminating research and good practice through multi-disciplinary training.

Association of Lawyers for Children, consultation response

- 2.34 As we discuss later, the Family Justice Service should lead in developing and disseminating national standards and guidelines on working with children and young people, building on existing best practice. It should also make sure that up to date research analysis of the needs, views and development of children is sent to those who need to know it.

- 2.35 We have been impressed by the valuable work undertaken by the Cafcass Young People's Board. They provide an important perspective on the work of the family justice system and offer an intelligent and energetic challenge to the board of Cafcass. We believe that this work should be maintained through a Young People's Board for the Family Justice Service, with a remit to consider issues in both public and private law and to report directly to the Service.

- 2.36 Respondents welcomed our recognition of the importance of the United Nations Convention on the Rights of the Child (UNCRC). Some felt we should go further to recommend that it be incorporated into domestic legislation, as recently happened in Wales.

The single most crucial and most effective safeguard for children, therefore, would be the incorporation of the UNCRC into domestic legislation... The existing requirement, to comply with the UNCRC when decisions are made in family courts, has proved insufficient to produce the necessary change in practice and culture.

Judith Timms, from a paper supplied to the panel

Case study – The UNCRC in Wales

The *Rights of Children and Young Persons Measure (Wales) 2011* will come into force in May 2012. The UNCRC will become part of domestic Welsh legislation and will help shape all future policy.

In the first phase of implementation, running to May 2014, Welsh ministers will be under a duty to have due regard to the UNCRC in the development of any new policy or change of existing policy. From May 2014 the duty will apply to all Welsh ministers' functions. The Measure does not supersede any existing legislation (for example the paramountcy principle of the Children Act 1989). However it will be necessary for all those who exercise the functions of Welsh ministers – including Cafcass Cymru officers – to show how they have given due regard to the Convention in making decisions affecting children.

Currently the Welsh Government is preparing training and communications materials to give to all staff to raise awareness of the change, which will only apply to Welsh Government and not to local authorities or other external agencies. Evaluation of the effects of the change is planned.

- 2.37 Clearly the change in Wales is important and designed to ensure a fully child-focused approach in all work of the Welsh Government. There may be effects on the number and type of family cases, but these cannot be predicted. A change of this nature is beyond our scope and indeed would affect much more than family justice. It will need to be monitored by the UK Government.

Final recommendations

Where we refer to the Family Justice Service, we envisage that these functions would be performed initially by an Interim Board. (see paragraph 2.56).

- Children and young people should be given age appropriate information to explain what is happening when they are involved in public and private law cases.
- 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.
- The Family Justice Service should take the lead in developing and disseminating national standards and guidelines on working with children and young people in the system. It should also:
 - ensure consistency of support services, of information for young people and of child-centred practice across the country; and
 - oversee the dissemination of up to date research and analysis of the needs, views and development of children.

- There should be a Young People’s Board for the Family Justice Service, with a remit to consider issues in both public and private law and to report directly to the Service on areas of concern or interest.
- The UK Government should closely monitor the effect of the Rights of Children and Young Persons Measure (Wales) 2011.

A Family Justice Service

2.38 The interim report identified a need to bring together some of the key responsibilities within family justice, including court social work functions carried out by Cafcass and procurement of mediation and court ordered contact services. We recommended:

- *there should be a Family Justice Service; and*
- *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 Government.*

2.39 The need for improved leadership and coordination of family justice was widely recognised by respondents to the consultation.

I enthusiastically welcome the Review’s analysis of the shortcomings of the current family justice system and support its strategic proposals for reform.

Professor Mervyn Murch, consultation response

There needs to be a single coherent system, to ensure specialism and transparency of the system.

Mother, consultation response

I think it is important to provide some joined up thinking in respect of the system which currently is wholly disparate and disjointed. It seems to me that establishing a Family Justice Service will go a long way to redressing these points.

Mediator, consultation response

The introduction of a single service in which multiple disciplines and agencies will be subject to the same overall management structure should bring greater efficiency and cohesion.

Law Society, consultation response

2.40 While most people welcomed the direction of travel there were many comments on individual aspects of our proposals. To create a new organisation to take over some existing functions and to coordinate and influence others is complicated and affects established interests. There are financial issues. Some have raised concerns about a possible effect on judicial independence. And we have recognised that we were ourselves ambiguous in places in the interim report. So drawing on the responses to consultation and on discussions with government

and the judiciary we have revisited the objectives and possible models for management of the system.

2.41 Any options for design of the system must be tested against what it is expected to achieve and what characteristics it needs to have to deliver its objectives successfully. We do not want to recommend change for the sake of it and indeed we recognise that structural change can be expensive and fail to deliver the expected benefits. But currently in family justice there is no one tasked with analysing system performance with a view to securing or arguing for change of processes or rebalancing of resources, and some issues have no one at all to address them. A range of functions is needed to:

- provide appropriate leadership nationally and locally, for example through the development and oversight of a strategic plan;
- agree national standards against which those operating at national and local level are measured, for example standards of expert witnesses and their use;
- ensure clarity of accountability nationally and locally, and between individual agencies and services;
- ensure incentives align with strategic priorities, for example testing how the system is performing in securing the best outcomes for children;
- ensure there is capability and capacity nationally and locally to enable the system to operate effectively and efficiently, including the generation of management information and support for training within a responsibility for workforce strategy;
- optimise the use of resources nationally and locally to ensure value for money is secured, for example consolidating budgets for family justice services as far as is reasonable and practicable, and investigating administrative and function overlaps across agencies at the national and local level;
- enable and drive continuous improvement, for example collating, spreading and monitoring effective implementation of local best practice, commissioning research and disseminating learning; and
- be able to respond to change.

2.42 A further key criterion is whether a new organisation would have the position (status, legal role, or budget) to be taken seriously even where it cannot give instructions. Without that it would risk becoming a talking shop.

2.43 There is a range of possible models, in three broad categories:

Option 1 – a central coordinating board;

Option 2 – leadership of family justice within Her Majesty's Courts and Tribunals Service (HMCTS), including responsibility for delivering court social work services and other functions;

Option 3 – a separate Family Justice Service responsible for delivering court social work services, mediation, out of court resolution services and experts.

- 2.44 With a new coordinating board, option 1, the existing national delivery agencies would remain as now. The board would:
- draw its membership from the key delivery agencies, with appropriate participation from the judiciary and local authorities;
 - develop and monitor implementation of a system wide strategic plan and set out clear actions to be taken across and within agencies; and
 - review and analyse whole system performance with a duty to make recommendations on performance improvements to Ministers, the senior judiciary, local authorities and other players, for example the Department of Health in respect of supply and performance of experts.
- 2.45 It could be chaired by Ministers, independently or by a senior official and would need a budget and staff to support it.
- 2.46 A board of this kind could be implemented quickly, with minimal expense and without change to other institutional structures. Its clout would depend on the backing given to it by government and the judiciary. It would in our view probably have some effect while new, particularly if given a clear focus and remit for example to reduce delay by a specified amount. It could also be given a remit to propose and prepare for later more fundamental structural change. However without direct responsibilities and a budget its effectiveness would very likely decline.
- 2.47 To give leadership of the system to HMCTS with integrated court social work services (option 2) would be efficient in that it would reduce the number of agencies involved. Fully integrated management information would be achieved more easily. The courts, and to a degree the judiciary, would be tied more closely to other parts of the system and would be more in control of them. This structure would also meet judicial concerns about the risk to their independence of a powerful voice in family justice that was outwith the constitutional settlement.
- 2.48 Against this, such a structure would put functions into HMCTS such as social work that are wholly different from anything else it does. Social work within HMCTS would risk becoming even more divorced from local authority social work than it already is, with consequent friction and possibly recruitment difficulties. Further, HMCTS particularly is involved in major cost reduction and change programmes that are likely to take time to bed down. This option may have merit in future years, subject to further consideration of the difficulties already mentioned. We note that under this option as under the other two it would probably make sense to establish a board (though within HMCTS in this case) to ensure governance with the full range of expertise.
- 2.49 Option 3 would bring some key functions together in a new structure, that we called the Family Justice Service in the interim report. This could have responsibility for court social work services, provision of mediation and out of court resolution services. There would also be a role in setting quality standards and monitoring spend in relation to expert witnesses. There is also potential over time for the Service to manage more directly the supply of expert witnesses, as well as solicitors for children.

- 2.50 The core work of the Family Justice Service would be to monitor what was happening in the system, both locally and nationally, to identify best practice and difficulties and to consider how problems could be addressed in a practical way.
- 2.51 To bring some services together under the Family Justice Service would give it a budget and hands on experience of delivery. This would in turn give it greater credibility both in terms of its understanding and its ability to achieve change.
- 2.52 We should be clear here, as we were not in the interim report, that a Family Justice Service should not be responsible for the family judiciary or the operation of the family courts any more than it would be responsible for local authorities or the Legal Services Commission (LSC). It would not be able or expect to direct how these other bodies operate, nor would it control their budgets. These bodies would need to own their respective parts of the strategic plan developed with the Family Justice Service. Charged with the collation of trusted data and management information, the Family Justice Service would be the body with the strongest understanding of the needs and performance of family justice in the round. We would therefore hope and expect that its perspective would be taken into account as these other bodies formulated their own plans.
- 2.53 Some judges have expressed concerns that such a service could put undue pressure on the judiciary and would complicate resource allocation by HMCTS. The Family Justice Service would be there to support the judiciary and the court process, and would undoubtedly be less effective were it to be confrontational. Moreover senior family judges could if they chose substantially and effectively shape its work. The risks would only rise were they to choose to stand aside from it. In terms of the courts, HMCTS would be one input to its decision-making. We have also heard concerns that a more powerful family voice would succeed in drawing resource from other jurisdictions. The answer surely to that is for those other jurisdictions to be able more clearly to present their own needs and for all those to be balanced against each other by the HMCTS Board.
- 2.54 We recognise that, at least initially, the bulk of the Family Justice Service would consist of former Cafcass employees. This would help give children a strong voice in the Family Justice Service. But it would be a substantially different organisation with much broader responsibilities. Government would need to equip the new organisation with strong management and appropriately broad governance arrangements.
- 2.55 The government will need to give more detailed consideration to the feasibility and implications of these different models. Both options 2 and 3 would require investment. We understand that no new money is available to fund change to the system in the current Spending Review period, i.e. before 2014/15. Change generally has an initial cost and where that is underfunded it is much less likely to succeed.
- 2.56 We recommend that the first step should be to set up an Interim Board, option 1, with a clear remit to plan for more radical change towards a Family Justice Service on a defined timetable. In the meantime the board should be set up with

membership and authority to have impact. It should be charged with specific and clear responsibilities, and provided with adequate staff and budget support.

2.57 Certain other issues are relevant whichever model is ultimately adopted and we discuss below comments raised in response to our interim report. They are set out in relation to the Family Justice Service, as our preferred model. The sections following discuss:

- the functions of the Family Justice Service;
- governance;
- budget responsibility and charging;
- the need to prioritise the interests of children and young people in the operation of the Family Justice Service;
- performance management; and
- research and evaluation.

Functions

2.58 In relation to functions we recommended among other things:

- *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 the 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; and*
- *the Family Justice Service should be responsible for procuring publicly funded mediation and support for contact.*

2.59 The interim report also suggested that there was long term potential for the Family Justice Service to manage the legal aid budget and relationships with legal providers and experts.

(i) Lawyers, mediators and expert witnesses

2.60 Respondents strongly supported the principle of a Family Justice Service but wanted more detail about its responsibilities and funding. In particular, the interim report was unclear about the responsibility the Family Justice Service should have in relation to commissioning lawyers and paying them through legal aid.

2.61 There was concern about the need to hold duplicate contracts with both the LSC and the Family Justice Service.

It is important to note that a number of legal aid providers hold contracts in multiple categories of law and are managed as a provider and not a category basis. If the [Family Justice Service] becomes responsible for managing particular aspects of the relationship, then this will lead to a duplication of costs between the LSC and the [Family Justice Service]. This would also undermine the LSC's and MoJ's ability to manage the supply of practitioners and control legal aid expenditure as a whole. The terms of the contracts and the way in

which they are procured by the LSC and [the Family Justice Service] are likely to differ significantly and providers will need to be familiar with both sets of requirements creating additional work for them

Legal Services Commission, consultation response

- 2.62 It is common practice for legal firms to hold contracts with a variety of clients. However, one aim in creating a Family Justice Service would be to avoid duplication and extra cost for government, so it does not make sense to recreate functions that would also need to exist in LSC as well as causing extra work for lawyers. In view of the ties between legal aid provision for family work and other areas of law, we agree it would not make sense for family legal aid to be transferred to the Family Justice Service. But we think there is a case in due course to transfer responsibility for the funding of solicitors for children to allow an overall management of the tandem model of solicitors and children's guardians.
- 2.63 Publicly funded mediators currently hold contracts with the LSC. It may not make sense for the procurement and payment mechanisms to be transferred to a Family Justice Service. But mediation should not be viewed as a legal service. It should be viewed together with wider dispute resolution services. There is therefore a case for transferring responsibility for mediation to the Family Justice Service to have a role determining how the budget for mediation is best applied. This would include setting the strategy and monitoring how it is spent, while payments could continue to be administered through the LSC.
- 2.64 We see a role for the Family Justice Service in setting quality standards for expert witnesses in their court work, and collating and monitoring performance data, including spend. There is also potentially a case for the Family Justice Service to manage more directly the supply of expert witness services.

(ii) Court social work and Cafcass

- 2.65 Some respondents were concerned that simply to move court social work services into the Family Justice Service would be a name change that would not help resolve their concerns about Cafcass performance, or might even increase them.

Cafcass does not serve its purpose and to incorporate it into another organisation and simply change its name would not solve the problem.

Father, consultation response

- 2.66 Many respondents criticised Cafcass, largely along the lines we discussed in the interim report:¹³
- difficulties in managing the upsurge in care demand following the death of Baby Peter;
 - endorsement of comments in reports from the National Audit Office and Public Accounts Committee;^{14, 15}

¹³ *Family Justice Review Interim Report* (2011) paragraphs 3.90 – 3.102.

- a tension between management standards that are seen as overly bureaucratic and the need for Cafcass officers to exercise professional discretion; and
- tensions between Cafcass, other agencies and the judiciary.

2.67 It has not been for us – and we were not equipped – to review Cafcass effectiveness in the depth that would be needed to establish the rights and wrongs of these arguments. There are clearly some difficult issues to be resolved, and whatever happens to structures the current lack of confidence in some quarters about Cafcass and the mistrust need to be addressed. Cafcass would themselves argue that perception is lagging behind a much improved reality. Others would say it is still struggling and needs clearer and more stable direction. Our own notion of the Family Justice Service would lead to a change of governance and bring court social work services closer to court processes. This would give the opportunity to some extent for a new start, but the pressures mean difficult choices will still be needed.

2.68 Respondents emphasised the need for those from non-legal disciplines based in the Family Justice Service to retain a professional ethos and accountability to their own professional bodies. We agree.

2.69 Some asked for clarity about the links between the Family Justice Service and Cafcass Cymru, particularly in terms of how the provision of Cafcass Cymru services would work at a practical level.

2.70 Cafcass Cymru would need to be a key delivery partner to the Family Justice Service, in the same way as HMCTS and the LSC. However Cafcass Cymru will remain the responsibility of the Welsh Government, and the Family Justice Service will also have a role in providing wider family justice services in Wales. Specialist arrangements will need to be put in place that:

- secure effective engagement between the Welsh Government and Family Justice Service at a strategic and operational level; and
- ensure clarity of expectation and understanding by professionals and service users in Wales;

(iii) *Contact centres*

2.71 We were reminded by respondents to the call for evidence of the importance of child contact centres. Supervised contact centres in particular play a key role in complex public and private law cases, providing a secure and child centred environment for contact, as well as intensive social work support and shuttle mediation where parents are not able or willing to speak to each other.

The work done by Child Contact Centres makes a significant contribution to introducing or re-establishing contact between children and their non-resident parents and other family members, and to facilitating contact until parents can

¹⁴ <http://www.nao.org.uk/publications/1011/cafcass.aspx>. Last accessed 26 October 2011.

¹⁵ <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpublic/439/43902.htm>. Last accessed 26 October 2011.

manage appropriate levels of contact for themselves. Feedback from children and parents in NACCC accredited centres and from the judiciary, mediators and legal representatives, shows that this work is making a practical difference to children's lives.

National Association of Child Contact Centres, consultation response

2.72 We understand that despite increased central government investment in this area contact centres have long had rather fragile funding. We are aware that three supervised contact centres have recently closed and that others are experiencing difficulties due to the withdrawal of local authority contracts and other sources of funding. We cannot address this, but we see a role for the Family Justice Service to consider these centres and their relative priority as it undertakes its wider planning for the system.

(iv) Other responsibilities

2.73 A small number of respondents suggested that there would also be benefits were the Family Justice Service to take responsibility for child maintenance. This makes some sense because couples do not separate the various issues when they need to make arrangements about the future care of their children. However, there would be considerable complications and child maintenance was not within our terms of reference.

Governance

2.74 We proposed as governance for the Family Justice Service:

- *the Service should be led through a Family Justice Board and a Chief Executive;*
- *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; and*
- *Local Family Justice Boards should be established, with consistent terms of reference and membership. They should work closely with Local Safeguarding Children Boards.*

2.75 Most respondents supported these recommendations while pointing to the importance of the Chief Executive and asking for more detail on the responsibilities and accountabilities of the Board. We believe detailed governance arrangements are a matter for government once the model is settled.

2.76 The interim report suggested that a Family Justice Board should include representation from a balanced group of qualified people from all parts of the family justice system, including:

- those representing the interests of children;
- the President of the Family Division;
- the interests of appropriate government departments; and
- local authorities.

- 2.77 Others mentioned in the consultation included:
- expert witnesses;
 - representation of the interests of parents;
 - social workers;
 - child psychology disciplines;
 - practising lawyers; and
 - certain representative organisations.
- 2.78 There is a clear risk that any representative board could become too large and unwieldy. We suggest that the board for the Family Justice Service will need to be tightly focused and should include people from an appropriate range of backgrounds. These should be appointed in their own right, not as representatives of particular bodies or disciplines.
- 2.79 The main board would probably need to be supported and advised by sub committees. There is also a case for ensuring the interests of children have a strong voice, either on the main board or through its committees.
- 2.80 Some respondents asked for greater clarity about how the local boards would work, particularly in larger urban areas such as London. We suggest local boards should include representatives from local delivery agencies, including local authorities, and the local judiciary:
- to ensure in their area that the best outcomes possible are delivered for those children that come into contact with the family justice system;
 - to provide leadership, effective coordination and inter-disciplinary engagement across all players in the system locally;
 - to collate and spread examples of local best practice, sharing these nationally where appropriate;
 - to monitor and investigate local system performance; and
 - to provide a formal link with Local Safeguarding Children Boards and act as a contact point for information exchange.
- 2.81 Areas should be coterminous with other relevant functions as far as possible and it may be helpful for them to be statutory to secure the involvement of local authorities. Other existing local meeting arrangements, including Local Performance Improvement Groups, Local Family Justice Councils and family court business committees would need to be reviewed and rationalised.
- 2.82 We note that some Local Performance Improvement Groups are making progress having been based around care centre areas. Performance Improvement Groups have not been established in Wales so the appropriate local structure for Wales would need to be considered separately.
- 2.83 There is concern about the impact of our recommendations on the Family Justice Council and Local Family Justice Councils with the possible loss in particular of scrutiny by those working in the system every day.

- 2.84 The Family Justice Council performs a valuable role as an inter-disciplinary source of independent advice both to practitioners and government. It also acts as a vehicle for commissioning research. These roles will be needed in any new structure but they need to be exercised in a way that fits with the final design of the Family Justice Service (and Interim Board). There is a clear risk of duplication and overlap. This will need further discussion at the next stage.
- 2.85 The Family Justice Service will also need to engage directly with service users, including parents and wider family members. This was not explicit in our interim report.

There needs to be a public information aspect to the Family Justice Service explaining its work and the way it carries it out.

Professor Judith Masson, consultation response

Interim arrangements

- 2.86 We have proposed (paragraph 2.56) that an Interim Board should be created to start to carry out as far as possible the functions of the Family Justice Service ahead of its creation as well as to recommend the process for its creation. With its preparatory function it may be right for this to include representatives of executive agencies, and it could build on the work of the National Performance Partnership, which sponsors the Local Performance Improvement Groups. Work to rationalise the various bodies nationally and locally should not wait for the Family Justice Service.

Budget responsibility and charging

- 2.87 We proposed:
- *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;*
 - *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;*
 - *charges to local authorities for public law applications and to Cafcass for police checks should be removed.*
- 2.88 We should have been clear that the first of these recommendations was addressed to the judiciary and HMCTS. Budgets are allocated in financial terms and these are then calculated into sitting days for regional planning purposes. We therefore see no need to pursue this recommendation.
- 2.89 We continue to believe, with the *Plowden Review* on court fees, that it makes no sense to charge local authorities for public law applications.

I believe that, at the margins, resource issues can play a part in deterring when and if care proceedings are initiated or that alternative courses of action are preferred.¹⁶

- 2.90 These charges either affect local authority behaviour, in which case they risk damage to children, or they do not, in which case they are pointless.
- 2.91 The charges are also administratively costly to both HMCTS (in chasing payment) and local authorities. They should be abolished. Charges to local authorities and Cafcass for police checks should be abolished for the same reasons.
- 2.92 Some respondents said that the family justice system was already under resourced and that more detail was needed on how budgets would be allocated to the Family Justice Service and the extent to which they would be protected. This is beyond the scope of our work. However a Family Justice Service with the paramount interests of children at its heart should be better placed than the current disparate arrangements to make the case for appropriate funding. A more effective approach to delay, duplication and inefficiency should also bring identifiable financial benefits.

Prioritising the interests of children and young people

- 2.93 We have discussed earlier the general issues relating to the voice of the child and turn here to matters relating more directly to the Family Justice Service. We proposed:
- *the Family Justice Service should ensure that the interests of children and young people are at the heart of its operation; and*
 - *safeguards should be built in to ensure the interests of the child are given priority in guiding the work of the Family Justice Service.*
- 2.94 Our proposals would help demonstrate the government's commitment to the United Nations Convention on the Rights of the Child (UNCRC), to which the United Kingdom agreed to be bound in 1991.
- 2.95 There was little comment specifically on these proposals, although there was some scepticism about whether the Ministry of Justice (MoJ) would protect the interests of children and young people as sponsor of the Family Justice Service. Respondents saw a risk that money would be diverted to courts and legal services or to work on crime.

We would recommend that the Review team considers again the idea of co-sponsorship of the service jointly by the Ministry of Justice and the Department for Education, since this type of joint ownership is arguably the best way to ensure that children's needs and family support are given priority in the system.

Barnardo's, consultation response

¹⁶ Plowden F. (2009) *Review of Court Fees in Child Care Proceedings* Ministry of Justice, p. 4.

- 2.96 We felt it better that one Department should have oversight of family justice. It is currently shared in a way that arguably has contributed to incoherence. We have not discussed how policy responsibility will need to be divided in light of the responsibilities of the Family Justice Service but there will need to be continuing strong ties with the Department for Education and Welsh Government given their responsibility for children's and family policy.
- 2.97 We suggested other possible safeguards. One option would be to place a duty on the Lord Chancellor to prioritise the welfare of children in carrying out his general duties. It would be unclear how such a wide duty, which would go beyond the boundaries of the family justice system, would be likely to operate in practice and we think this would render it unworkable. Several respondents suggested the UK Border Agency (UKBA) provided a sensible model. Section 55 of the Borders, Citizenship and Immigration Act 2009 requires UKBA to make arrangements to safeguard and promote the welfare of children in discharging its immigration, nationality or general customs functions. A similar duty could be placed on the Family Justice Service. Requiring an annual report to set out how this function had been fulfilled would help ensure accountability.
- 2.98 Respondents argued the importance of recognising in the Family Justice Service the need to safeguard vulnerable adults. We agree although this should not deflect from the priority of the children's welfare principle.

Given the prevalence of domestic violence in private family law cases, we urge the Review Panel to also recommend that safeguards should be built in to protect vulnerable or intimidated adults within the family justice system – including those affected by domestic violence.

Rights of Women and Women's Aid, consultation response

Performance management

- 2.99 We proposed:
- *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; and*
 - *robust performance information should be fed into the national and local boards, and the judiciary.*
- 2.100 There was - unsurprisingly - general agreement about the need to improve management information, through improvements to IT, and to ensure this was available to all parts of the system, as the Justice Select Committee also noted.

This Committee and its predecessor committees have repeatedly highlighted the need for robust data gathering to allow the development of evidence based policy. We were extremely disappointed by the serious gaps in data that we and the Family Justice Review found during our inquiries.

Justice Select Committee¹⁷

2.101 Current IT systems are wholly inadequate. The list of data gaps from our interim report is repeated here as Annex E. Fundamental and sustainable improvement in performance is unlikely to be achieved until improvements are made. This will need investment. In the meanwhile there should be an urgent review of how better use could be made of existing systems.

Research and evaluation

2.102 We proposed:

- *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 coordinated and system wide approach to research and evaluation.*

2.103 We agree with respondents who highlighted the importance of a dedicated research budget. A variety of different bodies currently commission research and we recommend that this budget be amalgamated.

With regard to the role of research, we welcome the statement that there needs to be a more coordinated and system wide approach to research and evaluation...but would urge that an appropriate and dedicated research budget needs to be allocated to this activity or there is a risk that research and evaluation will not be possible or will be of poor quality.

Network on Family, Regulation and Society, consultation response

2.104 We also recommend that the processes by which research is transmitted around family justice should be reviewed and improved. These are ad hoc at present, and different judges appear to take different views on the extent to which they can take research into account if it is not adduced in evidence. It may be sensible for summaries and links to relevant research to be posted on a web site with a system of email alerts. Local authorities and wider stakeholders will need to be linked into this. A system for vetting of the research would also be needed, creating a form of NICE to give greater confidence to lawyers and judges.¹⁸ A system of this kind operates in Australia, whereby a 'clearinghouse' acts as a central research resource on key topics.¹⁹

¹⁷ *Operation of the Family Courts Sixth Report of Session 2010-12, Volume I (2011) House of Commons Justice Committee, p. 12.*

¹⁸ NICE stands for the National Institute for Clinical Excellence.

¹⁹ <http://www.aifs.gov.au/>. Last accessed 26 October 2011.

2.105 We also agree that better data and research could improve public understanding of family justice.

[This] should be linked to the data and research function – data should not be seen as important only for informing practitioners and managers, it also needs to be used to help the public understand what work the Family Justice Service does and how it might resolve their dispute.

Professor Judith Masson, consultation response

Final recommendations

We have reviewed our proposal for a Family Justice Service and set out in paragraphs 2.41 - 2.42 above the requirements we believe any new structure should be designed to meet. We recognise that there are several possible structures and that a final arrangement may take time to achieve. Government will need to give detailed consideration to the full range of options for delivering improved leadership and management of the family justice system, and assess these against the design requirements. We make the following recommendations based on our preference for a Family Justice Service. Where we refer to the Family Justice Service, we envisage that these functions would be performed initially by an Interim Board.

- A Family Justice Service should be established, sponsored by the Ministry of Justice, with strong ties at both Ministerial and official level with the Department for Education and Welsh Government. As an initial step, an Interim Board should be established, which should be given a clear remit to plan for more radical change on a defined timescale towards a Family Justice Service.
- The Family Justice Service should have strong central and local governance arrangements.
- The roles performed by the Family Justice Council will be needed in any new structure but government will need to consider how they can be exercised in a way that fits with the final design of the Family Justice Service (and Interim Board).
- The Family Justice Service should be responsible for the budgets for court social work services in England, mediation, out of court resolution services and, potentially over time, experts and solicitors for children.
- Charges to local authorities for public law applications and to local authorities and Cafcass for police checks in public and private law cases should be removed.
- A duty should be placed on the Family Justice Service to safeguard and promote the welfare of children in performing its functions. An annual report should set out how this duty has been met.
- An integrated IT system should be developed for use in the Family Justice Service and wider family justice agencies. This will need investment. In the meanwhile government should conduct an urgent review of how better use could be made of existing systems.

- The Family Justice Service should develop and monitor national quality standards for system wide processes, based on local knowledge and the experiences of service users.
- The Family Justice Service should coordinate a system wide approach to research and evaluation, supported by a dedicated research budget (amalgamated from the different bodies that currently commission research).
- The Family Justice Service should review and consider how research should be transmitted around the family justice system.

Judicial leadership and culture

2.106 The interim report highlighted that improvements to the family justice system could not be achieved through organisation and governance alone. Changes to the way people do things are essential, and here the judiciary are key to the effective running of the family justice system. 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 proposed action is in the best interests of their children.

2.107 However, most judges lack experience of working in a management structure or having management responsibilities. Judges mostly work alone and there is no appraisal, nor measurement of how each judge goes about his or her business. A consequence is variety in ways of working in different courts and areas of the country. This in turn is a barrier to reducing delays and lowering costs.

2.108 The President of the Family Division, in his response to the interim report, agreed that changes in judicial culture and behaviour are required. The President also recently acknowledged this might result in a change in emphasis in his role.

My role...is essentially to serve the [family justice system] in the most effective way possible. If this means taking on more administration, and more 'cracking of the whip' so be it. Let the conference and the Final Report of the [Family Justice Review] tell me.²⁰

2.109 We made a number of recommendations in the interim report aimed at supporting this. These were focused on:

- providing a clearer leadership and management structure for the judiciary;
- ensuring judicial continuity in family cases, with the exception of the High Court; and
- encouraging specialism in family matters amongst all tiers of the judiciary.

²⁰ Sir Nicholas Wall, The President of the Family Division *Reform of the Family Court – delivering a unified system; specialist judiciary; allocation; judicial continuity; role of lay magistrates; role of the President in a Single Family Court* (forthcoming) to be published by Jordans, paper originally presented at Dartington conference *The Family Justice Review: Evaluation & Implementation* 30/09/11 – 2/10/11.

2.110 We should have been clearer that these recommendations were addressed to the judiciary, not to government. This section of the report is similarly addressed to the judiciary; the recommendations will need to be considered by senior family judges and the Judicial Executive Board.

2.111 Most respondents agreed that the changes we proposed to the judiciary would lead to improvements in the operation of the family justice system.

Leadership and management

2.112 The starting point for change is a clearer structure for management of the family judiciary, by the judiciary. The following interim recommendations were made to support this:

- *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;*
- *Family Division Liaison Judges should be renamed Family Presiding Judges, reporting to the Senior Family Presiding Judge on performance issues in their circuit;*
- *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; and*
- *information on key indicators such as case numbers per judge, court and area, case length, numbers of adjournments and number of experts should support this approach to judicial case management.*

2.113 There was little comment specifically on these proposals from respondents to the consultation. From those who did there was strong support.

We applaud the Review's attempts to define a better judicial management infrastructure that involves all of the judiciary.

Magistrates' Association, consultation response

2.114 Some judges queried the value to be added by changes in senior judicial roles. The Judicial Executive Board did not favour the creation of a role of Senior Family Presiding Judge – as this had the potential to confuse the role of both the Senior Presiding Judge and the President of the Family Division – but proposed to appoint a Vice President of the Family Division to support the President as he works to improve the performance of the family judiciary.

2.115 The President noted that work is already underway to develop job descriptions.

I also regard it as essential that [Designated Family Judges] in particular should have a clearly defined role. I am in the process of formulating a job description which was discussed at my conference in May 2011.

President of the Family Division, consultation response

2.116 Some feared that stronger leadership and management might reduce judicial independence, particularly the use of key indicators to track judicial performance.

We are particularly concerned about the manner in which an individual judge's performance is to be monitored and question whether the 'key indicators'

proposed would properly measure a judge's performance. Every case is fact-sensitive and, particularly in family cases, less susceptible to a blanket approach.

Association of District Judges, consultation response

2.117 This concern may have been influenced by the lack of clarity in the interim report that the recommendation was addressed to the judiciary. It would not be appropriate for any external body, including the Family Justice Service, to monitor the performance of the judiciary. As we found in Australia, such information would though help individual judges by allowing them to see how their management of cases compared to the average for the country and their area. It would also guide members of the judiciary with management responsibilities in discussions with colleagues. It would also be for the judiciary to agree among themselves the indicators to be measured. Those in our interim report were derived from Australia.

2.118 Some Designated Family Judges (DFJs) were unclear whether they could exercise leadership in relation to the Family Proceedings Courts in their areas. This relates to the historic separation between jurisdictions. Our proposals for a single family court (see paragraphs 2.158 - 2.172 below) mean that DFJs should lead all members of the judiciary including magistrates and consider the performance of all courts. They will need to be aware of performance and capacity, working with Justices' Clerks, family bench chairmen and judicial colleagues to address any issues.

Final recommendations

- A Vice President of the Family Division should support the President of the Family Division in his leadership role, monitoring performance across the family judiciary.
- Family Division Liaison Judges should be renamed Family Presiding Judges, reporting to the Vice President of the Family Division on performance issues in their circuit.
- 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.
- HMCTS should make information on key indicators for courts and areas available to the Family Justice Service. Information on key indicators for individual judges should be made available to those judges as well as judges with leadership responsibilities. The judiciary should agree the key indicators.
- Designated Family Judges should have leadership responsibility for all courts within their area. They will need to work closely with Justices' Clerks, family bench chairmen and judicial colleagues.

Judicial continuity

2.119 Nearly everyone has told us at every stage how important it is to have the same judge throughout a case. Our interim recommendation was that:

- *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.*

2.120 Again there was general agreement.

I see this as pivotal to the attack on delay...I agree that judicial continuity should increase speed and efficiency and should give the judge more time as he or she will not have to read off the papers in a case each time. What is of critical importance, however, is that judges are given the administrative freedom to make judicial continuity work. In essence, this means that the case must be heard when it is ready, not when the judge next becomes available.

President of the Family Division, consultation response

2.121 Since publication of the interim report the President has issued two sets of guidance emphasising the importance of judicial continuity in applying the Public Law Outline.²¹

2.122 There is also a trend in other jurisdictions to achieve continuity wherever possible. Lord Justice Jackson's review of civil litigation costs promoted continuity (referred to as docketing in his review) and led to the establishment of a pilot in Leeds county court.²²

I have received a clear message from court users and practitioners that (a) specialism by judges and (b) docketing of cases to specific judges are welcomed.²³

2.123 We discuss specialism in the next section.

2.124 We recognise that to achieve continuity will need changes to the work patterns of some judges. It will not be possible for them to move to work in other jurisdictions for other than a few weeks at a time. This is a small price compared to the prize for children and families. A willingness to adapt work patterns to be able to offer continuity should be a condition for the ability to take family work. If some courts can deliver continuity, all can.

2.125 Our interim recommendation took account of the practical barriers to achieving continuity in the High Court. However, many people in response argued that judicial continuity in these cases is arguably more important because they are the most complex and difficult.

²¹ President's Guidance: Listing and hearing care cases (bulletin number 3, 2011) and President's Guidance: Allocation and continuity of case managers in the Family Proceedings Courts (bulletin number 4, 2011).

²² *Civil Litigation Costs Review*, Lord Justice Jackson (2010) Judicial Office.

²³ *Ibid*, p. 391.

...we do not see why there should be an exception to this rule for the High Court. This is where the hardest and most complicated cases are heard and so this is where the principle of continuity, specialisation and management are arguably more important.

Network on Family, Regulation and Society, consultation response

2.126 We agree. Although it could not be implemented immediately, it is right that High Court judges, together with the President of the Family Division, should consider what organisational changes might be necessary to ensure judicial continuity. The collegiate approach of the High Court is important and solutions will need to maintain this.

2.127 Some respondents suggested there might be circumstances when judicial continuity might result in added delay.

The key principle of having one family judge throughout proceedings would mean that less time is wasted, there would be more continuity and parents may feel more trust towards the system. However, there is concern that this may not always lead to [expeditious] running of the case, particularly in circumstances where the judge is unavailable it could lead to delay. There is insufficient detail in the review setting out what would happen if a judge is unavailable for longer than expected and when a case would then be referred to another judge to hear.

Release, consultation response

2.128 This point was made particularly by magistrate respondents, who were concerned that the need to convene three members of the bench, in addition to a legal adviser, for all court hearings, could lead to an increase in delays in the Family Proceedings Courts.

[Magistrates] tend to be busy committed people in many spheres of life and unnecessary delay should be avoided just in order to get three diaries coordinated.

Magistrate, consultation response

2.129 Others highlighted that there was also benefit in introducing a different perspective on the case from a different member of the bench.

Continuity and rigorous case management go hand in hand but they should not be the sole consideration. There is real value to be gained from the introduction of a fresh but experienced mind into the resolution of protracted debates which may become tainted by emotional involvement. A bench of three magistrates, at least one and probably two of whom have dealt with a case with the same legal adviser provides a structure in which the benefits of continuity and fresh 'eyes' can be balanced with continuity and effective case management.

Magistrate, consultation response

2.130 Nonetheless there was also recognition by magistrates of the importance of continuity.

Magistrates are united in support for greater judicial continuity, and stand by ready to engage in discussion as to how this can be achieved...having different members of the judiciary, and as appropriate their legal advisers, handle each hearing of a case is inefficient, ineffective and clearly not right or fair to the parties.

Magistrates' Association, consultation response

2.131 We recognise the difficulty of achieving full continuity of bench and legal advisers in all cases. However, we heard from benches where continuity is achieved without compromising case progression.

We agree that judicial continuity should be achieved and that it is important for parents to see the same judge/magistrate during the proceedings...We book our magistrates at contested hearings and findings of fact ensuring that all three, or at least two are available for the final hearing. It should be rare that this is not possible and it is a cost effective use of court time as the family and issues are known to the bench.

Magistrate, consultation response

2.132 The Magistrates' Association suggested it would be more workable to provide consistency through the same legal adviser, a bench chair and one other member of the bench rather than all three members of the bench.

Final recommendations

- The judiciary should aim to ensure judicial continuity in all family cases.
- The judiciary should ensure a condition to undertake family work includes willingness to adapt work patterns to be able to offer continuity.
- The President of the Family Division should consider what steps should be taken to allow judicial continuity to be achieved in the High Court.
- In Family Proceedings Courts judicial continuity should if possible be provided by all members of the bench and the legal adviser. If this is not possible, the same bench chair, a bench member and a legal adviser should provide continuity.

Judicial specialism

2.133 We aimed in our interim report to encourage both magistrates and judges to specialise in family matters. We argued that people who spend a minority of their time on family matters lack the confidence for tight case management and will have difficulty in achieving judicial continuity. We recommended:

- *judges and magistrates should be enabled and encouraged to specialise in family matters; and*
- *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.*

2.134 Most respondents were supportive.

This is a tremendous proposal. It has probably been the single greatest obstacle to solicitors having more judicial appointments. It is, for example, in stark contrast to a very similar jurisdiction, Australia, where solicitors hold some of the most senior family court appointments and judicial roles.

Centre for Social Justice, consultation response

Family proceedings require very different skills from those required in other parts of the court service. I believe that we need more specialist judges doing the work full-time, or nearly full-time...A judge who sits full-time in family proceedings develops the confidence and therefore the competence to be robust in case management.

District Judge, consultation response

2.135 Others highlighted the value of wider experience in other areas of law. Some pointed to the emotional stress of family law and the need to be able to take a break from it.

Social policy, public welfare issues, education and provision of services are all issues that judges encounter in a variety of disciplines, often considered from different perspectives. Judges who have experience of criminal law, administrative law, immigration law and mental law bring a wider and more informed perspective to bear. We also consider that it is better for judges to have occasional relief from the intense burden that family law sometimes imposes upon them.

Manchester FLBA Committee, consultation response

2.136 Most magistrates were unwilling to specialise in family matters, noting the value of experience of criminal work. The Magistrates' Association gave the example of the Nottinghamshire bench, where no family panel members (over 90 magistrates) expressed an interest in specialising in family work. However, there was agreement that family cases should take priority.

2.137 By contrast a small number said they had been unable to specialise in family matters even though they wanted to do so.

As a magistrate who has experience of a Foster Panel and work in family mediation for many years, I am not allowed to use this expertise on my local bench. I hope that this form of exclusion will be removed.

Magistrate, consultation response

There are some of our members who are being frustrated in their attempt to undertake family work only – they claim as a result of administrative convenience rather than judicial considerations.

Magistrates' Association, consultation response

2.138 The intention of the interim proposals was not to insist that all judges and magistrates specialise in family matters and never hear any other type of work. But those wishing to specialise solely in family matters should not be stopped.

As important, family work should not be a sideline in any judge's work. Indeed it seems unlikely that any judge who has a minority of family work in their caseload will be able to offer continuity.

- 2.139 In a related issue, we have heard representations from magistrates that the limitation on the number of days they may sit is unnecessary and prevents specialisation in family matters.

We would like to see family panel magistrates permitted to sit as often as they are able, provided they do not deprive colleagues of sittings, without the fear of admonishment by the Lord Chancellor for having exceeded their permitted level of sittings.

Greater London Family Panel, consultation response

- 2.140 We believe this should be reviewed.

- 2.141 Magistrate respondents overwhelmingly resisted the suggestion that magistrates could be recruited directly to hear family cases without the need for a two-year induction period in the adult court. As lay members of the judiciary the experience and training received in this period were seen as a vital induction with no alternative.

I am...very alarmed at the thought that magistrates should not have to do their training and experience in adult courts for two years before applying for membership of the family panel. The implication that we would be recruiting and selecting ordinary members of the public 'off the street' and into family courts fills me with horror and dismay. Anyone who has been involved to any extent in selecting people for particular roles knows that it would be difficult to test the motivation of those applying to sit in family courts to a satisfaction required for the protection of children going through the courts.

Magistrate, consultation response

- 2.142 Accordingly we do not recommend that the requirement for magistrates to have two years' experience in the adult court before being allowed to hear family cases should be abolished. Our other proposals are unchanged. We wish to make clear that we do not propose to require complete specialism, although judges and magistrates who wish to do this should not be prevented from doing so. We note finally that continuity is likely to mean changes in sitting patterns and express the hope that judges will recognise the importance of their being willing to do this.

Final recommendations

- Judges and magistrates should be enabled and encouraged to specialise in family matters.
- The Judicial Appointments Commission should consider willingness to specialise in family matters in making appointments to the family judiciary.
- The Judicial Office should review the restriction on magistrate sitting days.

Case management

2.143 Stronger case management is the partner of judicial continuity and we made proposals to encourage this, with tighter criteria for case management and case reviews to learn from experience. Case management is also discussed in the chapters on public and private law. This discussion relates to the system as a whole.

Stronger case progression

2.144 We recommended:

- *robust case management by the judiciary should be supported with consistent case progression resource.*

2.145 This attracted little comment, although several people rightly pointed out that effective case progression is not solely down to the judiciary and the courts. It depends on everyone playing his or her part.

2.146 HMCTS staff support case progression in a variety of ways, part time in some areas, and with dedicated resource in others. There is concern this is threatened by staff cuts. Support to case progression is an essential part of the support function that HMCTS should provide to the judiciary. The judiciary also need to take an active role ensuring matters are followed up effectively when parties do not progress the case as expected. Without that HMCTS staff cannot be effective. HMCTS should consider with the judiciary how it can best help the judiciary in this work.

2.147 The President strongly supports the need for more active case management and case progression and that for this to succeed judges also need to exert more control over listing than is currently the case. His recent guidance promotes the importance of case management.²⁴

2.148 We have changed our final recommendation to reflect the partnership needed between HMCTS and the judiciary to support effective case progression.

Final recommendation

- HMCTS and the judiciary should review and plan how to deliver consistently effective case management in the courts.

Tighter criteria for managing cases

2.149 The interim report suggested it might be helpful if legislation was introduced to support effective case management:

- *legislation should be considered to provide for stronger case management... in respect of the conduct of both public and private law proceedings.*

²⁴ President's Guidance: Listing and hearing care cases (bulletin number 3, 2011) and President's Guidance: Allocation and continuity of case managers in the Family Proceedings Courts (bulletin number 4, 2011).

2.150 Most respondents welcomed this, and felt it would promote greater consistency.

Tighter controls of timetabling are needed to minimise delay and a clear set of principles and guidelines are needed to improve consistency across the judiciary.

Guardian, consultation response

Public trust in the process will be greatly increased if case management principles are seen to be in place.

Guardian, consultation response

2.151 But there was also scepticism about how effective this would be in practice. People noted that the Family Procedure Rules already contain detailed case management provisions and that to reflect these in primary legislation would not add force. As the President of the Family Division said in his response, “*the problem is making it work*”. Many respondents argued the need for a focus on leadership and culture change to ensure the current rules are properly applied.

It is difficult to see how legislation will, of itself, change the existing culture. These issues are better addressed by effective training, and by ensuring that judges have sufficient time to read cases properly and thereby actually address their attention to case management issues rather than leaving case management to the advocates.

Judge, consultation response

2.152 We accept this view. Progress will need to be monitored through the improvements we propose to judicial leadership (in paragraphs 2.106 – 2.118).

2.153 Firm case management and case progression need culture change. We understand that a similar change in culture was also looked for when the Civil Procedure Rules were introduced. Extensive training supported this. The Family Procedure Rules had no similar training or launch. This needs to be addressed and we return to it in chapter 5.

2.154 Inter-disciplinary case reviews should also promote effective case management (see paragraphs 2.206 – 2.209).

The courts

2.155 Recent years have seen closer working between the three different types of family courts (Family Proceedings Courts, based in magistrates’ courts; county courts; and the Family Division of the High Court). But difficulties and inconsistencies remain, with wide variations nationally in how different cases are allocated to different courts, despite national guidance.²⁵ This causes confusion and uncertainty for families about where cases will be heard, particularly important for litigants in person.

²⁵ The Allocation and Transfer of Proceedings Order 2008 (2008 No. 2836 (L.18)).

2.156 The current family court structure is also quite rigid. Applications often need to be made to specific courts in certain areas of the country, making it more difficult for HMCTS to realise efficiencies in processing applications.

2.157 In consequence we proposed in the interim report that:

- there should be a single family court; and
- hearings and the use of family court estate should be rationalised.

A single family court

2.158 To support the creation of a single family court we recommended:

- *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; and*
- *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.*

2.159 Work would be allocated to the judiciary sitting in the family court based on complexity.

2.160 Most respondents supported these recommendations. Many pointed out, as we noted in the interim report, that there is already substantial integration.

We agree that there should be a single family court. To all intents and purposes, other than in name, that is what is already largely happening.

Association of District Judges, consultation response

2.161 To take the additional step of establishing a single family court in statute was seen as likely to lead to greater clarity for the public and more effective working within the judiciary, and hence greater efficiency.

The system is too difficult for most people to understand at the moment. They don't know if they need to go to magistrates or to a judge.

Mother, consultation response

So far as accessibility is concerned a unified family court would avoid any confusion on the part of the court user as to which path to take. Users of the family court system will be going through an extremely stressful time and, with the proposed cuts to legal aid, will be more likely to be unrepresented in the future.

Resolution, consultation response

A single and simplified court with a unified administrative structure would facilitate the speedy transfer of cases, ensure that cases are heard by specialist members of the judiciary at all levels and would assist in data gathering and performance management. Derby courts have already benefitted

from the merging of the court office functions of the County Court and Family Proceedings Court. The concept of a single point of entry and the early identification of an appropriate court to hear the case would help to minimise delay.

Derby City Council, consultation response

2.162 A single family court would over time also promote a greater sense of cohesion and improved links between all members of the family judiciary, including magistrates.

2.163 Some respondents, including the Association of District Judges, also recommended a further step to remove distinctions between types of District Judge with the aim of greater flexibility. There are currently three different types of District Judge qualified to hear family work:

- a District Judge of the magistrates' court;
- a District Judge of the County Court; and
- a District Judge of the Family Division assigned to the Principal Registry of the Family Division of the High Court (PRFD).

2.164 As each group only has jurisdiction to hear cases within the specific type of family court to which they are assigned, the effect is inflexibility in being able to hear what are largely the same type of case.

It would add greatly to flexibility and thus potentially to efficiency if within the field of children work they could sit in each other's jurisdiction.

Mr Justice Hedley, submission to the Review Panel

2.165 The result would be that, within a single family court, the work of each District Judge would be interchangeable with any other, irrespective of the level of court to which the judge's appointment is otherwise tied for non-family jurisdictions. The Chief Magistrate and the President of the Family Division in discussion welcomed this as a logical development. Some practical issues arise:

- *Arrangements for the distribution of work.* The President is responsible for ticketing (authorising) judges to hear family work. The Chief Magistrate is responsible for decisions on the distribution of family work to District Judges (magistrates' court), although specific judicial itineraries are usually discussed with presiding judges and HMCTS. Clearly, in managing arrangements for the division of work across a single family court, there would need to be close co-operation between the President, the Chief Magistrate, Presiders and HMCTS.
- *The role of PRFD judges.* PRFD judges are at a comparable level to Queens Bench Masters; they have the full jurisdiction of a Circuit Judge and may undertake work as District Judges of the High Court. However, they are unable to sit in other courts unless they hear PRFD work. We think broadening the scope to allow these judges to hear the range of work in the family court will increase flexibility in how family cases are progressed. The status of these judges will need to be retained to reflect the experience they have in dealing with more complex work, and allocation criteria will need to

reflect this. There would also be a case for them to continue to be part of the High Court (see discussion at paragraphs 2.168 – 2.169 below).

2.166 As well as increasing flexibility in how the judiciary are deployed the proposal would give an opportunity for legal advisers, who work only in the magistrates' courts at present, to conduct work on behalf of judges across the family court. It might be appropriate for example for some simpler judicial tasks to be delegated to legal advisers. This would help judges and provide experience to legal advisers of the work of the wider judiciary.

2.167 There were two main concerns about the proposal for a single family court:

- implications for the work of the Family Division of the High Court; and
- the appropriate entry point for cases and who should perform the gatekeeper role allocating cases to the judiciary in the family court.

The High Court

2.168 The interim report acknowledged that it could be difficult to incorporate the High Court's international caseload and its inherent jurisdiction into the single family court. We suggested this might be avoided by promoting the fact that such decisions would be made by judges of the Family Division of the High Court, and we asked for views. There was clear concern in response that the position of the High Court must not be undermined.

I greatly value the expertise of the High Court Judges of the Family Division and would strongly oppose any proposal which interfered with, or sought to attenuate, their status as Judges of the Family Division of the High Court.

President of the Family Division, consultation response

In our view, if a UFC [unified family court] is created with the result that the Family Division of the High Court ceased to exist, other than as a husk deprived of all jurisdiction or function, then the name High Court Judge in respect of a judge who sits in the UFC [unified family court] will just be an historical anachronism... Once the supposed separateness of the name in the context of a branch of civil work is merely a historical anachronism, with no continuing special connection with a particular court which actually sits and exercises jurisdiction, its preservative effect is likely to vanish over time.

High Court judiciary, submission to the Review Panel

2.169 We agree that the Family Division of the High Court should retain a separate identity. But the High Court judiciary also need to have role in the family court. We propose:

- the Family Division of the High Court should remain, with exclusive jurisdiction over cases involving the inherent jurisdiction²⁶ and international

²⁶ The High Court's power to make any order to determine any issue in respect of a child, including wardship proceedings, where it would be just and equitable to do so unless restricted by legislation or case law (rule 2.3, Family Procedure Rules).

work that have been prescribed by the President of the Family Division as being reserved to the High Court;²⁷

- all other matters should be heard in the family court, with High Court judges hearing the most complex cases, in the same way as they currently sit in the Court of Protection, the Administrative Court or criminal courts;
- where a case in the family court involves work reserved to the High Court, it would be transferred to a High Court Judge, or a deputy High Court Judge, who would issue orders from the High Court and/or the Family Court as they are relevant to that case; and
- where an international case reserved to the High Court involves domestic jurisdiction, the High Court judge would hear that part of the case within the family court and issue orders from both courts as relevant.

Point of entry and gatekeeper function

2.170 We suggested that a legal adviser and District Judge should determine the level of judge to which cases would be allocated. In response some expressed concern about cost and delay and that cases may be diverted from magistrates.

The GLFP [Greater London Family Panel] was concerned that proposals had been made about the single point of entry and the Judge together with a legal adviser acting as gatekeeper had been made in the absence of any empirical evidence but based on anecdotal evidence that the present single point of entry at the [Family Proceedings Court] causes delay. The GLFP believes that delays will be caused and an extra stage added to proceedings by involving the judge and legal adviser prior to listing. There is no evidence to show that a gatekeeper system reduces delay and the proposals will cost more than the present system. Valuable judge time at the county court will be required to consider all the public law applications currently dealt with by the family proceedings courts.

Greater London Family Panel, consultation response

2.171 Our proposal aimed to ensure that the right decision is taken at the very beginning about the appropriate level of judge to hear a case. We heard substantial anecdotal evidence of cases being transferred too late from Family Proceedings Courts to county courts, with resulting delay.

2.172 We propose that legal advisers and District Judges should use standard allocation criteria. This reflects current good practice and should not add to cost or delay. These arrangements should also help strengthen the sometimes too distant relationships between Family Proceedings Courts and other courts.

²⁷ E.g. Child abduction proceedings under the Child Abduction & Custody Act 1985 and Council Regulation (EC) No 2201/2003, and certain applications under the Children (International Obligations) (England and Wales and Northern Ireland).

Final recommendations

- A single family court, with a single point of entry, should replace the current three tiers of court. All levels of family judiciary (including magistrates) should sit in the family court and work should be allocated according to case complexity.
- The roles of District Judges working in the family court should be aligned.
- There should be flexibility for legal advisers to conduct work to support judges across the family court.
- The Family Division of the High Court should remain, with exclusive jurisdiction over cases involving the inherent jurisdiction and international work that have been prescribed by the President of the Family Division as being reserved to it.
- All other matters should be heard in the single family court, with High Court judges sitting in that court to hear the most complex cases and issues.

Improvements to hearings and the family court estate

2.173 We proposed changes to improve the experience of families:

- *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; and*
- *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.*

2.174 These proposals have been repeated in a succession of reports, including for example one in 1992 which urged that court facilities needed to be more family friendly.²⁸ Common complaints then were inadequate waiting rooms, a daunting and unfamiliar setting and a lack of privacy. These problems persist.

2.175 Our proposals – unsurprisingly – were welcomed.

We endorse the overdue modernisation of the family justice system. Over the past 15 years or so, we have fallen dramatically behind other jurisdictions in the use of IT to deliver a more publicly accessible system. England has many cases involving people from abroad who are simply amazed that they are required to attend interim hearings without consideration of electronic access. Individuals incur substantial expenditure in travelling from one part of the country to a hearing in another, with this sometimes an aspect of the litigation tactics of one party. Occasionally some final hearings may require actual personal attendances but most do not. This consideration of better use of facilities and resources is fundamental to a better system.

Centre for Social Justice, consultation response

²⁸ Murch, M. & Hooper, D., (1992) *The Family Justice System* Bristol Family Law.

2.176 It is important also to ensure that victims of domestic violence are protected from coming into close contact with perpetrators, a point made by Rights of Women and Women's Aid.

2.177 Capital investment will be needed in the longer term if there are to be dedicated family court buildings. Even without this the current estate could be reallocated to achieve more co-location.

Lack of funding for the capital investment necessary to roll-out co-location should not be an excuse for failing to adopt the model – creativity and local empowerment could result in imaginative local solutions to at least some of the issues.

Magistrates' Association, consultation response

2.178 Many respondents were concerned that to have fewer court locations would harm court users based in rural areas. We acknowledged this in the interim report, and exceptions will be needed where public transport is poor. However, this may be offset to some extent through the greater use of technology.

2.179 The needs of London are an issue at the other end of the scale.

Greater London presents different issues or issues on a different scale to the rest of the country by reason of its size, its huge cultural mix and the looseness and transitoriness of many family relations associated with a vast urban complex.

Mr Justice Hedley, submission to the Review Panel

2.180 With two different specialist family centres – Inner London Family Proceedings Court and the Principal Registry of the Family Division – the courts operate differently from other areas of the country. They are also in different places, which inhibits the flow of work between them.

2.181 We have not been equipped to consider the specific needs of London. We recommend there should be a further separate review to consider the best use of the estate.

Final recommendations

- HMCTS and the judiciary should ensure routine hearings use telephone or video technology wherever appropriate.
- HMCTS and the judiciary should consider the use of alternative locations for hearings that do not need to take place in a court room.
- HMCTS should ensure court buildings are as family friendly as possible.
- HMCTS should review the estate for family courts 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.
- HMCTS and the judiciary should review the operation and arrangement of the family courts in London.

Workforce

Introduction

2.182 Earlier in the chapter we considered organisational and systemic changes as a means to reform the family justice system. In this section we discuss the skills and knowledge of the people who work in family justice and what training and other inputs may be needed. The skills and attitudes of people are at least as important as legislation and processes.

2.183 The culture will need to change so that institutions and people work and learn together for the benefit of children.

Our approach

2.184 In the interim report we recommended:

- *the creation of an 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 coordinate professional relationships and workforce development between key stakeholders;*
- *there should be consistent quality standards for practice that build on local knowledge, are evidence based and replicable;*
- *there should be greater opportunities for professionals to specialise in family law; and*
- *the system needs to have an increased focus on continuous learning.*²⁹

²⁹ *Family Justice Review Interim report* (2011) paragraphs 3.113, 3.118, 3.120, 3.124 and 3.127.

2.185 We have sought wide feedback on these interim proposals through our consultation and through discussions with professionals. We have also met training bodies and sector skills councils, gathering among other things information on recruitment requirements, learning and development offers and performance management schemes, to compare provision and identify areas for improvement.

The case for change

A lack of national focus

2.186 The family justice system includes professionals in the legal, health and social care sectors. Planning for workforce development tends to be done in silos, with no overall plan. This illustrates the lack of national leadership and undermines the ability to bring about change.

Inadequate opportunities to work together

2.187 We have discussed the system's lack of trust, in this report and in more detail in the interim report. This is symbolised and exacerbated by the lack of opportunity for people to learn together, to gain mutual clarity about roles and responsibilities and to work together to overcome problems. Family cases are necessarily an inter-disciplinary process, relying upon agencies working together, so this is all the more surprising. There are particular difficulties for people new to the system.

We must together address the culture of 'blame' within the system. Multi disciplinary liaison and joint training is the best way for different groups to understand the perspectives of others and to work together to overcome obstacles.

Family sub committee of the Council of Her Majesty's Circuit Judges,
consultation response

We agree with the interim report of the Review that there should be inter-disciplinary induction for all those working in the system and a much clearer framework for inter-disciplinary working, for all those engaged in it.

Children's Workforce Development Council, consultation response

2.188 Joined up working is not only deficient across professional boundaries but also within different branches of professions. One example is the boundary between magistrates and the professional judiciary.

We would want a greater degree of working together with the judiciary in local county courts, both in practical terms and also that there are more opportunities for shared training.

FPCs feeding into Newcastle and Sunderland Care Centre,
consultation response

Capability and culture

2.189 Predictably we found a broad consensus amongst respondents that more needed to be done to equip professionals with the right skills and knowledge but little agreement on what the skills and knowledge should be, illustrating itself the lack of shared understanding of the expected capabilities.

2.190 Many pointed to the need for a better understanding of child development and domestic violence.

Education and training for all who work in the family justice system should include a proper grounding in child development. Whilst each child is an individual and has different needs there are some key developmental stages which are regularly addressed in evidence. There is scope for concise but authoritative guidance on child development, produced through a process of peer review, for all those working in the family justice system.

Family Justice Council, consultation response

2.191 Parents and children with experience of family justice felt professionals needed to strengthen their compassion and empathy. And others felt the culture was insufficiently focused on children.

Proposals for system wide workforce development

2.192 Training is key to delivering both reform and efficiency. This will take time and money, require priorities to be set, and require the Family Justice Service to work with professional bodies, employers and sector skills councils to explain the case for change and develop strategy and plans. Children should be consulted.

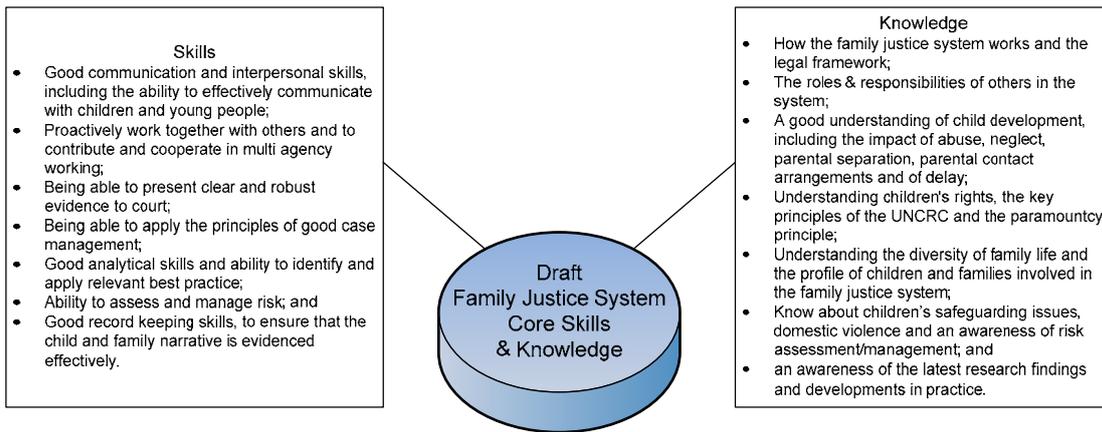
2.193 A workforce strategy for family justice is overdue. The Family Justice Service (and Interim Board) should develop this and it should include:

- an agreed statement of core skills and knowledge;
- a statement of priorities, and a plan for how they will be realised;
- proposals on how shared learning opportunities and inter-disciplinary training are to be promoted; and
- proposals to show how the strategy will be monitored, reviewed and measured.

Core skills and knowledge

2.194 The diagram at Figure 1 is an attempt to list skills and knowledge to be required of all who work in family justice. Some are more relevant than others to particular professions. These need validating by the Family Justice Service and to be related to the training already offered to the different groups. The intention is that they should help set learning priorities.

Figure 1 – Draft Family Justice System Core Skills and Knowledge



Induction training

2.195 There should be an inter-disciplinary induction course for all who come to work in family justice. Youth justice is in many ways analogous to family justice. In that sector an online induction course provides a range of entry-level activities and is short, interactive and flexible.³⁰ There is also a range of qualifications for youth justice professionals to equip practitioners with the necessary theoretical and practice skills.

Continuing Professional Development

2.196 Continuing professional development (CPD) is clearly important to keep people up to date with changes in law, practice and the latest research. There is wide variation within family justice in terms of hours, content and compulsion. The Royal College of Psychiatrists requires that members complete 50 hours of CPD per annum by way of a range of clinical, academic and professional activities.³¹ The Bar requires a minimum of twelve hours for established barristers.³²

2.197 Professional bodies should be encouraged to:

- review CPD minima for those who work in family justice (while recognising the need to avoid disincentives); and
- encourage mutual learning by the granting of CPD points for job shadowing and mentoring.

2.198 This is a good time for the effort. The Bar Standards Board is currently consulting on a new CPD framework for barristers, the Solicitors' Regulation Authority are reviewing CPD for solicitors and the Social Work Reform Board is developing proposals for a CPD system for social workers. More than family justice is at issue but it should have a powerful say.

³⁰ Youth Justice Board for England and Wales, *Workforce Development Strategy 2008 – 2011*.

³¹ <http://www.rcpsych.ac.uk/training/cpdandvalidation/cpdpolicy.aspx>. Last accessed 26 October 2011.

³² <http://www.barstandardsboard.org.uk/Practisingcertandcpd/>. Last accessed 26 October 2011.

Inter-disciplinary training

- 2.199 We have already pointed to the accepted need for inter-disciplinary training. Joint training exists, delivered mainly through the Family Justice Council (FJC) and its local network, but the amount and quality of inter-agency training is variable and inconsistent.
- 2.200 The Family Justice Service should work with professional bodies to agree annual inter-disciplinary training priorities for the workforce, with longer term aims set out in the workforce strategy. This would guide local boards that should have responsibility for shaping the detailed content of inter-disciplinary training.
- 2.201 Local boards should organise inter-disciplinary training events taking account of the different learning needs of professionals. They should also promote other training methods. Some already happen; others are proposed.
- Derby City Council suggested job shadowing between children’s guardians and local authority social workers so that their staff learn what guardians do, but also guardians, often former local authority social workers, keep in touch with the realities of local authority work.
 - The London Borough of Ealing thought that judges and lawyers could facilitate mock courtroom experiences, to give social workers an opportunity to develop their court skills and confidence in presenting evidence in family cases. We were told this already happens in Manchester.

Feedback and learning

- 2.202 Review after review of child protection has emphasised the importance of sharing information between agencies and practitioners. It is just as true of family justice. Local Performance Improvement Groups have made a good if variable start. Progress is hampered by lack of performance data but even where it does exist it is not routinely shared nor used effectively to inform discussion about how practice can be improved.
- 2.203 This extends to a need for more qualitative discussion and feedback at an individual level, which many people would welcome.

Expert work could be improved if we received regular feedback about the outcome of cases and about what judges found helpful or not about our reports.

Consortium of Expert Witnesses to the Family Courts,
consultation response

- 2.204 In a different sense this applies also to judges and magistrates who rarely know what happens to families about whom they have taken decisions. Where feedback had been tried, we understand local authorities were concerned that this would encourage judges to try to continue to supervise cases. But the absence of any feedback mechanism leaves judges and magistrates without any way to learn about the effectiveness of their decision making, beyond an appeal on a point of law.

2.205 There is a crying need for a culture in which feedback is given and accepted in the right spirit. In particular we recommend a pilot project which provides reports back to the relevant judges and magistrates from time to time (perhaps after one and three years) on the situation of children and families. The minutes of any meetings associated with the breakdown of an adoption placement could also be circulated. This should be in addition to the regular sharing of statistical information. This should include information from the Independent Reviewing Officer (IRO).

Case reviews

2.206 We recommended that there should be inter-disciplinary reviews of court cases for local areas to learn what works and what should be changed. The focus would be on process. There should be no challenge to decisions.

2.207 We recognise concern from the judiciary in relation to a perceived threat to judicial independence, but we are clear these reviews would not be an assessment of any individual's performance. The aim is to foster an environment of learning and continuous improvement in which examples of best practice can be developed and shared and lessons learned where process has not gone well.

2.208 To build confidence, reviews in local areas could begin with a sample of anonymised cases distributed from the centre. This would allow participants to debate process in a more abstract way. If successful, it could move on to anonymised cases from the local area. Senior judges with whom we have discussed these ideas do not themselves see a threat to judicial independence. Initially having a judge in the chair could provide protection.

2.209 If however even these suggestions are not acceptable, we propose that a system of judicial peer review be introduced to develop best practice, to try to replicate well established and valued practice in the NHS.³³ The following example provides an illustration of what we intend.

Judges would identify a particularly difficult case, or perhaps one which had gone really well, and would meet formally with colleagues, who had read some of the documentation, to analyse how the case may have been addressed differently. This sort of approach is well established within the NHS and has recognised benefits.³⁴

Her Honour Judge Newton

³³ Mott, A. & Thomas, A. (2009) *Child protection peer review for doctors who safeguard children*, RCPCH.

³⁴ HHJ Newton, L. *Reforming care proceedings – a judicial perspective 'The challenge of changing the approach of practitioners and the judiciary'* (forthcoming) to be published by Jordans, paper originally presented at Dartington conference *The Family Justice Review: Evaluation & Implementation* 30/09/11 – 2/10/11.

Final recommendations

Where we refer to the Family Justice Service, we envisage these functions initially being performed by an Interim Board.

- The Family Justice Service should develop a workforce strategy.
- The Family Justice Service should develop an agreed set of core skills and knowledge for family justice.
- The Family Justice Service should introduce an inter-disciplinary family justice induction course.
- Professional bodies should review continuing professional development schemes to ensure their adequacy and suitability in relation to family justice.
- The Family Justice Service should develop annual inter-disciplinary training priorities for the workforce to guide the content of inter-disciplinary training locally.
- The Family Justice Service should establish a pilot in which judges and magistrates would learn the outcomes for children and families on whom they have adjudicated.
- There should be a system of case reviews of process to help establish reflective practice in the family justice system.

Proposals for specific workforce groups

2.210 This section discusses the training needs of particular groups, including:

- judges;
- family magistrates and their legal advisers;
- lawyers (solicitors, barristers and local authority lawyers);
- HMCTS court staff;
- social work professionals (local authority social workers, social work managers, Cafcass practitioners, independent social workers and IROs);
- family mediators; and
- expert witnesses (e.g. paediatricians, psychiatrists and psychologists).

Judges

2.211 We welcome the establishment of the Judicial College.³⁵ Work has begun to develop a clearer strategy for training of all judges. The quantity and professionalism of training has improved in recent years, but those involved readily acknowledge that there is a long way to go. We intend our recommendations as an input to the developing strategy.

³⁵ The Judicial College is responsible for training for judicial office holders in the courts and in most tribunals.

- 2.212 The starting point is clearly to specify the skills and knowledge needed by all members of the judiciary and then to set out those required in the different jurisdictions. At present it seems each jurisdiction has separate training. Instinct suggests, rightly or wrongly, that this is less efficient and loses opportunities to develop common approaches and learning. It may be preferable to have a core that is common to all areas and then separate modules for the different jurisdictions.
- 2.213 The core should be focused on training in judicial skills, such as case management, which are common to all jurisdictions. Courses for this have begun in the past few years. They are heavily oversubscribed and their development and extension should be a high priority. As the President has pointed out: “*case management is an essential tool for the modern judge... I recognise the need for a true change of judicial culture*”.³⁶
- 2.214 The core should also include training in leadership and management for more senior judges. These are increasingly demanding roles, yet those undertaking them are given no specific guidance or support.
- 2.215 Whatever the structure of training, case management and child development are essential requirements of the family modules. We emphasise the need for more and better training in child development and understanding of the issues around wishes and feelings as the basis for among other things understanding the timetable for the child and the effects of delay. In this the associations of both District and Circuit Judges support us. This has to be an absolute requirement for all family judges and must be kept up to date.
- 2.216 The manner of training is also important. Training of judges should include visits to the work areas of other professionals, including social work, parenting information programmes, contact centres and the like. It is a particular need for newly appointed judges who may never have worked in family law while in private practice. At the very least judicial training should include presentations from these professionals.
- 2.217 We believe that there should be an expectation that all members of the local judiciary, including the lay bench and legal advisers involved in family work should join together in training activities. This already happens in some areas with benefits to confidence and trust as well as effectiveness. More opportunities should be provided.
- 2.218 The judicial hierarchy is increasingly and rightly also becoming a management hierarchy. We recommend that the President’s annual conference be followed by circuit level meetings between Family Presiding Judges and the senior judiciary in their area to discuss the delivery of family business.

³⁶ President of the Family Division, consultation response.

2.219 Designated Family Judges should have regular one to one meetings with the family judges for whom they have leadership responsibility, including relevant family legal advisers and bench chairmen. These proposals will add to cost and will need to be phased.

2.220 We wish also to recommend the development of greater support for the family judiciary. We are aware that family work can create huge emotional strain, with damage to health and mental wellbeing. There would ideally be a formal support scheme. In its absence Family Presiding Judges and Designated Family Judges should be provided with advice on what to do if they have concerns over someone in their area of responsibility.

Family magistrates and their legal advisers

2.221 Training and management of magistrates is ahead of that of the judiciary, with a regular appraisal and mentoring scheme and a requirement for more continuing development activity. We recommend some changes:

- induction training currently lasts two days. This needs to include focused training on case management (in part so that the magistrate can understand and respond to the role of the legal adviser) and on child development and understanding wishes and feelings, as for the judiciary; and
- opportunities to visit to the work settings of other agencies involved in the system should also be included, again as for the judiciary.

2.222 Legal advisers too need focused training on case management, to be refreshed as appropriate.

Lawyers

2.223 Lawyers play an important role in ensuring the speedy resolution of cases, in supporting families to negotiate settlements and narrowing issues where matters are contested. We have been impressed by the high standards of accreditation schemes offered by the Law Society and Resolution for private and local authority solicitors practising in family law. These give confidence to users and take up should be encouraged.

2.224 The Family Procedure Rules 2010 include a detailed practice direction and sample letters of instructions for solicitors to draw on when instructing expert witnesses. The evidence is that these are far from always followed and that instructions can often be too long and unfocused, causing delay. Stronger judicial oversight would help but professional bodies should also consider what training might contribute to improvement.

Social work professionals

- 2.225 We discuss in paragraphs 3.100 – 3.102 the work now in hand to improve social work practice generally. Here we comment on matters relating specifically to family law.
- 2.226 We proposed that social workers should be taught about relevant legal process and procedure and in particular what the court expects them to present and how to present it, including a clear narrative of the child's story.³⁷ They should also understand what the court will expect them to have done before the proceedings start (see paragraph 3.48 – 3.53 for a recommendation about how this might be done). This was widely welcomed and we recommend that the College of Social Work and the Care Council for Wales should issue guidance to employers and higher education institutions on how it can be achieved.
- 2.227 The College and Care Council should also consider with employers whether initial social work and post qualifying training includes enough focus on child development, for those social workers who wish to go on to work with children.
- 2.228 We support the work to improve leadership training for social work managers that is being undertaken by Skills for Care, in close collaboration with the Children's Workforce Development Council.
- 2.229 We know that some Directors of Children's Services in England may not themselves have practised as social workers. If so the Children's Improvement Board should consider what training and work experience they might welcome.
- 2.230 We make recommendations in chapter 3 in relation to guardians and IROs.

Family mediators

- 2.231 We make recommendations about mediators in chapter 4. We note here the strong views in consultation about the lack of an agreed national standard. We welcome the government's work in this area.

Expert witnesses

- 2.232 Expert witnesses come from a wide variety of professional backgrounds.
- 2.233 The various medical colleges and professional bodies representing expert witnesses provide their members with a variety of training opportunities on the skills and knowledge to work in the family court arena. We think there is a role for the court in ensuring that experts that they appoint to advise on cases have the relevant experience and skills, and this is explored further in the public law chapter.

³⁷ *Family Justice Review Interim report* (2011) paragraphs 3.119, 4.148 and 4.220.

Final recommendations

Where we refer to the Family Justice Service, we envisage that these functions would be performed initially by an Interim Board.

- The Judicial College should review training delivery to determine the merits of providing a core judicial skills course for all new members of the judiciary.
- The Judicial College should develop training to assist senior judges with carrying out their leadership responsibilities.
- The Judicial College should ensure judicial training for family work includes greater emphasis on child development and case management.
- The Judicial College should ensure induction training for the family judiciary includes visits to relevant agencies involved in the system.
- There should be an expectation that all members of the local judiciary including the lay bench and legal advisers involved in family work should join together in training activities.
- The President's annual conference should be followed by circuit level meetings between Family Presiding Judges and the senior judiciary in their areas to discuss the delivery of family business.
- Designated Family Judges should undertake regular meetings with the judges for whom they have leadership responsibility.
- Judges should be encouraged and given the skills to provide each other with greater peer support.
- The Judicial College should ensure induction training for new family magistrates includes greater focus on case management, child development and visits to other agencies involved in the system.
- The Judicial College should ensure legal advisers receive focused training on case management.
- Solicitors' professional bodies, working with representative groups for expert witnesses, should provide training opportunities for solicitors on how to draft effective instructions for expert evidence.
- The College of Social Work and Care Council for Wales should consider issuing guidance to employers and higher education institutions on the teaching of court skills, including how to provide high quality assessments, that set out a clear narrative of the child's story.
- The College of Social Work and Care Council for Wales should consider with employers whether initial social work and post qualifying training includes enough focus on child development, for those social workers who wish to go on to work with children.
- The Children's Improvement Board should consider what training and work experience is appropriate for Directors of Children's Services who have not practised as social workers.

Transparency and public confidence

2.234 Finally, we briefly discussed in the interim report the question of transparency and public confidence in the family courts and the issue of media access. Our terms of reference asked us to have regard to transparency. However, we did not take evidence on this issue and none of our interim recommendations affected, or needed to affect the openness or otherwise of the family courts.

2.235 We highlighted our own positive impressions of how transparency operates in Australia. However, we acknowledge this is a complex area requiring further consideration by government. We welcome the Justice Select Committee's recommendation that the scheme to increase media access to the courts contained in Part 2 of the Children, Schools and Families Act 2010 should not be implemented.

3. Public law

The problem of delay

3.1. Public law proceedings are the mechanism through which the state can intervene in family life to protect children. Children may be removed from their families, often permanently, as a result. We described in our interim report the nature and difficulty of the families involved in these cases, of damaged children, abusive relationships, neglect and deprivation. The proceedings themselves can be complex and riven within acute conflict. But they are central to safeguarding children. The Children Act 1989 provides the framework, stating clearly that the welfare of the child is the paramount consideration.

3.2. The protection system is under great and increasing pressure:

- case volumes have increased in recent years and appear to still be increasing. The number of children involved in public law applications was 3% higher in the last 12 months than the preceding 12 months;³⁸
- care and supervision cases are taking ever longer - cases take an average of 61 weeks in care centres and 48 weeks in Family Proceedings Courts, a figure that has increased in the six months since our interim report;³⁹ and
- there are around 20,000 children currently waiting for a decision in public law, compared to some 11,000 at the end of 2008.⁴⁰

The length of cases is likely to rise further.

3.3. It seems that delay is endemic, and builds up at every stage:⁴¹

- local authorities too often wait too long before making an application to court;
- the quality of evidence they present is not consistently good;
- this fuels distrust and lack of confidence in local authority social work;
- there have been difficulties in recent years in providing court social work services through Cafcass in some areas so these are also distrusted;
- multiple reports from expert witnesses are a time-consuming and routine requirement;

³⁸ Ministry of Justice (2011) *Court Statistic Quarterly April to June 2011: Ministry of Justice Statistics bulletin*. Data for last 12 months is from July 2010 to June 2011. 12 months before is July 2009 to June 2010.

³⁹ Statistics from January to June 2011. Length of case has increased by 4 weeks in care centres and 2 weeks in Family Proceedings Courts since 2010 figures quoted in interim report (p97). Based on HMCTS FamilyMan data for 2011. 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-and-data/courts-and-sentencing/index.htm. As such this data set is not subject to the same levels of quality assurance.

⁴⁰ Ibid.

⁴¹ The causes of delay were analysed in some detail in our interim report. *Family Justice Review Interim Report* (2011) Ministry of Justice, Department for Education and Welsh Assembly Government. See paragraphs 4.52 – 4.132 in particular.

- the reliance on experts rather than local authority assessment encourages authorities to think there is little point in carrying out their own expert assessments before a case begins;
- the rules and guidance intended to manage proceedings are often ignored;
- courts too often fail to manage cases robustly, with too little regard to the child's timetable; and
- capacity issues in all parts of the system mean work is not always done when it should be.

3.4. The system struggles to cope with the weight of its responsibilities. Understandable sympathy for parents and an acute awareness of the enormity of the decisions encourages a wish to explore every avenue. The idea of a proportionate approach comes across as unfeeling as well as seeming to risk denial of the parents' right to a fair hearing. Processes become exhaustive so that when a decision is finally made everyone can be reassured that everything that could be done was done. We were told and we agree that the right of the parents to a fair hearing has come too often to override the paramount welfare of the child.

3.5. Delay really matters.⁴²

- Long proceedings may deny children a chance of a permanent home. The longer proceedings last the less likely it is that a child will find a secure and stable placement, particularly through adoption.
- They can damage a child's development. The longer proceedings last the more likely children are to experience multiple placements. Placement disruption does not just cause distress in the short term. It can directly impact on a child's long term life chances by damaging the ability to form positive attachments. This can cause multiple problems in adolescence and later life.
- They may put maltreated and neglected children at risk. If children remain in the home during proceedings they may be exposed to more harmful parenting with long term consequences.
- Long proceedings can cause already damaged children distress and anxiety. Children live with uncertainty while possibly experiencing multiple placements, continuous assessment and distressing contact arrangements.

I can't answer Tom's questions. He wants me to make him promises about what is going to happen but I can't, it's very difficult to know what to tell him. He has such little concept of time it's hard to explain that we have to wait and see because a week feels like a lifetime to him.

Foster Carer⁴³

⁴² See our interim report *Family Justice Review Interim Report* (2011) paragraphs 4.57 – 4.64. Relevant research findings are also usefully summarised in Davies, C. and Ward, H. (2011) *Safeguarding Children Across Services: Messages from research on identifying and responding to child maltreatment, Executive Summary*, Department for Education and in Giovannini, E. (2011) *Outcomes of Family Justice Children's Proceedings – a Review of the Evidence*, Ministry of Justice.

- 3.6. The cost matters too. We estimate the total cost to the state of public law cases in 2009/10 at approaching £1.1 billion.⁴⁴ One London local authority has recently examined its costs associated with care proceedings by studying 50 recent cases with an average case duration of 67 weeks. It estimates that each case costs it approximately £80 000. Three cases cost over £175 000 and one exceptional case cost over £655 000. These figures do not include costs incurred by the Legal Services Commission (LSC), HMCTS and Cafcass.⁴⁵
- 3.7. It may be argued that time and money are well spent when the decisions to be made are so fundamental to the outcomes for children and the human rights of parents. Protection of children is rightly a priority for both central and local government. But even within child protection choices have to be made. Time and money spent on one child cannot be spent on another. The amount of money spent on taking care cases through the courts can look disproportionate to the amounts available to prevent cases needing to be brought in the first place.
- 3.8. Respondents to our consultation readily accepted the need to avoid delay. But some pointed to a need sometimes for ‘purposeful delay’ for example to allow time for parents to change. This may sometimes be right but we approach this proposition with some caution. Purposeful delay can be an excuse for poor decision making which is not consistent with the child’s timescale. The needs of the child must be the true test if all decisions are to be made in the child’s best interests.
- 3.9. Delay has become habitual.

... Too many of us have become inured, desensitised, to the nature and extent of delay within the system. We have to challenge the inaccurate and complacent belief that much of this delay within care proceedings is ‘planned and purposeful’, it isn’t...most delay is unintended and harmful.

Her Honour Judge Lesley Newton⁴⁶

Our proposals

- 3.10. The recommendations in our interim report were designed to put the child’s interests back at the heart of the process, to deliver a system which:
- is resolutely child focused;

⁴³ Barnardo’s, submission to Justice Select Committee *Inquiry into the Operation of the Family Courts*, sixth report of session 2010-12: Vol. 2 Oral and written evidence House of Commons papers 518-II 2010-12.

⁴⁴ See Annex D. Figures have been revised up since publication of interim report (see *Family Justice Review Interim Report* (2011) paragraph 2.37 and its Annex F) following receipt of updated data. In brief the costs cover those incurred by Cafcass/Cafcass Cymru, HMCS (now HMCTS), local authorities and the Legal Services Commission.

⁴⁵ The figures were supplied by London Borough of Hammersmith and Fulham who examined a sample of 50 cases where care proceedings ended in the period 2009-2010. The costs included cover local authority social worker time spent on the case, legal input, care placements, travel expenditures re school etc.

⁴⁶ HHJ Newton, L. *Reforming care proceedings – a judicial perspective ‘The challenge of changing the approach of practitioners and the judiciary’* (forthcoming) to be published by Jordans, paper originally presented at Dartington conference *The Family Justice Review: Evaluation & Implementation* 30/09/11 – 2/10/11.

- refuses to accept delay as a commonplace;
- takes responsibility for the use of resources, to make best use of every pound;
- operates in a collaborative way across agencies;
- is consistent in its delivery; and
- respects parents' rights, and offers them effective support.

3.11. This section considers:

- the role of courts and case management in public law;
- local authority practice and the relationship with the courts;
- the use and supply of expert witnesses;
- representation of children and the tandem model; and
- alternatives to conventional court proceedings.

The role of the court

The legal framework

3.12. We discussed in our interim report options to reduce the role of courts in public law, as for example Scottish tribunals, and concluded that we should recommend no change: courts should remain the decision making forum when deciding whether children should be removed from their parents' care. Respondents agreed.

3.13. We proposed and respondents agreed that the framework of the Children Act 1989 is sound. This imposes different responsibilities on the courts and local authorities. It is for courts to decide who should exercise parental responsibility for a child. If that is to be the local authority it may exercise that responsibility without further interference from the court.⁴⁷ Put simplistically the courts decide who should parent, but not how.

3.14. The line between the two is sometimes difficult in practice. The central question is the role courts should play in scrutiny of the care plan. How far does the court need to scrutinise the local authority care plan to be satisfied a care order is in the child's best interests? Should the court be satisfied about the detail of the plan before entrusting the child to the care of the authority or is this interference in the authority's responsibilities?

3.15. The Act requires the court to examine the care plan for the child before making an order but does not specify how complete the plan needs to be. The leading case requires that there be *"a care plan which is sufficiently firm and*

⁴⁷ The local authority's actions are of course subject to various obligations, restrictions and regulations e.g. statutory duties, detailed regulations and guidance, OFSTED inspection, local government scrutiny functions and the possibility of applications to discharge care orders and judicial review.

*particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future.*⁴⁸

The issues

- 3.16. There seems to us little doubt that courts have progressively extended their interest in the proposed care plan.

If parental rights and responsibilities are to be changed or rearranged, article 6(1) of the ECHR requires that the decision be made by a court after a fair hearing. A fair process is also required by article 8 where the state interferes with the right to respect for family life. But the court's current close involvement with the formulation of the care plan in care proceedings goes beyond what was originally envisaged when the Children Act was passed and probably beyond what is required by the ECHR. Article 8 requires that the courts have some control over the contact between parents and children in care and also over the decision to sever contact with the birth family. But it does not require that the courts have control over how the child is looked after in care. Courts cannot look after children or conjure up the resources with which to do so.

Lord Phillips and Lady Hale, Supreme Court, call for evidence submission

- 3.17. We concluded in our interim report that at present court scrutiny of the plan can go beyond what is needed to be satisfied that a care order is required.⁴⁹ It can try to determine how the child should be parented and not just by whom. The motivation is honourable but the result is to cause delay for that child and others, and to waste time and money, particularly bearing in mind that a court can only consider a child's needs at one point in time. The needs and circumstances are highly likely to change, potentially negating the value of the detailed scrutiny. To take responsibility away from the local authority contributes to a lack of confidence and decisiveness on their part, undermining their parental authority.

Our proposals

- 3.18. We proposed, in summary, the following.⁵⁰

- *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.*
- *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.*
- *When determining whether a care order is in a child's best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child.*

⁴⁸ Re S (Minors) (Care order: implementation of care plan); Re W (Care orders: adequacy of care plan) [2002] 1 FLR 836 per Lord Nicholls.

⁴⁹ See *Family Justice Review Interim Report* (2011) paragraph 4.157.

⁵⁰ See *Family Justice Review Interim Report* (2011) paragraphs 4.152 – 4.169.

- *Instead the court should consider only the ‘core’ or essential components of a child’s plan. We suggest that these are:*
 - *planned return of the child to its family;*
 - *a plan to place (or explore placing) a child with family or friends;*
 - *alternative care arrangements; and*
 - *contact with birth family – but to the extent only that it should be regular, limited or no contact.*
- *As a consequence we proposed that the court will not need to examine such issues in the local authority plan 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.*
- *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;*
 - *the ability of parents and others to apply under section 34 of the Act for a contact order and the court’s powers under this section; and*
 - *the ability of the parents or others to seek to discharge a care order.*

Response to consultation

3.19. Our proposals provoked a strong and mixed response, though most were in favour.

I believe that the extent of scrutiny of care plans can and should be reduced in the way you propose.... The new provision in s. 1(5) of the 1989 Act, that the court cannot make an order ‘unless it considers that doing so would be better for the child than making no order at all’ invites a closer scrutiny as to what actually will happen to the child if the order was made. It was probably desirable that more attention should be paid to that issue. However, the court ought not to insist on precise information about all details of how an authority will exercise the powers it acquires under whatever order is made.

John Eekelaar, Oxford Centre for Family Law and Policy,
consultation response

3.20. There were also strong voices against the proposals in whole or part.

We do not shrink from describing these proposals as misconceived and wholly contrary to the interests of children.

Association of Lawyers for Children, consultation response

Arguments made by respondents included:

- as a point of principle court scrutiny of the detail of care plans is a right and proper function of the court;
- court scrutiny can improve the care plan; and

- other safeguards are not adequate, including particularly Independent Reviewing Officers (IROs) who are overburdened and not truly independent of local authorities.

3.21. Beneath these arguments there is an undercurrent of deep scepticism about the ability of local authorities to deliver adequate care for children.

If one could fully trust the local authority to come up with a care plan that is actually in the interests of the child and has taken account of all the issues, then I would say yes. But in my experience ..., the local authority often neglects very basic aspects of the care plan.

Magistrate, consultation response

The report appears to gloss over the large body of data on the poor performance of local authorities acting in loco parentis and the consistently poor outcomes for children in public care. The evidence is that decisions about health and educational provision, plans for sibling placement and the other matters set out ... cannot always be safely delegated to local authorities.

Nagalro, consultation response

3.22. The thrust is that care is to be avoided at all costs.

3.23. These assertions are commonly made and indeed are also widely accepted in the media. But this does not tell the full story. Of course we want outcomes for children in care to be better.⁵¹ But we must take into account the unquestionable difficulty of looking after children who are usually by definition extremely vulnerable and with high levels of need.

3.24. There is a tendency to overlook the successes of the care system. Evidence shows that the majority of maltreated or neglected children who stay in care or who are adopted will do better in terms of well being and stability than those who remain at home.⁵² Care works for these children.

3.25. There is also evidence that reunifications of maltreated and neglected children with their birth families frequently break down.⁵³ This identifies issues with local authority support to families and their planning for reunification. It also raises questions about the robustness of court decision making. One study found that when plans to return neglected children to their families were made during care proceedings the majority failed.⁵⁴

⁵¹ For example 33% of former care leavers were not in education, employment or training in 2011. See DfE: Children Looked after by Local Authorities in England (including adoption and care leavers) – year ending 31 March 2011. Available at <http://media.education.gov.uk/assets/files/xls/s/england%20summary%20tables%20sfr212011.xls>. Last accessed 21 October 2011.

⁵² Wade et al (2010) *Maltreated children in the looked after system; a comparison of the outcomes for those who go home and those who do not* Department for Education. Farmer, E. and Lutman, E. (2010) *Case management and outcomes for neglected children returned to their parents: a five year follow-up study* Department for Children, Schools and Families (now Department for Education). Giovannini, E. (2011).

⁵³ Farmer, E. and Lutman, E (2010).

⁵⁴ Ibid.

- 3.26. The concern is that resistance to care as an option for children is leading to decision making which may not be in their best interests:

Almost all decisions made by the wide range of practitioners involved, from health, adult mental health, education and the family justice system as well as professionals in children's social care, are made in the expectation that children will fare best if looked after by their birth families. This is in keeping with the Children Act 1989 and with human rights legislation, as well as with professional values and theories of empowerment. However, it means that decisions to separate children from their families go very much against the grain and are particularly difficult to make. Expert assessments ordered by the courts tend to follow this line, as do court decisions themselves, with the result that parents are given numerous chances to demonstrate their capacity to look after a child; if these efforts prove unsuccessful they delay the progress of a case to the detriment of the child's welfare.⁵⁵

Our response

- 3.27. Clearly local authorities, like other parts of the system, can fail in their responsibilities in both navigating the process of application and providing and planning care for children. We are also not making a case that more children should be taken into care. But it cannot be right to allow the legal system to function on a starting assumption that local authorities are incompetent.
- 3.28. Another question is whether court scrutiny of care plans adds such value that it should be an integral part of the court's duties. Respondents cited examples where they believed the care plan would have been incomplete or inadequate were it not for the court.
- 3.29. Care planning is bound to be difficult and uncertain. Many plans change after the care order – inevitable if children are in care for many years. It would be concerning if they did not. And local authorities have to make compromises. They are not alone here; all parents have to do this.
- 3.30. We are not aware of any research on whether changes to the detail of local authority care plans ordered or induced by the court process lead to better outcomes for children. Court involvement is certainly not a guarantee of success and courts are not well equipped to carry out the care planning role. We also need to set alongside the possible benefit the cost and time taken by court scrutiny and the effect of that both on that child and other children not yet before the court.
- 3.31. The courts have a legitimate interest in the quality of social work practice and we applaud recent guidance from the President that encourages the courts to raise with local authorities in the appropriate forum any concerns about pre-proceedings work.⁵⁶ However, to try to improve the quality of social work from the bench on an individual case-by-case basis is likely to be ineffective and

⁵⁵ Davies, C. and Ward, H (2011)

⁵⁶ *What case management means in practice: A message from the President* (Sep 2010) issued by President of the Family Division circulated to family judges, magistrates and legal advisers.

costly. We return elsewhere to the question of better working and understanding between courts and authorities (see paragraphs 3.45 – 3.53).

- 3.32. Some respondents felt that our suggested reforms could be implemented if and when local authority work improved. Some suggested that implementation of this proposal should wait until the recommendations from Professor Munro's review take effect. Others would be more positive if the role of the IRO were strengthened. (Our proposals in these respects are discussed in paragraphs 3.112 – 3.119).
- 3.33. It is true that preparation for introduction of this measure and implementation of the Munro reforms will likely run along similar timeframes. Government should ensure that planning for both is joined up. But any idea of waiting until local authority work is in a sufficient state for courts to 'let go' is in our view not sensible. It would be to ignore the points of principle made in the preceding paragraphs about the appropriate role of courts and local authorities.
- 3.34. It has been put to us that we are departing from the principles set out in the decision in *Re S; Re W* (see above paragraph 3.15). The principles that the court should consider the local authority care plan and that this needs to be sufficiently certain remain. However, our proposal would modify this decision in so far as it would specify what is a sufficiently firm and particularised plan.
- 3.35. One misunderstanding is a view that our proposals here would restrict the ability of the court to come to an understanding of the child's needs, including for example their health and educational needs. This is not right. The court needs to determine whether an order is in the best interests of a child. Is an order needed and what should it be? To answer these questions the court would need to consider the child's wishes and feelings, the needs of the child and whether or not parents or family were able to meet those needs with good enough parenting.
- 3.36. However, where it was plain in a case that a care order was needed and the core of the care plan was agreed as we describe, the detail of the local authority's plan should not be debated, or the case held open until it was completed. Here the court should assume that the child's needs, as identified during the case, could and would be addressed by the local authority. A care order should be made and the case concluded.
- 3.37. Lastly, we did not in our interim report discuss applications for secure accommodation orders. Where the court is considering whether to make a secure accommodation order it would be able to consider the care plan in full and our proposal, as with placement order applications, would not limit the scope of its enquiries.

Contact with parents and siblings

- 3.38. We suggested that in agreeing the local authority care plan the court would not look at the full detail of contact with the birth family. We suggested that the court need only be satisfied with the broad outline of contact arrangements, so whether there should be regular, limited or no contact.
- 3.39. A number of respondents argued that contact is such a critically important issue that it should benefit from the full scrutiny of the court.
- 3.40. Clearly the court should have jurisdiction over contact issues. We propose no change to its powers under section 34 of the Children Act 1989 which enable it to make orders regarding contact. Parents would retain the right to apply to the court for a contact order.
- 3.41. But we should expect section 34 to be used only by exception and the courts should not encourage section 34 applications as a matter of routine. Contact arrangements are complicated. To work best they often need to be flexible and capable of regular review. Court is not the best place for these to be resolved. Direct dialogue between the local authority and the family is usually better. For these reasons we do not think it appropriate or helpful to have the court routinely scrutinise these issues in detail when it makes a care order.
- 3.42. However, we are aware that legislative provision in respect of siblings is more limited. Siblings must seek leave of the court to apply for an order of contact with a sibling in care. Section 34 also does not place an explicit requirement on the local authority to provide reasonable contact with siblings, although other legislative provision and guidance does require this.⁵⁷
- 3.43. We have considered whether section 34 should be amended in order to provide a further safeguard. We did not consult on the issue and so have not fully considered the implications. But we do think it should be looked at in more detail. We recommend that government consult on whether section 34 should be amended to promote reasonable contact with siblings, and to allow siblings to apply for contact orders without leave of the court.
- 3.44. In all other respects we are maintaining our original recommendations in this area.

⁵⁷ See for example Children Act 1989, schedule 2, paragraph 15; s22C Children Act 1989 and Care Planning, Placement and Case Review (England) Regulations 2010.

Final recommendations

- Courts must continue to play a central role in public law in England and Wales.
- 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.
- When determining whether a care order is in a child's best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead the court should consider only the core or essential components of a child's plan. We propose that these are:
 - planned return of the child to their family;
 - a plan to place (or explore placing) a child with family or friends;
 - alternative care arrangements; and
 - contact with birth family to the extent of deciding whether that should be regular, limited or none.
- Government should consult on whether section 34 of the Children Act 1989 should be amended to promote reasonable contact with siblings, and to allow siblings to apply for contact orders without leave of the court.

The relationship between courts and local authorities

- 3.45. Our recommendations are intended to restore the respective responsibilities of courts and local authorities. But to change the law does not tackle the root cause of the difficulties. This stems we believe from a deep rooted distrust of local authorities and unbalanced criticism of public care, as discussed in paragraphs 3.21 – 3.26 above. This in turn fuels dissatisfaction on the part of local authorities with the courts, further damaging relationships.
- 3.46. The result is that the relationship between local authorities and courts can verge on the dysfunctional. For the system to work better it is not acceptable for each group to sit on the sidelines and criticise the other. A failure in one part of the system must be seen to be a failure of all. Courts and local authorities, and other professionals, should work together to tackle this at a national and local level.
- 3.47. There has to be a dialogue both nationally and locally. At the national level the development of an Interim Board and then the Family Justice Service should facilitate this debate. In due course local boards as discussed at paragraphs 2.80 – 2.82 should be the vehicle. In the meantime the Local Performance Improvement Groups that exist for each care centre in England may be a starting point. Different arrangements apply in Wales where local authorities and the courts need to consider whether these are adequate. In addition across both England and Wales the local Designated Family Judge (DFJ) and their Director of Children's Services (DCS) or Director of Social Services (DSS) (the latter in Wales) should have a relationship and meet regularly to discuss issues. Discussions at the national level could help establish ground rules for these

meetings and address any concerns about judicial independence. We are confident these can be managed appropriately.

- 3.48. A further and more substantial priority is the need to consider local authority practice in relation to threshold decisions and when they trigger care applications.⁵⁸ This is particularly so in relation to recognising long term chronic neglect and emotional abuse. There are also significant variations across local authorities in the rates of children in care across the country and whether they are looked after on a voluntary or compulsory basis.⁵⁹
- 3.49. This again requires discussion at national and local level. A range of factors influences policy and practice that need to be better understood. Government should support these discussions through a continuing programme of analysis and research into among other things the effects of high profile cases and economic influences.
- 3.50. Evidence suggests that local authorities can wait too long to commence proceedings, sometimes because they are putting too much faith in the capacity of parents to change.⁶⁰ Social workers like courts may not always focus sharply enough on children's timescales and can underestimate the long term impact of neglect and emotional abuse.⁶¹ Cases may be allowed to drift as continual assessments are carried out, or perhaps children are accommodated under section 20 with no firm long term plan for their future wellbeing. In effect delay starts before proceedings. Too often proceedings are viewed as the step to be taken when child protection services fail – they are considered the absolute last resort. This can result in professionals failing to realise when permanent removal of children is required.
- 3.51. Clearly the decision when to initiate proceedings is complex and requires fine judgement. Nevertheless delay in initiating proceedings is poor practice and should be challenged.
- 3.52. We recommend that the revised Working Together and relevant Welsh guidance should emphasise the importance of the child's timescales in planning for children as well as the need to make appropriate use of proceedings as part of structured child protection activity. It should also point to the need for the courts to have clear, evidenced and objective information when applications are made. This does not mean that local authorities should rush to the courts. It is of course preferable to avoid proceedings if this is consistent with the child's welfare and is based on a confident understanding of the family history and circumstance.

⁵⁸ Davies, C. and Ward, H (2011).

⁵⁹ Department for Education: *Children Looked After by Local Authorities in England (including adoption and care leavers) - year ending 31 March 2011*.
<http://www.education.gov.uk/rsgateway/DB/SFR/s001026/index.shtml>. Last accessed 25/10/11.

⁶⁰ Davies, C. and Ward, H (2011).

⁶¹ Ibid.

- 3.53. Research suggests that at present the courts are disinclined to rely on evidence provided by local authorities.⁶² This fuels the culture of assessments which create delays and is a symptom of a poorly functioning system. We return to this issue in later sections looking at improving the quality of local authority assessment and addressing the over use of expert witnesses.

Final recommendations

Where we refer to the Family Justice Service, we envisage that these functions would be performed initially by an Interim Board.

- There should be a dialogue both nationally and locally between the judiciary and local authorities. The Family Justice Service should facilitate this. Designated Family Judges and Directors of Children’s Services / Directors of Social Services should also meet regularly to discuss issues.
- Local authorities and the judiciary need to debate the variability of local authority practice in relation to threshold decisions and when they trigger care applications This again requires discussion at national and local level. Government should support these discussions through a continuing programme of analysis and research.
- The revised Working Together and relevant Welsh guidance should emphasise the importance of the child’s timescales and the appropriate use of proceedings in planning for children and in structured child protection activity.

Case management

- 3.54. We have already discussed the importance of robust judicial case management to reduced delay (paragraphs 2.143 to 2.154). It is central to the Public Law Outline (PLO) and there is growing recognition of the particular skills and approaches needed to achieve it. We warmly welcome the President’s guidance to the family judiciary, which reiterates the importance of robust judicial case management and recognises that this is largely a matter within the discretion of the trial judge.⁶³ Our recommendations here are intended to help ensure his intentions are achieved in public law.

- 3.55. It seems clear that significant change is necessary. There are varying practices in courts across the country as seen in recent research.⁶⁴ This is also reflected in differing case lengths. In care centres the average time taken to achieve a final outcome for the child in care cases ranged from 38 to 79 weeks – a difference of over 9 months. In the same period the average in Family

⁶² Pearce, J. and Masson, J. with Bader, K. (2011) *Just following instruction: the representation of parents in core proceedings* University of Bristol

⁶³ President’s Guidance, Bulletin Number 2: *Case management decisions and appeals therefrom*, December 2010.

⁶⁴ Pearce, J. and Masson, J. with Bader, K. (2011).

Proceedings Courts ranged from 29 to 63 weeks – nearly 8 months.⁶⁵ These variances can be seen across neighbouring courts and court performance, whether good or bad, appears to be relatively consistent over time. Local demographics and resources affect case duration but such wide variations and the consistency over time suggest that local culture and practice are also important.

3.56. Recent research found that the introduction of the PLO has had little impact on the way in which cases are managed.⁶⁶ Indeed in three of the four areas studied there was little evidence that the court followed it. Negotiation between lawyers had a greater role than judicial case management in shaping the progress of cases, within a shared ethos – among lawyers for all parties, legal advisers and judges - that care proceedings involve such draconian decisions that parents should have an absolute right to contest them, regardless of the needs of the child. Contesting was seen as therapeutic for parents and therefore to be welcomed. This ethos rather than the formal rules governed how cases were managed, meaning that cases took as long as needed to ensure that every possibility to avoid local authority care had been explored.

3.57. Our recommendations (which included elements of procedural reform) were:

- *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;*
- *a time limit for the completion of care and supervision proceedings within six months should be put into legislation;*
- *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;*
- *the Family Justice Service should manage the task of developing and maintaining the detailed criteria that will support judges in drawing up the Timetable;*
- *courts should strengthen the use of the case progression function;*
- *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;*
- *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; and*
- *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.*

⁶⁵ Figures are for the 12 months to June 2011. The range of averages stated exclude courts where there were fewer than 10 final outcome orders made during the period. Cases have been designated as county court or Family Proceedings Court cases based on the court type at which an order was made; the time period measured goes back to when the initial application was made and so, for cases transferred from an Family Proceedings Court to a county courts at some stage, or vice versa, includes the time where such cases were processed in the other type of court prior to being transferred. Data based on HMCTS FamilyMan data for 2011.

⁶⁶ Pearce, J. and Masson, J. with Bader, K. (2011).

Responses to consultation

- 3.58. Most respondents supported our proposals, with widespread agreement that the judge should manage cases, and that standards need to improve. Many, including judges themselves, felt the judiciary should be more robust in their decision making, particularly around timetabling. This would need training and the time to do it, including the time to read papers. Judicial continuity and greater specialisation would be important together with greater collaboration between agencies.

Judicial case management will never be something that judges do alone – they are likely to continue to rely on lawyers for the parties but need to develop a better sense of their responsibility and improved knowledge of the cases they handle in order to make good use of practitioner expertise without losing focus on the welfare of the child and the importance of timeliness.

Family Justice Council, consultation response

...by far the most likely way to engender improvements in case management is to give the judges more reading time, more control over listing and more flexibility to tailor directions to the particular needs of the child, along with the other improvements to social work practices and input outside and inside the court system.

The Western Circuit, consultation response

- 3.59. We discuss three particular aspects in the following sections: case management skills, whether there should be time limits for cases, and the changes needed to case handling and process.

Case management skills

- 3.60. To achieve more consistent and child focused practice judges will need support to develop their case handling approaches. Training will be important and our proposals on this are set out in paragraphs 2.211 – 2.220 of this report. Reform needs to emphasise understanding child development and how it impacts on children's timescales and their case management decisions. Judges need to receive regular information about latest findings from research on these and other relevant issues. This training also needs to support judges in understanding the value (or not) of particular types of expert assessment.
- 3.61. Chapter two above discussed the need to offer judges opportunities for peer review, performance management and feedback on outcomes of their cases, all particularly important in public law.
- 3.62. In many ways these are early days for case management in public law. Different courts take different approaches. As elsewhere in family law, these need corraling, researching and promulgating by the judiciary to share best practice and ensure consistency. Practices mentioned to us included:
- 'hot tubbing' of experts (see expert witness section, paragraph 3.146);

- working more closely with the guardian to establish the reports that are really needed, and those that are not;
- using gatekeeping to put cases on defined case length tracks from the beginning; and
- making full use of the powers contained in the Family Procedure Rules 2010 to develop quasi inquisitorial approaches, with limits on the issues to be debated and on the length of hearings;

3.63. Some respondents urged that wasted cost orders should be used more often when court directions are not followed and that they should be made easier to apply. We tend to believe that existing powers are sufficient though agree that courts could deploy them more than they do now. We note that judges also have the option to report to the relevant professional body or their local authority practitioners who do not comply with court orders.

Time limits

3.64. We noted in the interim report that delay, and concern about delay, in public law is not new.⁶⁷ Many attempts have been made to reduce case length but case duration continues to rise. In particular the introduction of system wide targets has not been successful.

3.65. We argued that there was a need for greater firmness and consulted about the possible introduction of a statutory time limit of six months obliging the court to conclude proceedings within this time.

3.66. Overall respondents supported this proposition.

We support the introduction of a six month time limit. In Derby, a significant percentage of our cases are already concluded within a 30 week time frame and this has proved to be an achievable, albeit at times challenging, target. Indeed, we would suggest that it is viable for some cases to be concluded in a much shorter timescale.

Derby City Council, consultation response

3.67. But some were opposed. They argued that any time limit ran the risk of being contrary to an individual child's timescales, would be impossible to implement given the systemic problems that exist at present, and the priority should be to address those problems.

Delays are most often caused by a shortage of resources (courts, LA social workers, guardians etc..) ...setting a time limit does not address the causes of the problems, but instead just places an arbitrary time limit that is likely to result in wrong decisions being made because the evidence is not of sufficient detail and quality.

Anna Gupta, Royal Holloway, University of London, consultation response

⁶⁷ See for example Booth, M. (1996) *Avoiding Delay in Children Act Cases*, Lord Chancellor's Department.

- 3.68. We agree that a time limit would not of itself guarantee success in tackling delay. A programme of wide ranging and fundamental reform is needed, whether or not there is a time limit. But we believe that a time limit could give a strong focus to the work. Her Honour Judge Newton (quoted in paragraph 3.9) argued in effect that acceptance of delay is now institutional. A time limit could deliver a jolt to the system, breaking current expectations, and creating a new set to which all would need to work.
- 3.69. For these reasons we propose there should be a statutory time limit of six months for care cases.
- 3.70. Respondents generally agreed that six months was an appropriate time frame, although some cases could be dealt with more quickly and a few would need to be longer:

I do not disagree with the proposition that the aim should be for cases to be concluded in six months.

President of the Family Division, consultation response

- 3.71. We set out below how we believe the time limit should operate, including possible exceptions. Detailed thought and preparation will be needed but here is a starting set of proposals.

- The power to set a time limit should be introduced in primary legislation. Secondary legislation and guidance should specify the actual time limit and provide the operational detail.
- The court would be obliged to reach a decision on a care or supervision application within six months from receipt of the application. The court should decide to conclude the case in less than six months if it considered this to be in the child's best interests and consistent with the other parties' rights.
- The case managing judge could extend the case beyond six months if they could establish grounds to do so. They would need explicitly to consider the child's needs and timescales in making this decision.
- The case managing judge would also need to seek the agreement of the DFJ (or Family Presiding Judge (FPJ) where the case manager was the DFJ) to extend a case.
- The grounds would be defined but fairly widely drawn.
- A case could be extended only for two months and a final hearing should be held within this time. If further extension(s) were required the need to establish grounds and seek the agreement of the DFJ/FPJ would reapply.
- The parties would have the right and opportunity to challenge any decision to extend or not a case.
- The declared grounds would need to be publicly stated and recorded. These would need to be monitored and would be shown within performance information.

- 3.72. The grounds for extension would be important. We considered whether these should be narrowly drawn. Cases would be allowed to go beyond six months

only where threshold was still being determined or placement with parents or family was being tested. We concluded that this would be too restrictive.

- 3.73. We propose instead that there should be broad grounds with a protection against delay in the requirement to seek the agreement of the DFJ/FPJ. We believe that six months is, subject to other systemic change (see chapter two) feasible for cases that do not involve testing placements or highly complex or unusual threshold issues. Extension should not be routine or regular and the judiciary should give their unswerving commitment to dealing with cases within six months.
- 3.74. Based on the consultation we propose that grounds for extension could include:
- testing placement with parents or family;
 - material and unforeseeable change of circumstances;
 - unusual complexity;
 - difficult threshold issues, involving complex medical issues for example;
 - critical system failure, for example, failure to appoint a guardian for many months; or
 - parallel criminal proceedings.
- 3.75. These would need careful definition. There is currently for example a tendency to see all cases as complex. We do not believe this to be right. But to change this view is a matter as much of culture as of definition. Judges, and particularly DFJs, would need substantial training and support as they took on these new responsibilities.
- 3.76. Implementation would need preparation, debate, training and with a trial or pilot. The limit could not be brought into effect in the short term in view of the legislative timetable and this would allow scope for other changes to begin to take effect. There would be a need for transitional provisions to cover cases already in the system.
- 3.77. We repeat that this could not be done in isolation and would depend on wider system reform. Judicial continuity in particular is an absolute requirement.

Process

- 3.78. We discussed in the interim report the need to strengthen the 'Timetable for the Child', as set out in the PLO. Respondents overwhelmingly agreed that this has to date failed to have any measurable impact on proceedings. Underpinning our recommendation was a belief that cases need timetables that reflect the child's needs and timescales.

The basis must be how long a child can wait, so when it is being formulated regard should be had to: developmental stages; attachment issues; the child's main needs, for example stability, security and permanency, strength of existing relationships.

The Law Society, consultation response

- 3.79. The timetable for the case informed by the child's needs and timescales should provide a firm structure for the case.

By using the timetable for the child we should be able to set down the 'latest date for (x) or (y)' if it is to be admissible in the case. This would give a very clear unambiguous structure. You cannot turn up late for a plane, or an exam paper. If there were a legally enforceable timetable based on key dates for the child, it would focus minds.

Sussex Central (Brighton) Family Panel Magistrates, consultation response

- 3.80. The proposal for a time limit reinforces the need for a robust approach to timetabling and case handling issues. Judges should set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales. There is a strong case for this responsibility to be recognised explicitly in primary legislation.
- 3.81. The timetable for the case should be established early. It should set out the key stages of the case, the information needed, who should provide it and how long they should be given to do so. The timetable should include hearing dates, dates for Cafcass and expert reports and the final date for assessment of possible carers.
- 3.82. The parents' rights need to be set against this and considered too of course. The court must ensure that there is a fair and proportionate trial of any issues. But it must do so in a way that ensures the child's welfare is given the paramount consideration.
- 3.83. The current culture of negotiation and delay often helps secure the parent's agreement not to contest a care order so, as some respondents pointed out, our proposals could increase conflict with parents. This may be. But the result of the conciliatory approach can be damaging to children. We agree with Professor Masson who argued that if a time limit is introduced:

Courts will need to be more willing to adjudicate, and to control strictly the length of contested hearings where the evidence of significant harm/the need for the order is strong. The same process should not be applied to all cases irrespective of the circumstances which have resulted in proceedings.

Professor Judith Masson, consultation response

- 3.84. The judge must feel able to say no. The President in his recent guidance has sought to reassure trial judges about the breadth of their discretion.

The overriding objective means that you allocate the resources for the case. Of course any hearing that you conduct must be ECHR Articles 6 and 8 compliant. However, after you have discussed the matter with the parties and heard their submissions, expedition, fairness and proportionality DO NOT

- (1) prevent you telling the parties that you only have X hours/days in which to hear a case;*
- (2) that you will allow only so much time to be spent on a particular issue;*

- (3) that a particular issue will be resolved in a particular way – for example, in writing, or by way of video link;
- (4) that a particular witness, sometimes but not exclusively an expert, will only spend a given time in the witness box and, in particular, that he or she will only be cross-examined for such length of time as you determine.⁶⁸

3.85. In a recent judgment the President has also emphasised the discretion of the trial judge. Here he upheld the decision of the trial judge to refuse an interim viability assessment of the child's mother.⁶⁹ Even if positive the mother was not going to be in a position to parent the child for 18 – 24 months. The child could not wait that long. He concluded:

In my judgment, the judge followed the authorities, the PLO and The Guidance and applied her discretion judicially to the facts of the case before her. In these circumstances it is quite impossible to say that she was plainly wrong...

3.86. A particular cause of delay occurs when relatives put themselves forward late in proceedings as alternative carers. One option would be to introduce a standard time limit. The aim is laudable but the means may infringe human rights legislation. In individual cases it may however be acceptable to introduce cut off points based on the requirements of the child's timescales. This would need to be communicated to the parties early in the case. The issue would also be mitigated by thorough pre-proceedings work possibly including the use of family group conferencing.

3.87. We said in the interim report that we would review in more detail the implications of our proposals for the PLO. This represents a significant advance in its approach to uniform and simplified procedures. It provides a solid basis for child focused case management. It is disappointing that some courts still do not fully apply it. Inconsistency in its implementation across courts is not acceptable and we encourage the senior judiciary to insist that all courts follow it.

3.88. The need to accommodate the time limit and other changes described in this report will mean substantial changes for the PLO. It will need to be remodelled.

3.89. There may be an opportunity to consider in this a trial of requiring an early decision on threshold as suggested by some people in the consultation. In most cases, particularly those involving chronic neglect, threshold is arguably not difficult to establish and can be determined without recourse to multiple experts. An early decision on threshold may send a clearer message to the parties and help focus attention on the welfare stage.

3.90. A review of the PLO should include

- engagement with all with an interest, particularly local authorities, while being clearly owned by the judiciary;
- training before and after implementation;

⁶⁸ *What case management means in practice: A message from the President (2010).*

⁶⁹ S (A child), Re [2011] EWCA Civ 812.

- strong local leadership;
- opportunities for all stakeholders to review progress; and
- processes to suit the majority of cases, not the complex minority.

3.91. We recommended two procedural changes in the interim report, first that the need to renew interim care and supervision orders should be reduced. Respondents overwhelmingly supported this and we recommend it again now.

3.92. We also proposed that adoption panels should not be required to advise on whether adoption is the right permanence plan for a child when adoption is proposed without parental consent. A small minority opposed this.

Panels are made up of very experienced and informed members including people who have been adopted themselves and adopters. Given the draconian nature of adoption as a plan for a child, we feel that the dedicated and informed focus of Panels is crucial to the planning processes of Local Authorities.

Leeds City Council, consultation response

3.93. Panels have skill and expertise. But the court will also scrutinise these cases in detail and, with the great majority of respondents, we believe that is sufficient safeguard, recognising also the need to reduce delay for these children.

3.94. Lastly, the Family Justice Council suggested that it might be useful to strengthen the court's powers by allowing it to attach conditions to supervision orders. This would enable the court to conclude its interest in cases where placement with family or rehabilitation to parents is currently tested under an interim care order. Breach of an order would be evidence that might speed up a subsequent care application.

3.95. The ability to attach conditions to supervision orders (for example that the child will be returned to a mother's care provided she leaves an abusive relationship) could give greater security to courts and thus enable them to make faster decisions. But there are also risks. Research evidence suggests that even now courts too often try to place children back within their families causing further damage when the arrangements break down.⁷⁰ Stronger supervision orders could tempt courts further in this direction. And local authorities could seek these orders as reinforcement for the efforts they were anyway making to pressure parents to change. This would be helpful if they were effective. But it could lead local authorities to make many more applications to give themselves legal cover.

3.96. We have not had the opportunity to review this proposition in depth. Noting the potential difficulties we do not ourselves feel in a position to recommend it.

⁷⁰ Farmer, E. and Lutman, E. (2010)

Final recommendations

- Different courts take different approaches to case management in public law. These need corraling, researching and promulgating by the judiciary to share best practice and ensure consistency.
- Government should legislate to provide a power to set a time limit on care proceedings. The limit should be specified in secondary legislation to provide flexibility. There should be transitional provisions.
- The time limit for the completion of care and supervision proceedings should be set at six months.
- To achieve the time limit would be the responsibility of the trial judge. Extensions to the six month time limit will be allowed only by exception. A trial judge proposing to extend a case beyond six months would need to seek the agreement of the Designated Family Judge / Family Presiding Judge as appropriate.
- Judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales. There is a strong case for this responsibility to be recognised explicitly in primary legislation.
- The Public Law Outline provides a solid basis for child focused case management. Inconsistency in its implementation across courts is not acceptable and we encourage the senior judiciary to insist that all courts follow it.
- The Public Law Outline will need to be remodelled to accommodate the implementation of time limits in cases. The judiciary should consult widely with all stakeholders to inform this remodelling. New approaches should be tested as part of this process.
- The requirement to renew interim care orders after eight weeks and then every four weeks should be amended. Judges should be allowed discretion to grant interim orders for the time they see fit subject to a maximum of six months and not beyond the time limit for the case. The court's power to renew should be tied to their power to extend proceedings beyond the time limit.
- 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.

Local authority practice

3.97. Local authorities are critical to proceedings. We acknowledged in the interim report the pressures on them and we have challenged the ready assumption that they are incompetent in what they do. This is far from the case and we have seen ample evidence of good practice. But we have also seen that poor practice happens.

3.98. Reviews of child protection in England, by Professor Eileen Munro, and in Wales, through the Welsh Safeguarding Forum, have run in parallel with our own.⁷¹ Professor Munro has now published an interim and a final report. We made some recommendations in this area:

- *we support Professor Eileen Munro's recommendations in 'The Child's Journey' about how local authorities can contribute to reducing delays in care proceedings;*
- *We encourage use of the 'Letter Before Proceedings'. We recommend research be undertaken about its impact; and.*
- *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.*

3.99. Respondents praised Professor Munro's proposals. Some noted that her reforms will take time to have an effect. Our recommendations in this area were generally welcomed. We now comment further on local authority practice.

Reforming local authority practice

3.100. A major change programme is now beginning in both England and Wales to reduce bureaucracy and refocus social work practice onto direct work with families. There will be fresh emphasis on increasing the amount of time social workers spend working directly with children and families and providing them with early help. There should be less bureaucratic process.

3.101. Social workers, as with all professionals across the family justice system, will need to develop a stronger understanding of child development and the impact of delay when making decisions about children.

3.102. We welcome these changes. The wider family justice system will need to keep pace with them through training for judges, lawyers and court social workers. The changes reinforce the importance of strong local partnership arrangements where new and emerging practice can be discussed and learning shared.

Local authorities' assessments and care applications

3.103. One of the first priorities for local authorities and the judiciary is to address the unwillingness of courts to rely on local authority assessments. Elsewhere in this report (paragraphs 2.226) we recommend improved training in court presentation skills for social workers. Assessments and reports need to be appropriately detailed, evidence based and clear in their arguments and some social workers need help to achieve this. The starting point of course is that good assessment is good for children.

⁷¹ More detail about Professor Munro's work is available at www.education.gov.uk/munro including copies of all her reports. The Welsh Safeguarding Children Forum, established by the Deputy Minister for Children and Social Services in 2009, included people with safeguarding responsibilities reported to Ministers in summer 2011. The Welsh Government set out its intentions with respect to social services reform in a written statement on the 18 October, *Safeguarding and Protection of People at Risk*. Available at <http://wales.gov.uk/about/cabinet/cabinetstatements/2011/18octsafeguardingandprotection/?lang=en> last accessed 26 October 2011.

Effective social care interventions follow careful assessment and planning. Assessments need to be completed quickly with a focus on the critical question: is this child safe to stay in their current circumstances? Rigorous assessments must be completed regardless of whether the family courts will be involved or not because careful planning has been shown to improve outcomes for children. Assessments should include thorough analysis of the accumulating risks of children being harmed. Good quality social and family history taking is essential, including accurate chronologies and historical information about parent's childhood relationships and behavioural backgrounds. Professionals need to avoid the 'start again' syndrome with parents where all previous history is ignored, including the removal of other children. The child's right to a safe and nurturing home must not be overridden by the parents' human rights.⁷²

3.104. We propose that the judiciary led by the President's office and local authorities via their representative bodies should urgently consider what standards should be set for court documentation, with examples to be circulated. This need not be a long or cumbersome exercise leading to detailed guidance. Good quality documents could be identified from case files and, anonymised and with relevant permissions, made available as working examples.

3.105. This is an important point. Loss of local authority social work expertise from the court room may mean that the court does not have the full picture.

In spite of the value of multi-professional assessments, increased reliance on expert witnesses in family courts has been a factor in increasing delay in the progress of court cases and reducing the perceived value of social work assessments. The contribution of social workers' knowledge of social relationships, family history and parents' behaviour over time can then be lost – a potentially serious omission, as past parental behaviour is a key predictor of likely future conduct.⁷³

The Letter Before Proceedings

3.106. Before submitting an application to the court, and where the short term safety and welfare of the child permits, many local authorities send parents what is known as a Letter Before Proceedings. This 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.

3.107. We noted in our interim report that this was widely seen as a useful stage in the process. We recommended that research be undertaken to look at its effectiveness and to establish why its use is patchy.

⁷² Maskell-Graham, D. et al, (2011) *Safeguarding Children Across Services: Messages from research on identifying and responding to child maltreatment: Messages for professionals working in children's social care*, Department for Education.

⁷³ Turney, D. et al, (2011) *Social work assessment of need: what do we know? Messages from research*, Department for Education.

3.108. We are grateful to Professor Judith Masson for sharing with us early results from her research, which is due to report in 2012.⁷⁴ The research observes that the rate and nature of the use of the Letter Before Proceedings is variable across authorities. Use of the pre-proceedings process appears to have little impact on the courts behaviour if proceedings are then commenced. She concludes:

The pre-proceedings process has some advantages – lawyers appear to help parents feel less vulnerable, their presence may make it easier for parents to participate in a meeting to agree care arrangements. Involving local authority lawyers can ensure that threshold and evidence have been considered long before proceedings are issued. Some parents will make positive use of this ‘last chance’. However, there are also disadvantages. Applications to court may be delayed to the detriment of children; the creation of a new step towards proceedings may slow progress of cases to the court even where efforts to engage parents have proved futile. Starting the pre-proceedings process may give a false impression to social workers and managers that the case is progressing, leading to further drift and delay.⁷⁵

3.109. Clearly the operation of the pre-proceedings process will need to be reviewed once the full research is available. This will need to form part of the discussions around remodelling the PLO. Given the potential of the process to support parents as well as providing the courts with better prepared cases we continue to encourage its use in the interim.

3.110. There was some criticism of the limited legal aid available at the Letter Before Proceedings stage. It seems that paralegals often represent parents, raising questions about effectiveness. Any change would increase costs and need to be justified by benefits. The issue should be revisited in the light of Professor Masson’s research.

3.111. Other groups suggested that families subject to child protection enquiries should have greater access to independent advice and advocacy. We understand the motivation but believe the priority should be to focus on improved social work. The cost in any event could not currently be afforded.

The Independent Reviewing Officer

3.112. We have noted already the widespread distrust - often ill-founded - of local authority ability and willingness to implement a care plan in the best interests of the child.

3.113. This was associated with discussion of the role of the IRO and concern about workloads and independence from their employer, the local authority.

For as long as the IRO is employed by the local authority there is the possibility that their independence will be compromised and this will be detrimental to the welfare of the child... The role of the IRO is pivotal to ensuring that appropriate

⁷⁴ Masson, J. (2011) *Families on the edge of care proceedings – interim report on the use of the pre-proceedings process*, unpublished, prepared for and supplied to Family Justice Review Panel, August 2011.

⁷⁵ Ibid.

care plans are agreed and delivered, their independence is essential and can only be guaranteed if the role is moved outside of the local authority.

National Youth Advocacy Service, consultation response

3.114. We discussed the IRO in our interim report (paragraphs 4.262 – 4.270). The notion of independence we understand was always intended to mean independent of day to day local authority case management, rather than independent of the authority itself. Our view was and is that to take the IRO service out of the local authority would leave a gap that the local authority would need to fill under another name. The priority should be to improve the quality of the function rather than to create a new quasi inspectorate. Children themselves have said that they prefer the IRO should remain within the authority.

*Out of the children who chose where they thought IROs should work, the clear majority view was that in the future IROs should carry on working for the local council that provides children's services.*⁷⁶

3.115. We do share the concern that IRO workloads may sometimes be too high in some local authorities. We recommend that local authorities should review the operation of their service to ensure it is effective. In particular they should ensure that they are adhering to guidance regarding caseload.⁷⁷ Some respondents pointed to the lack of referrals to Cafcass, and via them to the courts, as a sign of ineffectiveness. Eight formal referrals have been made to Cafcass since the process was introduced in 2007. Informal advice is sought more frequently – on 61 occasions in 2010 and 104 times in 2009.⁷⁸ Revised guidance for IROs in England emphasises and strengthens the functions of dispute resolution and escalation that should exist within an authority.⁷⁹ The formal referral mechanism is one to be used by exception and the threat is often effective without the use. The figures suggest to us that the informal route is used and helping to resolve issues without court action.

3.116. That said the work of IROs and their impact needs to be more clearly seen and understood.

3.117. We recommend that the DCS/DSS and Lead Member for children receive regular reports from the IRO on the work undertaken and its outcomes. We also recommend that Local Safeguarding Children Boards should consider reports. These reports should include an analysis of the operation and effectiveness of dispute resolution and escalation within that local authority.

⁷⁶ Survey of 1530 young people, Children's Rights Director (2011) Children on Independent Reviewing Officers, OFSTED.

⁷⁷ Department for Children, Schools and Families (now Department for Education) (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; Independent Reviewing Officers Guidance Wales: Adoption and Children Act 2002 and The Review of Children's Cases (Amendment) (Wales) Regulations 2004.*

⁷⁸ Figures supplied to Family Justice Review Panel by Cafcass.

⁷⁹ Department for Education (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.*

3.118. Courts would benefit from this information too alongside information about the outcomes of care cases. We recommend in paragraph 2.205 that judges should receive such information. Pilots are needed to test how this is best done and these should include information from the IRO.

3.119. More immediately the day-to-day relationships between IROs and the courts, particularly the guardian, should improve. We are grateful to Nagalro, Napo and the National Association of Independent Reviewing Officers (NAIRO) who offered to debate this issue for us. They have suggested some simple steps which should be put in place and which we support:

- the introduction of a joint training initiative to foster greater clarity and communication;
- better protocols for joint working, exchanging contact details and keeping each up-to-date on changes in plans, particularly at short notice; and
- guardians to attend child in care reviews where appropriate.

The creation of bureaucratic process must be avoided in this.

Final recommendations

- The judiciary led by the President's office and local authorities via their representative bodies should urgently consider what standards should be set for court documentation, and should circulate examples of best practice.
- We encourage use of the Letter Before Proceedings. We recommend that its operation be reviewed once full research is available about its impact.
- Local authorities should review the operation of their Independent Reviewing Officer service to ensure that it is effective. In particular they should ensure that they are adhering to guidance regarding case loads.
- The Director of Children's Services / Director of Social Services and Lead Member for Children should receive regular reports from the Independent Reviewing Officer on the work undertaken and its outcomes. Local Safeguarding Children Boards should consider such reports.
- There need to be effective links between the courts and Independent Reviewing Officers and the working relationship between the guardian and the Independent Reviewing Officer needs to be stronger.

Expert witnesses

3.120. Expert evidence can often be necessary to a fair and complete court process. For example medical testimony may be critical to determining threshold: whether a child harmed by accident or not. Our interim report however identified a trend towards an increasing and we believe unjustified use of expert witness reports, with consequent delay for children. The Ministry of Justice's recent court case

file study found that experts are used in around 92% of care cases and an average of 3.9 reports per case were ordered.⁸⁰

3.121. We made a number of proposals:

- *we recommend that judges should be given clearer powers to enable them to refuse expert assessments and the relevant legislative provisions revised accordingly;*
- *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;*
- *research should be commissioned to examine the value of residential assessments of parents;*
- *the judge should be responsible for instructing experts as a fundamental part of case management;*
- *the development of multi-disciplinary teams to provide expert reports to the courts has merit; and*
- *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.*

3.122. Most respondents recognised the issues we had identified, and agreed that things need to change if delay is to be reduced. Questions to be resolved include the criteria for appointment of experts, whether these should be reflected in primary legislation and concerns about particular types of expert assessment. These are addressed in this section.

3.123. The primary concern is the delay caused by over use of expert reports. But we should also remember the effect on the children themselves, who are subjected to multiple tests and have to tell their stories again and again.

The introduction of additional adults into the decision making process for children and young people should be avoided wherever possible. One young person told us “it feels like 1001 people are dealing with your case, but no one really knows you”.

Who Cares? Trust, consultation response

Limiting the call for expert assessments

3.124. We asked what criteria should be used when deciding on the need for an expert opinion or assessment and who should provide it. Suggested criteria included that:

- their information or opinion should be essential for disposal of the case;
- it could not be provided by one of the parties, usually the local authority or the guardian;
- the expert witness should be appropriately qualified with relevant court experience;

⁸⁰ Cassidy, D. and Davey, S. (2011) *Family Justice Children’s Proceedings – Review of Public & Private Law Case files in England & Wales*, Ministry of Justice.

- they should be able to report within the timetable for the child; and
- the cost should be considered in the wider context of the court proceedings.

These seem right to us.

3.125. We discussed in the interim report statutory options to strengthen the ability of the courts to refuse requests for expert assessments. There were mixed views on whether it would be sensible to change the primary legislation or the rules of procedure. Respondents noted that new Family Procedure Rules 2010 had recently been introduced and that the President had issued guidance. Indeed some of the criteria listed above can be found in the rules.

3.126. Professor Judith Masson, among others, considered that decisions about expert witness evidence had to remain at the discretion of the judge and that it was unlikely that a form of words limiting expert witnesses effectively and fairly could be found.

Rather judicial training should seek to develop judges' critical faculties in considering applications and their recognition of how different cases can be determined without the current heavy reliance on expert witnesses.

3.127. The Academy of Experts thought:

It may well be that the judiciary would find it to be of assistance if further guidance was produced as to circumstances in which they should not give permission for an expert witnesses to be used.

3.128. We agree that training is vital but continue to believe that clearer powers would help:

- the proper use of expert witnesses is vital for the effective running of public law proceedings;
- there is too often a lack of clarity about why assessments are commissioned;
- the Family Procedure Rules and other guidance are too often ignored;
- primary legislation does not sufficiently address the use of expert witnesses;⁸¹
- Court of Appeal decisions have left judges unsupported and unclear when they can refuse requests for assessments;⁸² and
- amendment to primary legislation would more firmly drive a change of culture.

3.129. The child's timescales must exert a greater influence over the decision to commission reports and judges must order only those reports they truly need.

⁸¹ Currently section 1 of the Children Act 1989 sets out the principles that the court must apply when making decisions with respect to the child. In addition, section 38(6) gives the court powers to order assessments when children are under interim care or supervision orders. While the Act does refer to certain aspects of case management, it contemplates that detailed provision about the procedure and the conduct of family proceedings will be set out in court rules.

⁸² The President and the Court have in recent guidance and judgements sought to clarify matters. Eg in President's Guidance, Bulletin no 2, *Case management decisions and appeals therefrom*, and S (A child), Re [2011] EWCA Civ 812.

We welcome the President's guidance in this area and propose to build on it.⁸³ We recommend that primary legislation should reinforce that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case. The Rules would need to be amended to reflect the primary legislation.

3.130. This would not replace the need for local authorities and guardians to be more robust in challenging requests for expert witnesses to ensure proceedings remain child focused. Requests for experts are generally dealt with through negotiation between the parties.⁸⁴ The needs of the child's timescale are too often forgotten in this discussion.

3.131. Turning to the types of expert who are commissioned there was concern that in our interim report we had singled out independent social workers (ISWs) unfairly, alongside a related concern around our intention that they should be employed only to provide new information.

The assumption in the review that the contribution of Independent Social Work expert witnesses duplicates that provided by local authority social workers is highly questionable, as there is a regrettable lack of research evidence on the ISW contribution to family proceedings...

Nagalro, consultation response

3.132. Accordingly we propose to broaden our recommendation, to say that the court should seek material from any expert only when that information is not available, and cannot properly be made available, from parties already involved. In relation to ISWs we note that they will be the third trained social worker to provide their input to court, after local authority social workers and the guardian. Over reliance on ISWs may be another deterrent to social workers to carry out proper assessments in the first place and fuels the perception that local authority work cannot be objective. We continue to believe that use of ISWs should be exceptional. (The MoJ's recent court case file study found that ISWs were commissioned in a third of cases, an increase from a previous study.)⁸⁵

3.133. We have heard anecdotally the view that parents have an absolute right to a second opinion from an ISW. This is clearly wrong.

3.134. We also discussed in the interim report concerns about the value of residential parenting assessments.⁸⁶ We recommended that research be commissioned to examine the evidence. We remain concerned about their use given their cost and possibly limited value. We recommend again that this be pursued.

3.135. One proposal suggested to us in this area was that the need for further assessments after application to court could be reduced through judicial

⁸³ President's Guidance, *ibid*.

⁸⁴ Pearce, J. and Masson, J. with Bader, K. (2011).

⁸⁵ Cassidy, D and Davey, S (2011), Masson et al. *Care profiling study* (2008) Ministry of Justice.

⁸⁶ *Family Justice Review Interim Report* (2011) paragraphs 4.229.

oversight of local authority pre-proceedings assessments.⁸⁷ A local authority proposing assessments in the pre-proceedings would seek the approval of a judge. Judicial approval would then avoid the accusation in proceedings that local authority assessments were not independent. The intention is that the parties would demand fewer extra assessments once they reached court.

3.136. The risk here is that the pre-proceedings stage would in effect become a part of the proceedings themselves, with full legal representation and the development of another set of hearings. The extra cost would be compounded by the fact that many cases do not go forward from pre-proceedings to a court process. Accordingly we do not feel able to recommend this change.

Court directed expert witnesses

3.137. We recommended in our interim report that judges should be responsible for instructing expert witnesses rather than any of the legal advisers to the parties, better to control the scope of questions.

3.138. Respondents agreed that judges should decide whether experts were needed and that this responsibility should not be delegated to the parties, as it is in effect now. We intend to maintain this recommendation but on reflection agree with those who said that judges would not have the time to draft letters of instruction. We recommend instead that the judge should set out in the order giving permission for the commissioning of the expert witness the questions on which he or she should focus. In the normal course of events this will be done following discussions with the parties.

Improving the supply of expert witnesses

3.139. Lack of availability of expert witnesses is a widespread problem. The difficulty with analysis of the issue is that, as so much else in family justice, data on types of experts, use and costs are poor.

It is incredulous that in the current system no data is collected by the LSC or MoJ in terms of disbursements; this is not acceptable and would never be permitted in other settings where robust auditing is at the heart of services determining how budgets are set.

British Association of Social Workers, consultation response

Members are concerned both at the lack of transparency of witness selection and the unregulated requirements for reports.

Welsh Local Government Association, consultation response

So we have a weak basis on which to plan the delivery of expert witness services so they are delivered promptly, at reasonable cost and the right quality. Currently no single body has this overarching responsibility.

⁸⁷ Proposal submitted to the FJR panel in call for evidence submission by the Principal Registry of the Family Division.

3.140. The supply and management of expert witnesses is a serious problem and needs urgent action. The Interim Board, and then the Family Justice Service should take responsibility for work with the President, Department of Health, local authorities and relevant professional bodies to address quality, timeliness and value for money. There is also potentially a case for the Family Justice Service to manage more directly the supply of expert witnesses.

Management information

3.141. The starting point is the lack of management information. The LSC should routinely collate data on experts per case, type of expert, time taken, cost and any other relevant factors. This should be gathered by area and by court.

Managing quality

3.142. A report to be published shortly by the Family Justice Council has examined the quality of expert psychologist reports in a sample of private and public cases.⁸⁸ It points to serious issues both with the quality of reports and the qualifications of those carrying them out. We are not surprised in view of the concerns we heard expressed throughout our work about the quality of reports generally. We recommend that studies of the expert witness reports supplied by various professions be commissioned by the Interim Board, subsequently the Family Justice Service.

3.143. Agreed quality standards for experts in the family courts are clearly needed and we recommend that they should be developed. The FJS should lead this work. Meeting the standards could be a requirement for payments to be approved by the LSC. Criteria could include adherence to set timescales, membership of appropriate professional bodies and completion of specified court focused training, peer review and continuing professional development.

Further areas to explore

3.144. Other ideas are either contemplated or in early trial.

In-house experts

3.145. Some respondents believed that court employed experts in some disciplines could give better assurance of supply and quality.

In the longer term there is a case for individual courts or groups of courts having their own expert psychologist as part of the family court support service. This happens for example in some family courts in Germany.

Emeritus Professor Mervyn Murch

⁸⁸ Ireland, J. (forthcoming) *Evaluating Expert Witness Psychological Reports: Exploring Quality Standards for Family Court*, Family Justice Council. A draft version was supplied to the Family Justice Review Panel.

This idea raises a range of issues, including management, career progression and whether the parties would view these experts with suspicion. But it warrants further thought alongside measures to develop multi-disciplinary teams.

Concurrent evidence giving for expert witnesses

3.146. Concurrent evidence or 'Hot tubbing' is a practice where all expert witnesses in a case give evidence together in a court directed discussion. This has been practised in Australia with some success. It was recently used in a family case in the UK under the direction of Mr Justice Ryder and was described in his judgment:

Out of the experts' reports and discussions the court derived an agenda of topics which were relevant to the key issues and to which counsel were asked to contribute. The witnesses were sworn together and the court asked each witness the same questions under each topic, taking a topic at a time. The experts were encouraged to add or explain their own or another's evidence so that a healthy discussion ensued, chaired by the court. Each advocate is permitted to examine or cross examine and where appropriate re-examine each witness after the court has elicited evidence on a topic.

The resulting coherence of evidence and attention to the key issues rather than adversarial point scoring is marked. The evidence of experts who might have been expected to fill 2 days of court time was completed within 4 hours.

A Local Authority v A (No 2) [2011] EWHC 590

The Jackson review of Civil Litigation Costs has also recommended the development of concurrent evidence giving and this approach may well be worth extending.⁸⁹

Time limiting expert witness reports

3.147. The Midland circuit has declared that no psychological or independent social work expert witness should be commissioned unless their report will be available to the court within three months. Expert witnesses can be obtained from other areas if no local expert witness can achieve this. Although relatively recent, this is showing promise. Judge Duggan, the Designated Family Judge at Stoke-on-Trent Combined Court Centre, who ran the pilot, told us:

I cannot remember when I was last asked to approve a longer period. Overall the same experts are producing their work more quickly. They were of course given advanced notice and seem to have changed their approach to waiting lists as they promised they would. A national approach would avoid experts finding work on a more relaxed timescale across our artificial regional boundaries.

It would seem sensible to trial this approach in some other court areas.

⁸⁹ Lord Justice Jackson, (2010) *Review of Civil Litigation Costs*, Judicial Office.

Multi-disciplinary teams

- 3.148. We were attracted in our interim report to the proposals for multi-disciplinary expert witness teams set out in the Department of Health's 2006 report, *Bearing Good Witness*.⁹⁰ We suggested that 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. The team approach would better support training and peer review and, by bringing the work of the expert witness under the aegis of an employer (often the NHS), give greater confidence to take on the work.
- 3.149. Some respondents agreed that multi-disciplinary teams had merit though there were expert witnesses who argued that teams would lack the flexibility and independence of a single expert.

The independence of the expert both perceived and real is very important and a fundamental tenet of the English legal system. Extreme care must be taken to protect this.

The Academy of Experts, consultation response

- 3.150. *Bearing Good Witness* was taken forward through the Alternative Commissioning of Experts Pilot (ACE), which published its final report in June 2011.⁹¹ Multi-disciplinary working was highly regarded by clinicians, children's guardians, lawyers, judges and local authorities. The quality assurance provided through mutual support, the capacity of teams to identify the need for additional assessments (and also to resource those assessments), and the ability of teams to make informed recommendations about care planning specific to local resources, were all valued. Participants also saw potential for improved value for money and reduced cost to the legal and care systems overall, but small numbers of cases prevented a full financial evaluation. The study found that more detailed planning and discussion with clinicians and their employers would be needed to ensure proper resourcing and capacity. The key would be engagement of the NHS through a financial commitment. NHS providers also need to be persuaded that the work is consonant with the values and purposes of the NHS, that the work of experts is important to the health and safety of the parties, and is not simply part of a legal process.
- 3.151. The potential of multi-disciplinary teams seems clear, and indeed they already operate in some areas with success. But the ACE pilot is not by itself a basis for full roll out. We recommend that a further pilot be undertaken, but with some changes.
- 3.152. Effort must be made to ensure the strong support of the DFJ and local solicitors. The DFJ should be willing to bring pressure to ensure that the teams are employed and that judges and solicitors do not just fall back on the people they know.

⁹⁰ Chief Medical Officer. (2006) *Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases, A report by the Chief Medical Officer*. Department of Health.

⁹¹ Tucker, J. Moorhead, R. and Doughty, J. (2011) *Evaluation of the 'Alternative Commissioning of Experts Pilot' Final Report* London, Legal Services Commission.

- A range of cases should go through the service, both single and multi-issue, to ensure large enough volumes to make a team viable. (Teams were used only for complex cases in the ACE pilot, which undermines the economics.)
- The pilot must be long enough and large enough for NHS Trusts to be willing to make the commitment and to back-fill the resource lost from the NHS to court work.
- Local champions are needed to drive the pilot and coordinate it.
- Local authorities must be engaged with the creation of the teams to add expertise and explore options for using the team pre-proceedings.
- The pilot should draw on learning from other projects, including the way that the children's charity Coram supplies assessment services to the Family Drug and Alcohol Court (FDAC).

Funding expert witnesses

3.153. There is discontent over the way that expert witnesses are remunerated and we have been told that this affects their willingness to take on work. Witnesses are paid by instructing solicitors, of whom there may be several in a case. The result is that the witness has to chase their fee from several sources. The proposed alternative was that they should be paid directly by the LSC. This was suggested in response to the Legal Aid Reform consultation earlier this year, but the government rejected it following initial consideration on the grounds of cost.⁹²

3.154. To have to take sometimes considerable time to chase payment is clearly a deterrent to taking work. We recommend that the Family Justice Service review what other means may be available to improve the position and in due course to reconsider the issue of direct payment.

3.155. There is also concern about the new set of codified rates for expert witnesses with some arguing that fewer people will now be willing to take on the work.⁹³ It is too early to conclude this, but government will clearly need to keep it under review.

Final recommendations

Where we refer to the Family Justice Service, we envisage that these functions would initially be performed by an Interim Board.

- Primary legislation should reinforce that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case. The Family Procedure Rules would need to be amended to reflect the primary legislation.

⁹² *Reform of Legal Aid in England and Wales: The Government Response* (2011) Ministry of Justice.

⁹³ The new codified rates apply to all expert witness services in legal aid cases where certificates are issued from 3 October. These rates were based on guideline or benchmark rates applied to the taxation of bills by the LSC, minus 10% in, line with the 10% reduction being applied to solicitors' rates.

- The court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved. Independent social workers should be employed only exceptionally.
- Research should be commissioned to examine the value of residential assessments of parents.
- Judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out in the order giving permission for the commissioning of the expert witness the questions on which the expert witness should focus.
- The Family Justice Service should take responsibility for work with the Department of Health and others as necessary to improve the quality and supply of expert witness services. This will involve piloting new ideas, sharing best practice and reviewing quality.
- The Legal Services Commission should routinely collate data on experts per case, type of expert, time taken, cost and any other relevant factor. This should be gathered by court and area
- We recommend that studies of the expert witness reports supplied by various professions be commissioned by the Family Justice Service.
- Agreed quality standards for expert witnesses in the family courts should be developed by the Family Justice Service.
- A further pilot of multi-disciplinary expert witness teams should be taken forward, building on lessons from the original pilot.
- The Family Justice Service should review the mechanisms available to remunerate expert witnesses, and should in due course reconsider whether experts could be paid directly.

The representation of children

Basic principles

3.156. In public law children are parties to proceedings and represented by both a social worker (the guardian) and a solicitor. We believe that children should continue to be parties to proceedings. We discussed in the interim report whether either representative could be removed but concluded that both should remain. We made a series of recommendations:

- *the tandem model should be retained but it needs to be used in a more proportionate way;*
- *the merit of using guardians pre-proceedings needs to be considered further; and*
- *the merit of developing an 'in-house' tandem model needs to be considered further.*

3.157. Respondents expressed strong support for the tandem model, as do we. Recognising the pressures we asked what core tasks a guardian should undertake in care proceedings. There was a high degree of consensus around the need for them to:

- meet the child and work with them to ensure their wishes and feelings are listened to and heard;
- represent those wishes and feelings to the court;
- focus proceedings at all times on the child's best interests;
- provide the court with their independent view of the child's welfare; and
- meet the parents and read all local authority files were considered important.

3.158. These seem right, with caution about the reading of local authority files. The guardian should continue to have this power but in most cases evidence submitted by the authority should be sufficient.

3.159. Respondents felt that the current statutory duties and responsibilities of guardians were appropriate. People disagreed over whether the guardian should have a role in the detailed scrutiny of the court plan, as over the role of the court in this regard.

In those cases where courts have sought to involve themselves in the minutiae of a plan, it is, as often as not, at the prompting of guardians that they have done so...Just as courts should re-focus on the core issue of whether a child should live with parents or be removed to the care of a local authority, so should guardians.

Kent County Council, consultation response

The guardian's scrutiny of the care plan should be limited in line with the limitations to be imposed on the courts. We propose no change to the statutory framework.

3.160. We emphasised in the interim report the importance of the guardian as a voice for the child in proceedings. Respondents agreed this is essential and felt strongly that the guardian must be able to spend sufficient time with the child.

The guardian needs to enter the child's world to find out what the child has gone through and is going through, and represent the child's perspective. This requires the giving of sufficient attention by the guardian to the child and active relationship building with them to fulfil that role, and not only at the beginning and end of cases.

Resolution, consultation response

3.161. We deal with the general principles relating to hearing the child's voice in chapter 2. In public law it is important that the guardian:

- ensure the child is aware of what is happening and understands the decisions to be made;
- give age-appropriate support to make their voice heard, should they wish, using a menu of options to spell out the ways that this could happen;

- gain and maintain the necessary skills to be able to understand and interpret the child's views; and
- ensure the child is given the chance to decide how they wish to hear the outcome of the case and from whom.

Proportionate working

3.162. We recognised in the interim report that court social work services must be managed efficiently. Their input has to be appropriate to the needs of the case, reflecting the complexity of cases and the stage they are at. We used the word proportionate.

3.163. Our use of this word concerned some respondents, viewing it as endorsement of a revised Cafcass operating framework. We have taken no view on that, not least because it is still under development.

3.164. We understand concerns about any reduction of guardian involvement. No public law case is unimportant. But the system has to be able to put resource where it is most needed. It cannot do everything so choices have to be made.

3.165. The key elements of a proportionate approach to allocation of guardian resource in our view are these.

- The guardian should carry out an initial assessment of how much support is needed from themselves and the solicitor when the case is received.
- An initial assessment at this point of the quality and sufficiency of the authority's work will be needed.
- There should be dialogue between the judge, guardian and solicitor throughout a case to agree what the guardian should focus on, without compromise to the guardian's independence.
- The guardian tends to be more important in the early stages of a case and their reports should be available as early as possible.
- Guardians, like judges, should focus on the child's timescales with a rigorous approach to the commissioning of expert reports and proposals for assessment of multiple family members.
- Guardian and solicitor should both attend court only if necessary.

The responsibilities here are in addition to those set out in paragraph 3.161

3.166. None of these is incompatible with the independence of the guardian in the individual case. The President has recently stressed the importance of this and held that the guardian's discharge of their professional duties is a matter within their discretion.⁹⁴ It remains of course a requirement that court social work services and guardians should be properly managed.

⁹⁴ A County Council v K & Ors (By the Child's Guardian Ht) [2011] EWHC 1672 (Fam).

Other ways of working

- 3.167. We noted in the interim report a pilot project set up by Cafcass and Coventry and Warwickshire local authorities to deliver court social work before proceedings. Cafcass officers are involved once the pre-proceedings stage begins in order to create a better and more coherent plan for the child, to prevent cases going further, to progress them more quickly if they do and to reduce the number of later expert assessments.
- 3.168. In consultation there were concerns about the impact on guardians work in proceedings if they also assumed pre-proceedings work and the capacity of the system to deliver these increased responsibilities. There was also concern that the responsibility of the local authority would be undermined before proceedings start. There are as yet no results from the pilot. The pilot will need to be judged in terms of outcomes for children and of cost-effectiveness.
- 3.169. Cafcass had also put forward the possibility that solicitors for children might be government-employed rather than self-employed, thus extending the High Court model where solicitors for the child are employed by Cafcass and work alongside guardians.
- 3.170. In response particular concern was expressed about the effect this could have on the availability in some local areas of family solicitors to represent parents. We share this concern. The option is nevertheless worth exploring and we recommend this should be done.

Final recommendations

- The tandem model should be retained but resources carefully prioritised and allocated.
- The merit of using guardians pre-proceedings needs to be considered further.
- The merit of developing an in-house tandem model needs to be considered further. The effects on the availability of solicitors locally to represent parents should be a particular factor.

Alternatives to conventional court proceedings

- 3.171. We recommended that alternatives to some current court processes should be developed and extended:

- *Family Group Conferences can be useful although their effectiveness needs more research;*
- *formal mediation approaches in public law proceedings may have potential; and*
- *the Family Drug and Alcohol Court in the Inner London Family Proceedings Court shows considerable promise.*

- 3.172. The response was mixed with the natural caveats that the alternatives should not increase delay or harm children. A number of respondents pointed to the fact

that 'mediation' is used in many different ways in the system already, as parties and professionals seek to engage parents and children and find constructive solutions to the difficulties they face.

- 3.173. We agree that these skills are important and professional development of solicitors, guardians and social workers should support their extension.
- 3.174. We continue to believe that the development of approaches and programmes that avoid or reduce the need for distressing and costly court cases should be encouraged. In particular these approaches are more likely to offer effective support to parents, to help them resolve their problems. Some respondents criticised us for not paying sufficient attention to the support needs of parents.
- 3.175. It will be important in the wider moves to reform the system that the view point and support needs of parents are not over looked. Our recommendations should support this (see chapter 2). Improvements to social work services and the quality of assessments (see paragraphs 3.97 – 3.105) are also clearly critical to better support for families.

Family Group Conferencing

- 3.176. We described Family Group Conferencing (FGC) and its extent in different forms in most local authorities in England and Wales.⁹⁵ Most respondents were strongly supportive with a few people arguing that their use should be mandatory, as in New Zealand. Some by contrast argued that an FGC would simply add delay where an authority has already carried out thorough investigations.
- 3.177. We see real potential for FGCs to add value. Statutory guidance already identifies FGCs as a useful tool and local authorities are expected to indicate in an application to court whether an FGC has been considered and held. We recommend again that research on effectiveness, quality and cost is required to cover also what works best in which circumstances. Stronger guidance must await that research but meanwhile we recommend that government and judiciary encourage them.

Child Protection Mediation

- 3.178. We described in the interim report how formal mediation is now used in child protection proceedings in some other jurisdictions, but rarely in England and Wales.⁹⁶ Respondents agreed this should be trialled here, particularly in relation to questions of contact or where relationships between family members had broken down. The mediation model would need to be created carefully. Many of the principles of mediation would not need to change but the mediator would need to be particularly skilled. Issues relating to mediator discretion and imbalances between the parties would need to be addressed.

- 3.179. We recommend that a pilot programme should be established.

⁹⁵ See *Family Justice Review Interim Report* (2011) paragraphs 4.277 – 4.279.

⁹⁶ See *Family Justice Review Interim Report* (2011) paragraphs 4.280 – 4.285.

Family Drug and Alcohol Court (FDAC)

- 3.180. The interim report described the innovative approach taken by FDAC to parents with substance abuse problems who face losing their children.⁹⁷ Responses to consultation were largely positive and the pilot continues to be supported by local authorities and other professionals.
- 3.181. In the interim report we considered that there was scope for further limited roll out depending on an evaluation of costs and the longer-term outcomes for children. Since then, the final report of the first stage of the FDAC evaluation has been published.⁹⁸ This shows that FDAC is dealing quickly and constructively with difficult substance-abuse cases, engaging parents and producing positive outcomes.
- 3.182. Recently, work has been commissioned to look at costs with a view to sustainable funding of FDAC, or other FDAC-style models. Further work is underway that should reveal the longer term outcomes for children who have been reunited with their parents through FDAC.⁹⁹ There has also been interest from local authorities outside London. We welcome these developments and recommend that other uses of the model should be fully evaluated.
- 3.183. Our support for the longer court directed FDAC process could seem at odds with our aim to reduce delay. However local authorities deem only a minority of cases as appropriate for FDAC and some of those are rejected by FDAC itself. The future could see an FDAC approach being used with the minority who show willingness and ability to change, with the majority going through the normal court process.
- 3.184. Both local authorities and courts more generally could learn from FDAC's focused approach to proceedings, including its engagement with all the parties and its use of an integrated team to provide high quality assessments to court and therapeutic support for parents.

Support for parents post proceedings

- 3.185. Parents have a degree of support before and during proceedings but not after. We have been urged to consider this. Several factors are relevant.
- Currently the length of proceedings and the use of multiple experts play a role in helping parents accept that they are likely to lose their children. Our other proposals should reduce this effect, with benefit for children but possibly loss to parents who may be left with less understanding and acceptance of the court's decision.

⁹⁷ See *Family Justice Review Interim Report* (2011) paragraphs 4.286 – 4.290.

⁹⁸ Harwin J., Ryan M and Tunnard J., with Pokhrel S., Alrouh B., Matias C. and Momenian-Schneider S. (2011) *The Family Drug and Alcohol Court (FDAC) Evaluation Project Final Report*. Brunel University.

⁹⁹ A second stage study is being conducted by Judith Harwin and her team at Brunel University, funded by the Nuffield Foundation to compare family outcomes in 100 FDAC and 100 comparison cases. The new study will track families for up to three years after the end of care proceedings. This will provide comparative information on the sustainability of parental substance misuse recovery, placement stability, child removal due to neglect or abuse, and the initiation of fresh legal proceedings.

- Court involvement, and particularly the loss of a child, might prompt change in parental behaviour.
- Parents often have more than one child removed from their care.¹⁰⁰ Courts reported to us cases where a mother has lost 10, 12 or 14 children.

It is argued that support and intervention after proceedings could help mitigate these issues and prevent problems reoccurring.

3.186. We have taken no evidence on this, but know that in some areas projects are being developed to offer support services to parents during and after proceedings to help rebuild relationships and avoid future court involvement. There seems to us that there is little doubt that later distress, damage and expense could be mitigated with support from health professionals and others. We recommend government consider options for piloting new approaches to supporting parents through and after proceedings, to re-establish engagement with social services and access other services, to prevent child protection concerns arising again.

Final recommendations

- The benefits of Family Group Conferences should be more widely recognised and their use should be considered before proceedings. More research is needed on how they can best be used, their benefits and the cost.
- A pilot on the use of formal mediation approaches in public law proceedings should be established.
- The Family Drug and Alcohol Court in Inner London Family Proceedings Court shows considerable promise. There should be further limited roll out to continue to develop the evidence base.
- Proposals should be developed to pilot new approaches to supporting parents through and after proceedings.

¹⁰⁰Masson, J. et al (2008)

4. Private law

Introduction

- 4.1. Private family law deals with issues following the breakdown of family relationships. We described in our interim report how difficult and damaging these can be. The state cannot fix fractured relationships or create a balanced, inclusive family life after separation, especially where this was not the case before separation. It needs instead to focus on education, support and effective processes to achieve the best possible outcomes, or the least detrimental, for those involved and above all any children. The state needs also to identify and protect those who are at risk when people seek its assistance. Protection issues must be dealt with swiftly to ensure that children and vulnerable adults are safeguarded.
- 4.2. Our interim report also discussed a range of issues, both specific to private law and more general, that drive the need for reform. These include:¹⁰¹
- the damaging effect of parental conflict on children;
 - the view (which may or may not be right) that lawyers generally take an adversarial approach that inflames rather than reduces conflict;
 - a perception that the system favours mothers over fathers;
 - a fear that wider family members may lose contact;
 - the difficulty of navigating the system;
 - children not understanding processes or feeling listened to;
 - questioning whether courts are the best place to resolve private law disputes;
 - arrangements that may break down in the long term, at a high emotional cost to both children and adults;
 - the time cases take; and
 - changes to legal aid.
- 4.3. Parental disputes about the arrangements for contact account for a significant number of private law applications made to court each year. This is despite the fact that currently, as one study has shown, only 10% of separating couples go to court to settle their disputes about contact.¹⁰² Judicial determination is unavoidable in the most difficult cases. But it tends to be a blunt instrument. Despite the best efforts of judges, lawyers and Cafcass the process of achieving a determination may itself further inflame things and court ordered arrangements are necessarily likely to be less flexible than agreements made by the parties. Fortunately most separating couples do make their own arrangements and our aim is to help as many people do that as safely as they can.

¹⁰¹ Further analysis of these issues can be found in the interim report paragraphs 5.27- 5.57.

¹⁰² http://data.gov.uk/dataset/non-residential_parental_contact_-_2007-08_results. Last accessed 26/10/11.

4.4. Our discussion of private law is divided into three main sections:

- making parental responsibility work;
- the process of resolving disputes; and
- divorce and ancillary relief.

Making parental responsibility work

4.5. A key principle of private family law is that both parents have a responsibility to ensure their child has the emotional, financial and practical support to thrive. These duties are recognised in the Children Act 1989 as parental responsibility and apply to both parents whether separated or not.¹⁰³

4.6. The panel – it hardly needs saying – starts from the position that both parents should be involved in raising their child wherever possible whether they are married, cohabiting or separated. A list of the elements of parental responsibility includes:

- 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 surname;
- consenting to the child's medical treatment; and
- arranging the child's education.

4.7. This arid list does no justice to the warmth and caring needed if parents are to nurture their children successfully. But understanding it is particularly important in the legal context of a separation and that needs to start before separation. We recognise the limits of what the law can do in this area, and the effectiveness of government action more widely also has limits. Yet it is right to do what can be

¹⁰³ See paragraph 5.66 of the interim report. We note that while the majority of fathers have parental responsibility, not all do. Currently, 93.8% of births are jointly registered (Office of National Statistics, *Births, further parental characteristics*, England and Wales 2009). Where fathers do not have parental responsibility they can acquire it if they are 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.

done. All our recommendations on the process of separation are governed by the aim to strengthen shared parental responsibility and to emphasise its importance as parents make arrangements for their child's upbringing post separation. The aim is to focus both parents on the needs of their child and, where they both have parental responsibility, that they each share equal status as parents of their child.

- 4.8. This section aims to look at:
- what should be achieved through general education and legislation;
 - how grandparents should be involved; and
 - encouraging parental agreement and the role of the courts.
- 4.9. The starting point for both parents to achieve shared parental responsibility must be education. Then following separation, parents must be helped as far as possible to grasp their roles and responsibilities so that they can cooperate in their parenting. The following paragraphs give an overview of the processes we propose ahead of a discussion of some key issues and then a more detailed discussion of process.
- 4.10. Our recommendations are intended to form part of a continuum with emphasis at each stage upon the shared parental responsibility of each parent and upon separating parents reaching agreement about the future care and welfare of their child.
- 4.11. We propose that separating couples should go first to an information hub (paragraphs 4.74 – 4.79) to give them ready access to a wide range of information and direction to further support as appropriate. This should emphasise shared parental responsibility throughout. The hub should:
- focus parents to consider the needs of their child first, emphasising that a child will benefit from a continued relationship with both parents, where this is safe;
 - support parents to resolve their issues independently;
 - direct them to find available support to resolve any disputes outside of court; and
 - help them to understand what to do and what to expect where an application to court is necessary.
- 4.12. Shared parental responsibility is a matter of practicalities as much as principles. It breaks down if the practical arrangements break down. We propose that parents be encouraged to reach a Parenting Agreement (paragraphs 4.49 – 4.54), which they will be able to access in template form from the information hub. A Parenting Agreement is a document, individual to each family to set out the manner in which parents will either jointly or independently meet their

parental responsibilities.¹⁰⁴ Parents should discuss the arrangements with their child and review them as he or she develops or circumstances change.

- 4.13. Where parents require further support they should attend a mediation information and assessment meeting (MIAM) (paragraphs 4.83 – 4.85). Following a MIAM we recommend that all parents should attend a Separated Parents Information Programme (PIP), (paragraphs 4.87 – 4.90). PIPs should support a better understanding of parental responsibility and the importance of a continued relationship with both parents where this is safe. PIPs should complement the information parents received on the information hub and the principles set out in guidance, a kind of code of practice.
- 4.14. If parents have not reached agreement by this stage we propose they should attend a dispute resolution service such as mediation (paragraphs 4.94 – 4.99). This should be centred on the best interests of the child and embody the principles of shared parental responsibility. Mediators may also find Parenting Agreements a useful tool. If dispute resolution has failed to lead parents to agreement they would then be able to apply to court. Here the Children Act 1989 explicitly makes the child's welfare the court's paramount concern. A clear principle in case law is that it is in a child's best interests to have a continued, meaningful relationship with both parents following separation where this is safe. (A particular question is whether this principle should be set out in primary legislation. We discuss that in paragraphs 4.22 – 4.40).
- 4.15. If cases go to court we recommend the introduction of a 'child arrangements order', to replace contact and residence orders and to cover all issues related to a child's upbringing (paragraphs 4.55 – 4.68). The new order would aim to move discussion away from loaded terms such as residence and contact to focus on the practical issues of the day to day care of the child. The First Hearing Dispute Resolution Appointment (FHDRA) will be retained, after which, if the dispute is not resolved, a case will be allocated to a simple or complex track depending on complexity.¹⁰⁵ We also propose more effective case management and judicial continuity to ensure cases are resolved more quickly, to avoid delay and to prevent unsatisfactory interim arrangements from becoming the norm.
- 4.16. We recommend swift enforcement where court orders are breached with the case returning to the same judge (paragraphs 4.152 – 4.155).

General education and legislation

4.17. In the interim report we set out the following recommendations:

- *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;*

¹⁰⁴ See interim report paragraphs 5.90 – 5.92 for further discussion.

¹⁰⁵ At the FHDRA the court, in collaboration with the Cafcass Officer, and with the assistance of any mediator present, will seek to assist the parties in conciliation and in resolution of all or any of the issues between them. Any remaining issues will be identified, the Cafcass Officer will advise the court of any recommended means of resolving such issues and directions will be given for the future resolution of such issues.

- *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; and*
- *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.*

4.18. We recommended in our interim report that parents should be given a short leaflet when they register the birth of their child, to give them an introduction to the meaning and practical implications of parental responsibility. This is often a time when families receive a variety of information to support them in the upbringing of their children, for example *The Pregnancy Book* published by the Department of Health. Wherever possible these materials should also include information on parental responsibility. It may also be useful to develop a richer statement of what it means to parent and the decisions that may be needed, analogous perhaps to the Code of Practice under the Mental Capacity Act (2005). This sets out core principles and methods for making decisions and carrying out actions in relation to personal welfare, healthcare and financial matters affecting people who may lack capacity to make decisions for themselves. Leaflets are a small step and capable of caricature, but could have some impact if parents read them during pregnancy and when their child has just been born.

4.19. Strong involvement of both parents with their children before separation helps ensure that this continues after separation. Research shows that when parents share parenting more fully before separation they will be more likely to share parenting after separation.¹⁰⁶ But with or without that the need after separation is to keep both parents focused on what is best for their children. This will include persuading each to recognise the importance of the other in the child's life and the need for the child to keep a meaningful relationship with both parents where it is safe to do so. Separating parents must be encouraged, in consultation with their children, to develop flexible agreements to fit their circumstances.

4.20. Parenting after parting is one of the most important, difficult, sensitive and emotive areas of family law. As we noted in the interim report many parents, usually fathers, feel that the private law system is biased. We found that advice given by solicitors to non resident parents is based on court norms and typical case outcomes, which can perpetuate this perception.¹⁰⁷ However, courts start from the principle that contact with both parents will be in the interests of the child, unless there are very good reasons to the contrary. One study noted that courts:

¹⁰⁶ Trinder, L. (2010) *Child and Family Law Quarterly*, vol 22, no. 4, 475-498.

¹⁰⁷ See *Family Justice Review Interim Report* (2011) paragraphs 5.33 – 5.36 for a more detailed discussion of this. The literature review published alongside this report found “evidence on outcomes of applications to court for contact and residence [which] suggest[s] that the principle of the *status quo* is often applied in residence cases” Giovannini, E. (2011) *Outcomes of Family Justice Children's Proceedings - a Review of the Evidence*, Ministry of Justice. We note that in most cases this will usually mean the child lives with their mother.

*... make great efforts to secure this; and in most cases they are successful. Nor are the amounts of contact that non-resident parents end up with negligible, though they may not be as much as some of them would wish.*¹⁰⁸

- 4.21. The research found no evidence that courts are biased against non resident parents.
- 4.22. We made clear in our interim report and have again emphasised it earlier in this report our view that children benefit from a relationship with both parents post separation, where this is safe. The question is how best to achieve this without inadvertently encouraging arrangements which involve frequent changes of carer or home for a very young child, or exposing children to ongoing parental conflict. In particular the issue for us was to recommend what role the law and the courts should play.
- 4.23. Drawing on international and other evidence we opposed legislation to encourage 'shared parenting'. The evidence showed that people place different interpretations on this term, and that it is interpreted in practice by counting hours spent with each parent, disregarding the quality of the time. The thorough and detailed evidence from Australia showed the damaging consequences for many children. So we recommended 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.*
- 4.24. Our opposition to legislation that might give rise to a shared parenting presumption attracted a large response in consultation. Charities, legal and judicial organisations and academics (including Professors Helen Rhoades, Liz Trinder, Rosemary Hunter and Judith Masson and the Network on Family Regulation) supported the panel's stance.

I am encouraged that the Review has opted against a shared care presumption. That is entirely consistent with the research evidence on what works for children.

Professor Liz Trinder, consultation response

- 4.25. Against this, many individuals – typically grandparents, fathers and unidentified respondents – said that a presumption of shared parenting is necessary in order to ensure that both parents remain involved with their children post separation. It was argued that decisive steps are required and a clear message needs to be sent.

There MUST be an assumption of shared parenting from the outset. It has been proven that children have a better outcome if both parents remain involved in their upbringing.

Grandparent, consultation response

¹⁰⁸ Hunt, J. and Macleod, A. (2008) *Outcomes of applications to court for contact orders after parental separation or divorce*, Ministry of Justice.

- 4.26. Many contributors took strong positions, citing gender imbalance, bias and institutional wrongdoing within family justice; others maintained that there is insufficient evidence against shared parenting to suggest that it should not be the primary consideration of the court.
- 4.27. Having thoroughly reconsidered the evidence, we remain firm in our view that any legislation that might risk creating an impression of a parental 'right' to any particular amount of time with a child would undermine the central principle of the Children Act 1989 that the welfare of the child is paramount. We also believe that legislation is a poor instrument for social change in this area. We were told in Sweden for example that shared parenting arrangements after separation have been increasing, but only because they are now more common before separation.
- 4.28. So we maintain our view that the focus should instead be on supporting and fostering a greater awareness of shared parental responsibility and on the duties and roles of both parents from birth onwards. Legislation is not the means through which to achieve this. As one legal adviser, responding to the online consultation put it: '*education, not legislation.*' This is the intention of the proposals set out in this chapter.
- 4.29. In the interim report we also recommended:
- *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.*
- 4.30. Many contributors – typically fathers and grandparents – supported it as an important step to "*reflect how society has changed and give hope to the thousand of fathers who wish to have an active and appropriate engagement in their child's upbringing*".¹⁰⁹ Many people responded out of painful personal experiences.
- 4.31. Often, however, these contributors conflated our more limited proposal with a move toward a presumption of shared parenting. Such confusion itself illustrates the dangers of any attempt at legislative change.
- 4.32. Other supporters also felt the proposal would be a useful step, part of a wider move to change the culture of private law cases and to reflect the body of case law that has developed around contact and residence disputes.

The Law Society supports this proposal as it would strengthen the principles behind the Children Act 1989 which recognise the importance of children having a meaningful relationship with both parents.

The Law Society, consultation response

- 4.33. However whilst the Law Society agreed with the principle they had doubts about its application, insisting that care must be taken to avoid misinterpretation of any legislation as a presumption of shared time. The British Association of Social

¹⁰⁹ Father, consultation response.

Workers also supported the principle, but argued it “*must never come at the expense of welfare concerns about children*”.¹¹⁰

Should this proposed change in the law be progressed we feel it must be expressed in terms of the welfare/rights of the child and must be accompanied by VERY clear information for parents and children which clarifies that the interests of the child must remain paramount.

The Children’s Society, consultation response

- 4.34. Many respondents felt that the insertion of a ‘meaningful relationship’ statement would potentially allow for the creation of a de facto shared time presumption and rejected the proposal as a result.

Although it could be said that such a provision would do no harm and would merely put into statutory form the approach already taken by the court, there is a real risk that such a statutory provision could give rise to an increase in litigation and in particular an increase in the number of high conflict cases where one parent (more often likely to be the father) stridently asserts that the other parent is not permitting him to enjoy a meaningful relationship with his child. In short, the motive for such a change is laudable but the consequences may not be.

Circuit Judge, consultation response

The panel has been unequivocal in its recommendation to shut the door on creating either a legal presumption of shared care or the expectation of shared care as an expression of parental rights. To proceed with an amendment to legislation regarding a ‘meaningful relationship’ would insert a wedge into a door the panel has sought to firmly shut elsewhere in the interim report.

Gingerbread, consultation response

- 4.35. We have also been particularly struck by further evidence, received from Australia, where a similar provision for a ‘meaningful relationship’ was made in their 2006 family law reforms. Evidence has shown increased litigation and that the change has contributed to damage to children because the term ‘meaningful’ has come to be measured in terms of the quantity of time spent with each parent, rather than the quality of the relationship for the child.¹¹¹

In practice, Australian trial judges have tended to measure the notion of a meaningful relationship in temporal terms, creating a de facto assumption or at least a yardstick of shared care.

Professor Helen Rhoades, consultation response

- 4.36. It has also led the courts to weigh up the balance between a meaningful relationship and harm to the child, with protection from harm compromised in

¹¹⁰ British Association of Social Workers, consultation response.

¹¹¹ In Australia, legislative changes in support of shared parenting saw a marked increase from 4% to 34% in judicially imposed shared time. Approximately a quarter of these arrangements involved children with a family history entailing violence and a parent concerned about the child’s safety. Kaspiw, R. et al (2009) *Evaluation of the 2006 family law reforms*, Australian Institute of Family Studies.

some cases. The Australian government has recently felt compelled to amend this provision to affirm that protection from harm must take priority.¹¹²

- 4.37. Many respondents pointed out that it is already accepted in law that it is in the child's best interests to have continued contact with both parents where this is safe. Any further statement in legislation to this effect risks creating confusion, misinterpretation and false expectations.

Superficially, a definition laid down in legislation would go some way in providing clarity for legal and family professionals as well as parents. However, coming to consensus on a workable definition would be fraught with difficulty and could result in a lengthy, and potentially conflicting, check-list of descriptors. Crucially, a tight definition would unduly impinge upon judicial discretion and restrict a judge's ability to focus on the child's welfare first and foremost. Conversely, no attempt to define the term 'meaningful relationship' could lead to unwieldy and inconsistent interpretations in judicial determinations. This is equally problematic and could result in appeals and repeat litigation.

Gingerbread, consultation response

- 4.38. This effect is already being felt in Australia, where judges have made repeated attempts to reach a definitive position on the meaning of a 'meaningful relationship'.

Legal practitioners reported that they had found the 2006 amendments "difficult to apply", and that a number of the Act's key principles were "hard for lay people to understand". These difficulties reflect the ongoing confusion about the meaning of the 'meaningful relationship' provision.

Professor Helen Rhoades, consultation response¹¹³

- 4.39. It would be quite wrong and counter productive for children to make this area even more complicated and contested. As a magistrate said in response to our consultation, "*meaningful relationships cannot be compelled*". There is also a clear risk that more legislation would lead to a need (as in Australia) for yet more legislation.

Rather than introducing a provision that creates problems and then adding a fix for those problems, it would be far more sensible not to introduce the problem-creating provision in the first place.

Family Justice Council, consultation response

- 4.40. We have concluded that the core principle of the paramountcy of the welfare of the child is sufficient and that to insert any additional statements brings with it unnecessary risk for little gain. As a result, we withdraw the recommendation that a statement of 'meaningful relationship' be inserted in legislation.

¹¹²The Family Law Legislation Amendment (Family Violence and Other Measures) Bill passed in the House of Representatives on 30 May 2011. The Bill seeks to emphasise that child safety is to take precedent over a 'meaningful relationship' and not vice versa.

¹¹³The relevant evidence received from Professor Rhoades is attached at Annex G.

Final recommendations

- Government should find means of strengthening the importance of a good understanding of parental responsibility in information it gives to parents.
- 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.

Involvement of grandparents

4.41. In the interim report we recommended:

- *the need for grandparents to apply for leave of the court before making an application for contact should remain.*

4.42. Grandparents too are often extremely important to children, and continue to be important if parents separate. They nevertheless are required to seek leave of the court before they are allowed to apply for contact with their grandchildren where this is being refused. We were asked to consider whether this requirement should remain, and concluded in the interim report that it should. We have reviewed whether we were right to make this recommendation.

4.43. Respondents to the interim report were divided:

We were disappointed to see the Review did not propose removing the requirement for a grandparent to seek leave of the court before applying for a contact order... A grandparent's relationship to a child is different and special but the law treats them like any other adult when they are trying to establish contact with their grandchildren. We believe this should change and do not accept the argument that the court system would be overrun with applications if this requirement were removed.

Grandparents Plus, consultation response

We welcome the recommendation that the need for grandparents to apply for leave of the court before making an application for contact should remain. Whilst recognising that a continuing relationship with grandparents can be important for children when their parents separate, we consider that the additional step of obtaining leave from the court ensures that only legitimate applications are dealt with in court. Removing this requirement would serve to increase applications for contact and put further pressure on a family justice system which is already under strain, increase delays and litigation within families, to the detriment of the children involved.

Welsh Women's Aid, consultation response

We agree with the Report's proposal that the requirement for grandparents to seek the permission of the court before making an application should be retained.

The Association of Her Majesty's District Judges, consultation response

- 4.44. Many respondents argued that the payment of two sets of fees, for leave of the court and then for the substantive application is a financial burden on grandparents.

Contrary to what the panel suggests, applying for leave causes additional expense, namely a minimum of £175 court fees plus any associated legal fees. Inevitably this additional step causes prolongation of proceedings, prolongation of litigation and a waste of court time.

An applicant, of course, then has to pay a further fee of £175 for the substantive application.

The Grandparent's Association, consultation response

- 4.45. We recognise the importance to children of relationships with their grandparents and recommend that this be emphasised in the process to come to an agreement about their future care. However we continue to feel that the requirement for grandparents to seek leave of the court before making an application is not overly burdensome and should remain.
- 4.46. As a matter of principle we agree with the many in the call for evidence who argued that just as contact is a right of the child not of the parents so also grandparents do not have a 'right' to contact. We noted in our interim report research showing 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.¹¹⁴ We do not believe that courts refuse leave unreasonably or that seeking leave is slow or expensive for grandparents. Rather, the requirement to seek leave prevents hopeless or vexatious applications that are not in the interests of the child.
- 4.47. As regards cost, under the Family Proceedings Fees (Amendment) Order 2010 when an application requires permission of the court, the relevant Children Act 1989 fee is payable when permission is sought but no further fee will be charged if permission to make the relevant application is granted and the application is subsequently made. So only one fee is payable.
- 4.48. We recommend that the requirement to seek leave should remain. But the importance of grandparents should be emphasised in the information and education processes discussed later in this report (paragraphs 4.74 – 4.79).

Final recommendation

- The need for grandparents to apply for leave of the court before making an application for contact should remain.

¹¹⁴Ferguson et al (2004) *Grandparenting in Divorced Families* Bristol Policy Press. For example, some grandparents may display greater animosity towards their son or daughter's ex-partner than the separated parties themselves. At times grandparents can express these negative feelings in front of their grandchildren.

Encouraging parental agreement and the role of the court

4.49. In our interim report we noted:

- that there is too great a focus on parental rights rather than responsibilities, and that this goes with the now loaded terms contact and residence to the extent that the terms themselves foster a sense of winning or losing; and
- 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.

4.50. As a result we made the following recommendations:

- *parents should be encouraged to develop a Parenting Agreement to set out arrangements for the care of their children post separation;*
- *provision should be made to ensure that a signed Parenting Agreement has weight as evidence in any subsequent parental dispute;*
- *residence and contact orders should no longer be available to parents who hold parental responsibility, but disputes over the division of a child's time between parents should instead be resolved by a specific issue order;*
- *the terms, forms and evidence required by the court should also be reviewed to reduce their contribution to conflict;*
- *a father without parental responsibility who wishes the court to consider the child living with him (currently a residence order) should first apply for parental responsibility, 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 parental responsibility he is still able to make a contact application; and*
- *the full range of the four orders under Children Act 1989, section 8 should remain available to non-parental relatives.*

4.51. The aim would be to support parents to focus on the best interests of their child and make agreements on the range of issues about their care post separation, rather than just the narrow issues of contact and residence so that:

- focus remains on the details of a child's day to day arrangements and care, rather than on status in relation to residence or contact;
- the agreement would set 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 potentially disputed issues is reduced.

4.52. With some exceptions there was general support for Parenting Agreements.

Gingerbread supports the use of parenting agreements as a tool to help parents come to arrangements regarding their children after separation. Agreements should focus on the best interests of the child and be entered into voluntarily by parents. Parents should also recognise that agreements might need to be revisited and altered over time as the needs of their children change.

Gingerbread, consultation response

- 4.53. They are seen as a positive move towards encouraging greater cooperation between parents. Concerns were based largely on a fear that they offer insufficient protection when there are welfare concerns, a history of domestic violence or where there is a marked power imbalance between parents.
- 4.54. Child protection concerns are clearly important. We do not propose Parenting Agreements be compulsory, but rather recommend them as a tool to support parents as they make arrangements. The information hub (see below, paragraphs 4.74 – 4.79) should alert parents to available support and provide advice where one parent has child protection concerns. Safeguards already exist for parents who choose to use a mediator or seek court determination. So we maintain our recommendation that Parenting Agreements should be encouraged both for people who do not go to court and for those who do, as a means of identifying areas of agreement and narrowing the focus of disputes before court. We also maintain that if court determination is sought following a Parenting Agreement being made, the agreement should be admissible in evidence to establish what the couple had considered was a reasonable arrangement at that time. It would be given such weight as the circumstances of each case determine. The term Parenting Agreement is intended to reinforce the idea that parents agree arrangements and should then adhere to these unless they are changed by consent or, if necessary, a court order.
- 4.55. There was widespread but not universal support for the removal of the terms contact and residence.

On balance, however, we consider that removing the current emphasis on the different labels of residence and contact, implying a winner and a loser, would be helpful as part of a wider and sustained effort to change attitudes and culture. Both residence and contact are in fact about parenting time. Our members report advising clients to forget the labels and that matters are often easier to resolve if discussions are about co-operative parenting and parenting time in the interests of the child. Otherwise, some cases have been known to fight around the label when there is in fact agreement on parenting time.

Resolution, consultation response

- 4.56. Against the change it was suggested that it might:
- make no difference, noting that the terms access and custody are still in common use despite their abolition 20 years ago;
 - create confusion, particularly for the expected larger number of litigants in person with reduced legal aid; and
 - need a large legislative and administrative effort for little appreciable benefit.

Changing the terminology will not reduce conflict. There is no evidence that removing the terms residence and contact will reduce in any way the number of families in dispute or the intensity of those disputes.

Professor Liz Trinder, consultation response

- 4.57. Some responses argued for the development of a new order rather than using specific issue orders.

We would propose that, for parents at least, residence and contact orders of all descriptions should be abolished and replaced by 'parenting time orders,' rather than specific issue orders.

The Association of Her Majesty's District Judges, consultation response

- 4.58. There was also general concern that our proposals for a dual process for fathers without parental responsibility seeking a residence order were bureaucratic and confusing and could potentially make it even harder for some fathers to secure contact with their children.

We do not agree that a father without PR should have to make a two stage application for PR and then the equivalent of a current residence order. In practice there would be no need to apply for either or both would be sought. Where a parenting arrangement cannot be agreed, the process suggested would simply cause unnecessary delay.

Resolution, consultation response

- 4.59. Whether to remove the terms contact and residence is clearly a matter of judgement, and it would be difficult to point to clear evidence either way. The balance of the responses to consultation was though firmly in favour of removal and we agree with that. We were also struck by the Chief Justice of Australia's clear view that removal of the terms had been beneficial there.

- 4.60. We propose to change our recommendation about the form of order that should now be used. In the light of the consultation responses we propose that a broader, new order should be developed that would encompass all arrangements for children's care in private law. This could be termed a 'child arrangements order', which would set out the arrangements for the upbringing of the child. It would focus all discussions on resolving issues related to their care, rather than on labels such as residence and contact. It would of course, be necessary either in a Parenting Agreement or a court order to provide clarity on where a child would normally live and with whom a child would spend time.

If there is a ['child arrangements order'] it should be provided to contain 'where necessary specific provision of arrangements including where the child shall live, making the child available to be with each parent at times to be specified'... and perhaps other examples such as schooling.

His Honour Judge Altman, submission to the Family Justice Review

- 4.61. We agree. The majority of applications from parents and wider family members that need judicial determination would be for a child arrangements order. However, prohibited steps orders should be retained to ensure a child's protection and welfare and specific issue orders would be retained for discrete matters.

- 4.62. Further, the inherent jurisdiction of the High Court will be retained for those cases that fall outside the Children Act 1989 scheme.
- 4.63. This recommendation replaces our earlier view that parents with parental responsibility should apply for a specific issue order. The panel recommends that the new child arrangements order be available to fathers without parental responsibility, and wider family members as well with the permission of the court. This reflects concerns about the two stage process for fathers without parental responsibility and the potential for lack of clarity about the orders available to parents with parental responsibility in dispute with wider family members. Wider family members should still be required to seek leave before making an application to court for a child arrangements order.
- 4.64. The expectation is that as now, where a father would require parental responsibility to fulfil the requirement of care as set out in the order, the judge would also make an order of parental responsibility. Similarly where the order requires wider family members to be able to exercise parental responsibility, the judge would make an order that that person should have parental responsibility for the duration of the order.
- 4.65. The detail of our initial proposals has changed since the interim report, and we recognise that there are a number of practical implications that need further consideration (see box *Introduction of the child arrangements order: practical implications* for further discussion). However, following discussions with a number of experts and interested groups, we are confident that this order would enable more flexible, child focused arrangements.

The thinking behind the Children Act 1989 was that parents should be encouraged to make their own arrangements and the court would only decide what they could not decide. But their task, and the court's task, was not to allocate status or rights, so much as to settle the practical living arrangements for the child. Over the years, 'residence' and 'contact' have taken on too much of the flavour of the old 'custody' and 'access' orders. These proposals would restore the original vision underlying the 1989 Act.

Lady Hale, Supreme Court

- 4.66. We also note that these recommendations are consistent with the proposals set out by the Law Commission in advance of the Children Act 1989:¹¹⁵

The task of court could therefore be to decide, in general terms, the allocation of the child's time between his parents, each of which should have care and control while he is with them.

There are several advantages in regarding post-divorce arrangements in this light:

¹¹⁵The Law Commission, Working Paper No. 96 (1988), *Family Law Review of Child Law: Custody* London.

- a) *It would not be necessary to make invidious allocations of power and responsibilities between parents. It need not be suggested that one parent is better or more fit than the other, simply the child is able to spend more time with one or the other.*
- b) *Implicitly, there may be some encouragement towards a more equal distribution of time and with it the day-to-day responsibility for the child. We believe that such arrangements should be encouraged where they are desired by both parents, although they should never be imposed upon the unwilling.*
- c) *The upgrading of access should in any event reduce some of the difficulties faced by the parent who is exercising it.*
- d) *Parental powers and responsibilities would be given substance by the fact of care and control. If we are to think in terms of parental responsibilities rather than parental rights, as we think we should, and accept that such responsibilities are difficult to exercise properly in the absence of care and control, power and responsibility should go hand in hand and largely 'run with the child'. This should be preferable to the current type of joint custody order in which one parent has physical care and control but the other has some ill-defined powers of intervention or decision.*
- e) *Each parent would retain his parental status and with it his power of independent action, just as each has (or at least should have) during marriage. In the event of a dispute, recourse could be made to the court, again just as it can by parents during their marriage.*

4.67. This recommendation was changed, following consultation, to the suite of section 8 orders currently set out in the Children Act 1989.

Most children will live with one parent for most of the time and spend variable amounts of time with the other. The usual order at present is for 'reasonable access'. Our respondents did not think it desirable for orders to spell this out in any more detail unless and until disputes arose. Parents are usually able to agree upon their own arrangements, which have to be flexible enough to meet changing needs and circumstances. Rather than being required to specify the periods of time intended, therefore, the court should normally deal with where (or, more accurately, with whom) the child is to live, who he should see, and any other specific matters which have to be resolved.¹¹⁶

4.68. We agree that orders should not seek to spell out arrangements in any more detail than is necessary. Orders should be made only on areas in which parents are unable to make agreements independently. Our sense now is that the Law Commission was right in its original view.

¹¹⁶The Law Commission, Working Paper No. 172 (1988). *Family Law Review of Child Law Guardianship and Custody* London.

Introduction of the child arrangements order: practical implications

We recognise that a new order would be a major change. Some of the consequences are discussed here.

At present the holder of a residence order may remove the child from England and Wales for up to 28 days without the need to obtain the consent of any other holder of parental responsibility or the court. The panel's initial recommendation was that this automatic consequence should disappear along with residence orders and that in each case the parents with parental responsibility would decide between themselves the ground rules for either of them removing their child from the jurisdiction (or have this issue determined by the court) as is the case with all other potential issues. After further consideration we note the benefit that the automatic 28 day provision can bring to those cases where the parents have not expressly agreed matters, helping to avoid the need for uncontroversial applications to court. The panel now recommends that there be the facility to remove the child from the jurisdiction of England and Wales for up to 28 days without the need to obtain consent from other holders of parental responsibility or the court. This provision could either be attached to all holders of parental responsibility or be attributed to named individuals where a child arrangements order is in force.

A further automatic consequence of a residence order is that no person may cause the child to be known by a new surname without the consent of all other holders of parental responsibility or the leave of the court. As with the provision to remove a child from the jurisdiction of England and Wales for up to 28 days, the provision to change a child's surname could either be attached to all holders of parental responsibility or be specified as part of a child arrangements order.

The removal of residence and contact orders will mean some consequential changes to current legislation. Careful consideration will need to be given to the implications for rights of custody.

Final recommendations

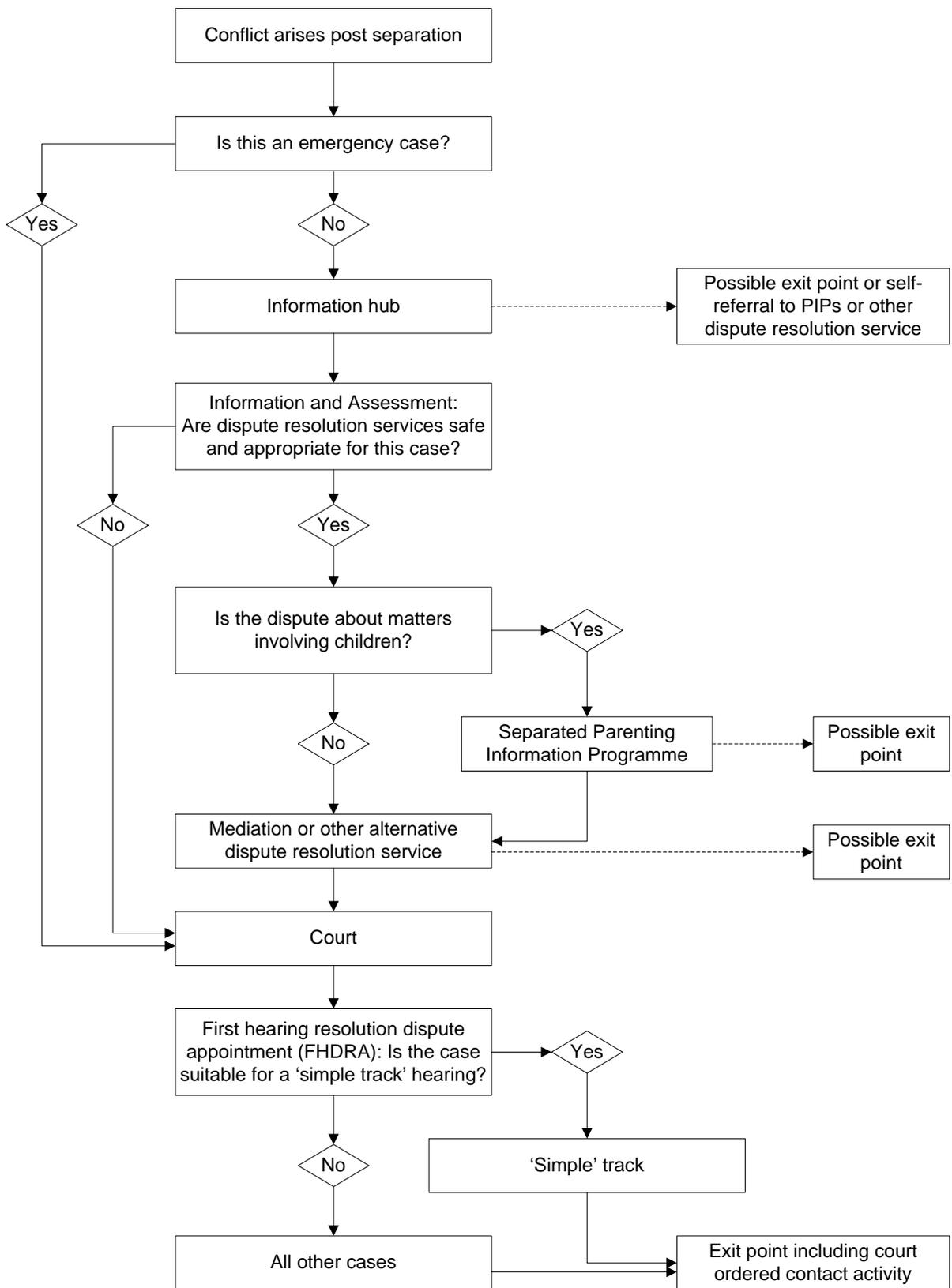
- Parents should be encouraged to develop a Parenting Agreement to set out arrangements for the care of their children post separation.
- Government and the judiciary should consider how a signed Parenting Agreement could have evidential weight in any subsequent parental dispute.
- Government should develop a child arrangements order, which would set out arrangements for the upbringing of a child when court determination of disputes related to the care of children is required.
- Government should repeal the provision for residence and contact orders in the Children Act 1989.
- Prohibited steps orders and specific issue orders should be retained for discrete issues where a child arrangements order is not appropriate.

- The new child arrangements order should be available to fathers without parental responsibility, as well as those who already hold parental responsibility, and to wider family members with the permission of the court.
- Where a father would require parental responsibility to fulfil the requirement of care as set out in the order, the court would also make a parental responsibility order.
- Where the order requires wider family members to be able to exercise parental responsibility, the court would make an order that that person should have parental responsibility for the duration of the order.
- The facility to remove the child from the jurisdiction of England and Wales for up to 28 days without the agreement of all others with parental responsibility or a court order should remain.
- The provision restricting those with parental responsibility from changing the child's surname without the agreement of all others with parental responsibility or a court order should remain.

A coherent process for dispute resolution

- 4.69. Our aim is a supportive, clear process for private law cases that promotes joint parental responsibility at all stages, provides information, manages expectations and that helps people to understand the costs they face. The emphasis throughout should be on enabling people to resolve their disputes safely outside court wherever possible.
- 4.70. In those cases where parents do decide that they need further support to help them reach agreement, assessment and targeted interventions should direct users to the most appropriate form or method of resolution at every stage. This section gives detail on the three main stages (see process map at figure 2) involved in dispute resolution:
- an information hub;
 - dispute resolution services; and
 - the court process.

Figure 2 – Processes for divorce



4.71. Most respondents to the consultation welcomed the proposed process.

The FJC supports the aim... to establish a supportive, clearly delineated process for private law cases that emphasises parental responsibility at all stages, provides information, manages expectations and that helps people to understand the costs they face at each stage.

The Family Justice Council, consultation response

4.72. But at this stage we note two general concerns, that the process would increase delay with the risk of reinforcing situations where children have no contact with their non resident parent (thus making it harder to re-establish contact with the other parent), and that it would undermine the existing Private Law Programme.

Mediation will also be inappropriate in many cases and, where that is the case, 'going through the motions' will cause delay, and likely harm to the child.

The Association of Her Majesty's District Judges, consultation response

The court is the place to resolve disputes. Having Case managers before coming to court is to introduce a new skill amongst people who are second-guessing the court. Mediators are mediators, not general factotums. The private law programme is dependent on getting to court within 4 weeks with safety checks already carried out and the court provides an umbrella under which the best way forward can be planned. Experience shows that in this arena between 50 and 60% of cases are resolved. To introduce an earlier procedure will cause delay, additional expense as it applies to 100% of cases and will weaken the private law programme that has been univer[s]ally approved.

Principal Registry of the Family Division, consultation response

4.73. We note that the concerns about delay and the effect on the Private Law Programme apply equally to the Pre-Application Protocol, which is already in force. But our difference from the respondents quoted in the preceding paragraph rests in many ways on a different view of the proper role of courts. We would argue first that the extra time will be well spent if it results as we expect in fewer cases going to court, and secondly that the opportunity of the FHRA will still be there. We address concerns about time management and risks to the parties in the following sections.

Information and support for dispute resolution

4.74. We made the following recommendation:

- *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. This should cover issues relating both to children and to finance.*

- 4.75. The proposal to join up information services was given overwhelming support, with many noting its importance in enabling parents to seek advice on the full range of issues they might encounter following separation.¹¹⁷

Cafcass supports the introduction of information hubs and steps to inform parents of options to resolve disputes and provide for effective parenting without recourse to courts.

Cafcass, consultation response

- 4.76. Some respondents noted the limitations of the information hub and argued that it must provide information to support families where there may be issues of child protection or domestic abuse, supported by suitably qualified staff.

The Law Society supports the concept of developing an online information hub and telephone helpline, however this hub will not be suitable for all members of the public. It is likely that some vulnerable people may find accessing services by telephone or online difficult or even impossible.

The Law Society, consultation response

- 4.77. The online information hub should offer support and advice in a single easy-to-access point of reference at the beginning of the process of separation or divorce to enable people to make informed decisions about how best to resolve any issues they may have. In particular, the website should provide clear guidance about parents' responsibilities towards their children, the benefits to children of a relationship with both parents, what further support is available, and advice about options and processes for supported dispute resolution, including court resolution. Those who deliver the helpline services should be trained to identify where there may be child protection or domestic violence concerns.

- 4.78. The information hub should provide families with the information they need to get further support including local dispute resolution services. It should also allow parties to access necessary application forms where they wish to make an application to court. Forms should be intelligent, allowing later forms to be pre-populated and also adapting to the information already entered. This last would be particularly useful in relation to ancillary relief application forms.

- 4.79. Government established an expert Steering Group, including academics and people from the voluntary and community sectors, in August 2011, to advise on the development of the proposals set out both in our interim report and in the Department for Work and Pensions Green Paper *Strengthening families, promoting parental responsibility: the future of child maintenance*.¹¹⁸ The first phase is expected to conclude by November 2011. Subject to government's approval, the Group will take forward its recommendations through a series of sub groups.

¹¹⁷ There are existing websites which provide information to separating parents and have been well received, such as the online calculator which supports couples considering divorce in financial matters (see case study on page 170 of the interim report).

¹¹⁸ *Strengthening families, promoting parental responsibility: the future of child maintenance* (2011) Department for Work and Pensions.

Final recommendation

- Government should establish an online information hub and helpline to give information and support for couples to help them resolve issues following divorce or separation outside court.

Dispute resolution services

4.80. Our starting point is that most people would benefit from a requirement to learn about and consider Dispute Resolution Services before making an application to court.

4.81. Our interim report recommended a process that built on the Pre-Application Protocol:¹¹⁹

- *where intervention is necessary it should be compulsory for the applicant to attend a Mediation Information and Assessment Meeting (MIAM) 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.*
- *respondents should be encouraged to attend a MIAM, although this cannot be compulsory;*
- *the mediator tasked with the initial assessment will need to be the case manager until an application to court is made;*
- *those parents who are still unable to agree should next attend a Separating Parent Information Programme;*
- *most parents will probably then attend mediation or another form of dispute resolution. This should not be compulsory. Where people wish to make a court application without attending mediation they should be able to obtain a certificate to enable this. Parties may also wish to take legal advice alongside mediation or engage lawyers to help them negotiate agreements without the need to go to court; and*
- *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 a child arrangements order to determine any outstanding issue.*

4.82. To support this process we also recommended that:

- *'alternative dispute resolution' should be rebranded as 'Dispute Resolution Services', in order to minimise a deterrent to their use;*
- *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*

¹¹⁹ In April 2011 the President of the Family Division introduced a pre-application protocol whereby the majority of private law applicants are required to attend a meeting to learn about mediation before they take the case to court. Following the introduction of this protocol, the informal feedback suggests there has been a near 22% increase in the number of MIAMs in the three month period April – June 2011 compared to the same period in 2010 (based on initial data gathered from mediation providers to consider the early impact of the pre-application protocol).

responsibilities being laid on mediators by our proposals. Mediators who do not currently meet those standards should be given a specified period in which to achieve them; and

- *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.*

- 4.83. Most respondents agreed that people should consider dispute resolution services before making a court application. This can be done through a Mediation Information and Assessment Meeting (MIAM).

Parties should be introduced to all the different dispute resolution services and should attempt at least one of those services before gaining access to a judge in a court. Parents need more information about those services and the value of attempting mediation etc. There will always be an irreducible core of cases which will have to come to court.

District Judge Nicholas Crichton, consultation response

12 or more years' experience of providing mediation information and assessment meetings have shown their value in enabling high rates of agreement between separated parents and in avoiding unnecessary court proceedings.

The Mediation Centre Stafford, consultation response

- 4.84. Respondents also argued that dispute resolution services are better at helping parents to focus on their children and to address disagreements before they become entrenched.

My experience is that court escalates the conflict and in many cases is used by way of threat / control by one party. Parents need to take responsibility for their children and not create positions that they then hide behind. Mediation does not focus on client positions, it focuses on the best interest of the children.

Consultation respondent

This is likely to be beneficial in most cases as it establishes the expectation of co-operative parenting focusing on the needs of the children concerned.

Lawyer, consultation response

- 4.85. We recommend all applicants should be required to attend a MIAM prior to making a court application. We cannot compel respondents to attend, but they should be encouraged to do so. Judges will retain the power to order attendance at a MIAM and the expectation is that this power should be exercised as much as possible where respondents have not considered mediation. Judges could be powerful advocates to encourage an expectation that other means of reaching agreement will be tried before an application to court.

- 4.86. Availability of trained mediators may be an issue, though we also understand that many mediation centres have been struggling through lack of demand.

The government is addressing this with the Family Mediation Council (FMC) and we discuss it further below, at paragraph 4.102 – 4.104.

4.87. After the MIAM the parties should be referred to a Separated Parents Information Programme (PIP).¹²⁰

Most importantly, as suggested, attendance at a Separated Parenting Information Programme should be available at the earliest possible stage, and pre-proceedings, sensibly prior to mediation (so that the lessons learnt can be taken into any mediation process), but perhaps as part of the overall mediation process. Anecdotal evidence is that these programmes are proving to be enormously beneficial but, having to wait for the court to make an order in this respect, is simply too late.

The Association of Her Majesty's District Judges, consultation response

Again only an applicant to court can be required to attend a PIP, but the aim should be to create an expectation that both parties will attend. Judges could help to achieve this by their stance if parties do in the end apply to court.

4.88. An evaluation of the early experience of PIPs was published after the interim report.¹²¹ Most results were not statistically significant though they pointed in a supportive direction. The authors made a series of recommendations, which are being considered by government.

- PIPs should be made available at an earlier stage. This should be as voluntary self-referral and also linked with mediation as a mandatory step before proceedings in appropriate cases.
- More effective and systematic screening is required whether a PIP is used during or before proceedings.
- More attention needs to be paid to ensuring that all parents have full, clear and accurate explanations about PIPs before attending the course.
- The programme aims and content should be reviewed. The aims should be clearer and more targeted. More skills development is needed. The programme should be more clearly focused on post separation parenting challenges.
- A suite of programmes is required to address very different needs, including programmes for working with high / entrenched cases and domestic violence programmes to set alongside the basic PIP programme.
- More effective mechanisms need to be set in place to follow up after PIP and to provide a bridge between parents and between PIP and the dispute resolution process.
- The PIP and associated material should be more widely available.

¹²⁰ Similarly, we cannot require a respondent to attend a PIP, however, a judge should retain the power to direct parties to a PIP.

¹²¹ Trinder, L et al, (2011) *Building Bridges? An evaluation of the costs and effectiveness of the Separated Parents Information Programme (PIP)* Department for Education.

- Mechanisms are required for practice and professional development amongst PIP providers.¹²²

4.89. These recommendations warrant careful consideration by government. PIPs should support a better understanding of parental responsibility and the importance of a continued relationship with both parents after separation where this is safe. Materials available on the hub should support the information and guidance given at PIPs.

4.90. Assessment for suitability for PIPs is currently carried out as part of the court process but should in future form part of the mediation assessment as happens in Australia. We do not believe it would be necessary or perhaps even appropriate for Cafcass to carry out safeguarding checks before attendance at PIPs. But mediators will need training to identify risks as an element in the training needed to carry out MIAMs. See also paragraphs 4.100 - 4.102 below.

Emergency routes to court

4.91. There must, as we recommended in the interim report, be exemptions from the process we have described. Emergency routes to court will be required where even the relatively short time required for mediation information and assessment would create unnecessary risk, for example where there are concerns about the risk of child abduction or where domestic violence is a strong concern. The information hub should provide clear guidance about where an individual may be exempt from the need to consider mediation and what they should then do.

4.92. 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. The panel sought views in the consultation as to what these exemptions should be and received a very wide range of views.

The exemptions detailed in the pre-application protocol for mediation provide adequate coverage of the issues that should constitute an exemption from the assessment process.

Gingerbread, consultation response

4.93. Our conclusion, in line with the evidence from Gingerbread, is that at this stage exemptions should be as for the pre-application protocol (Annex F). Government and the judiciary should keep these under review.

Mediation

4.94. After a PIP our view is that most parents would benefit from attendance at mediation or another form of dispute resolution, though as we said in our interim report, without compulsion. 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.

¹²² Ibid.

- 4.95. We recognise the importance of legal advice during dispute resolution processes. The relationship between mediators and solicitors is important for clients who may need legal advice before agreement.

Legal advice is required alongside mediation in all financial cases to ensure that agreements which are reached are fair and are capable of being made into an enforceable court order. Legal advice is desirable alongside mediation in relation to matters pertaining to children, if the issue is more complex than simply the quantum of contact.

Family Justice Council, consultation response

- 4.96. Government recognised the value of legal advice alongside mediation in the recent legal aid reform and have made provision for a fee for legal advice in support of mediation with higher payment for more complex cases.

- 4.97. We proposed in the interim report:

- *the mediator tasked with the initial assessment will need to be the case manager until an application to court is made.*

- 4.98. Respondents to the consultation felt this was not a task for mediators.

The case-management function will be a key element in the effectiveness of the new assessment processes. Currently, case management is not a mediator function, and FMA considers it puzzling that the FJR should label those who might provide a case management function as mediators.

Family Mediators Association, consultation response

- 4.99. Our proposal was not that mediators should manage cases in the way that court cases are (or too often are not) managed. The intention was that a mediator should in most ways do no more than they do currently, including particularly contacting the parties and arranging meetings. The main additional function in this respect would be to track the progress of the parties to the point where they decide or not to apply to court so that in particular the risk is reduced of one party dragging things out in order to disadvantage the other for example over contact with their child. A recalcitrant lack of contact or unwillingness to engage with the process would trigger the mediator to assess the case as unsuitable for mediation and issue a certificate enabling an application to court to be made.

- 4.100. The pre-application protocol, the process we propose and the reduction in legal aid for private law will all increase the demand for trained mediators. Mediation is a professional skill that cannot be learned without training and close supervision for a significant time. The processes we describe were phased in over three years in Australia yet inadequate training for mediators still led to failure to identify welfare risks in too many cases. This led us to propose in our interim report that as a minimum all mediators should be accredited to the standards required by the Legal Services Commission (LSC) 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.

4.101. A few respondents considered the training requirements that should be required both for mediation and MIAMs, with some arguing for a standardised appraisal system.

Only family mediators who have undertaken an FMC recognised foundation training course and have either obtained competence assessment or are working towards it should be able to undertake these meetings.

Mediator, consultation response

We also would like to see some nationally accredited qualification and monitoring / appraisal system for mediators.

Dorset Family Panel, consultation response

4.102. A clear plan must be developed to maintain and reinforce standards of competence and to ensure the effective regulation of mediation as numbers of mediators increase. Without that there are clear risks to children and their parents, and of discredit to the whole approach.

4.103. We welcome the work being done by the Ministry of Justice (MoJ) and Legal Services Commission (LSC) with the Family Mediation Council (FMC) to produce this plan, which covers accreditation, supervision of training, the training itself, and assessment.

4.104. We are not in a position to comment on the detail. But we are aware that the FMC, which brings together delegates from representative bodies, has found it difficult to work effectively. The risk is agreement only on a lowest common denominator. Representative bodies are also inevitably reluctant to provide adequate funding to another body that may appear to sit above them. We recommend that government should closely watch and review the progress of FMC to assess its effectiveness in maintaining and reinforcing high standards. Government should if necessary create an independent regulator to replace the FMC.

Child centred mediation

4.105. All mediation in which disputes about children are being discussed should be child centred – that is the welfare of children should be central to it. Training to deliver child centred mediation is a particular need.

4.106. Mediators may consult children, where children want this, in a process often known as child inclusive mediation. This mediation should be available to all families seeking to mediate, provided that it is appropriate and safe and undertaken by well trained practitioners. There are early suggestions that it can be successful. However, there is currently wide variation in child inclusive mediation practice and we would encourage a consistent, evidence based development of it.

4.107. Other specialisms offered by some mediators in children disputes include:

- prevention of child abduction mediation, issues which require particular skills and knowledge of the law here and in any other country concerned in the dispute; and
- international mediation: international disputes about contact across international borders and relocation cases are becoming increasingly common and requires specialist understanding.

4.108. A broader range of services and of types of mediation is likely to develop over time to meet peoples' differing needs. This has been the experience in other countries. Training and evaluation will be needed.

4.109. In the consultation we asked whether there is 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. There was no consensus among those who answered this question with some agreeing, some who felt it would increase hostility, and some who felt it would not change behaviour.

We would prefer the ability to make a cost order if a parent's unreasonable refusal has led to increased expenditure by the other parent, whether it is on legal fees or loss of wages and expenditure on travel costs for attending an unnecessary hearing.

Greater London Family Panel of Justices, consultation response

Financial penalties should be imposed on the hostile parent to prevent such practices or behaviours.

Father, consultation response

We do not think a fee charging regime to reflect a person's behaviour in engaging with dispute resolution services is likely to be in the best interests of the child and would strongly caution against it.

The Children's Society, consultation response

4.110. Further consideration should be given to this issue once the process has bedded in and there is a clearer picture of how many people move on from MIAMs to mediation.

Safeguarding children

4.111. We discussed earlier the question of exemptions from our proposed process (paragraphs 4.91 – 4.93) and the need for mediators to be properly trained to assess them. Some respondents questioned whether these measures would provide sufficient protection for vulnerable adults and children.

We agree that some can safely be prevented from progressing with the provision of information, and agree that the court is not the place to provide this information. However, it is vital that a thorough and well informed assessment is carried out at this point, which is not provided for under the process set out in the Panel's report... To this end, Cafcass recommends moving the full assessment, currently provided for at Court, to this initial assessment.

Cafcass, consultation response

4.112. We also note that this was also the subject of discussion at a recent Family Justice Council conference at Dartington. This conference argued that “*level 2 safeguarding checks must be carried out in advance of all MIAMs or any form of alternative dispute resolution (ADR), the results to be transmitted to mediators and endorsed for children and parties from the risk of harm.*”¹²³

4.113. We are not convinced that such checks should be required before parents attend a MIAM, or that they should be required before mediation. People should, as now, be free to seek mediation without automatically being subjected to police checks. Cost is a consideration. The main protection should be skilled and trained assessment by mediators. Here we would emphasise, with many respondents, the need to confine the role only to qualified mediators:

The FJC ADR committee does not agree with the view that non-mediators could also provide MIAMs, because in our view only trained mediators have the necessary range of knowledge and skills to explain ADR processes in sufficient detail, make assessments of suitability, screen and undertake risk assessment for domestic abuse and child protection issues, understand age-related needs of children in the context of parental separation and also to be able to use conflict management skills in managing highly emotional and acrimonious MIAMs attended by both parties together.

Family Justice Council, consultation response

4.114. Where parties have concerns about their welfare or that of their child they will not be compelled to mediate, but will be able to apply for an exemption or receive a certificate following attendance at a MIAM. Some who have experienced abuse may nevertheless choose to mediate.

There are at least five categories of domestic abuse. Mediation may be suitable in some categories with appropriate conditions and safeguards, whereas it would be strongly contra-indicated in other categories. In some cases shuttle mediation may be suitable... Joan Hunt's research showed that victims of domestic violence did not feel protected in court proceedings, especially if they were subjected to the further abuse of being cross examined by their abuser acting as a litigant in person.

Family Mediators Association, consultation response

¹²³ A resolution made at the Dartington Conference, *The Family Justice Review: Evaluation and Implementation* 30/09/2011- 2/10/2011 to be published by Jordans.

4.115. This is, however, clearly an area where further research would be helpful and the whole issue should be kept under review as experience of the pre-application protocol and our own proposals unfolds.

Final recommendations

- 'Alternative dispute resolution' should be rebranded as 'Dispute Resolution Services', in order to minimise a deterrent to its use.
- Where intervention is necessary, separating parents should be expected 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.
- The mediator tasked with the initial assessment (Mediation Information and Assessment Meeting) would need to be the key practitioner until an application to court is made.
- The regime would allow for emergency applications to court and the exemptions should be as in the Pre-Application Protocol.
- Those parents who were still unable to agree should next attend a Separated Parents Information Programme and thereafter if necessary mediation or other dispute resolution service.
- Attendance at a Mediation Information and Assessment Meeting and Separated Parent Information Programme should be required of anyone wishing to make a court application. This cannot be required, but should be expected, of respondents.
- Judges should retain the power to order parties to attend a mediation information session and Separated Parents Information Programmes, and may make cost orders where it is felt that one party has behaved unreasonably.
- Where agreement could not be reached, having been given a certificate by the mediator, one or both of the parties would be able to apply to court
- 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.
- Government should closely watch and review the progress of the Family Mediation Council to assess its effectiveness in maintaining and reinforcing high standards. The Family Mediation Council should if necessary be replaced by an independent regulator.

Court determination

4.116. We made the following recommendations about the court process in the interim report:

- *safeguarding checks should be completed at the point of entry into the court system for cases involving children;*
- *applications to court will be assessed upon receipt and initial safeguarding checks will be completed, following which the case will proceed to the First Hearing Dispute Resolution Appointment (FHDRA); and*
- *if unresolved the issues will then be assigned to either a 'simple' or 'complex' track for further judicial resolution, depending on complexity.*

4.117. Applications to court should be assessed on receipt and should go as now, after safeguarding checks, to the First Hearing Dispute Resolution Appointment (FHDRA). At this hearing the court, with the Cafcass officer (and any mediator), should seek to assist the parties to resolve their issues. A referral would be made to the local authority if child protection concerns were raised at any point. The court would set out any issues about which the parties are agreed, and the issues that remained to be resolved. Parenting Agreements could be used as part of this process.

Provision [should be made] for these [Parenting Agreements] to be completed at the first hearing (FHDRA) where there is one – the advantage being that the judge and Cafcass officer can lead and guide completion and if there is a minor hurdle on any aspect, then the judge, with consent that is usually forthcoming, could summarily determine it. This could be a really valuable addition to the 'tools' of the first hearing and would, in my view, fit the first hearing as a hand in a glove.

His Honour Judge Altman, submission to the Review Panel

4.118. We agree and recommend that the President of the Family Division and judiciary consider this.

4.119. Where further judicial determination is required, informed by Cafcass advice, the judge would allocate the case to a 'track' system according to complexity. We recommend the development of a 'simple track' to determine narrow issues and a 'complex track' for more difficult cases. The focus of both tracks should be on future arrangements for the welfare and care of the child. We discuss these two tracks in greater detail below (paragraphs 4.124 – 4.131).

4.120. We received a few responses, with divided views.

I agree, however, to a 'fast track' system. With a single point of entry this would in practice mean such cases being allocated to the FPC.

The President of the Family Division, consultation response

We have doubts about the practicality of a Simple Track. The need to keep time reserved for early hearings makes the job of Listing more difficult, and if in fact they are not used it is likely to be too late to fill the time reserved with another case. In fact Judges do use their discretion in listing cases, depending on the

availability of Hearing dates. Transfer to the FPC is also considered at this stage.

We support the proposals for the Complex cases. This follows present best practice, but it would be helpful to incorporate it more formally through a Practice Direction.

Council of Circuit Judges response

4.121. We recognise that implementation would require careful consideration by the judiciary and HMCTS. We cannot ourselves see why a simple track would prevent efficient management of hearing dates. If a case is unresolved at FHDRA and allocated to the simple track, parties would be given a single hearing date to resolve their issues. The case should be listed as soon as possible, but judges would be able to continue to use their discretion in listing cases, depending on the availability of hearing dates.

4.122. The Private Law Programme allows the court to request a report from Cafcass, if the court is not in a position to make final orders at the FHDRA. Under our proposal, as now, a judge would order Cafcass to produce one or more reports if required to support resolution of the case:

- a single issue report;
- a multiple issues report;
- a risk assessment (under section 16A); and
- a wishes and feelings report.

4.123. These reports would still be needed.

The simple track

4.124. The simple track would be established to determine narrow issues, where the court would undertake a tightly managed hearing (limited say to two hours), held at short notice and during which each party could be heard.

4.125. The simple track should allow the court flexibility in its approach to 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. Where a case was assigned to the simple track clear instructions would be given to both parties to enable them to understand the process and to minimise the scope for delay. The parties would be required to submit all documents relating to the case within deadlines before each hearing.

4.126. Tailored case management rules and principles would apply. These could include:

- informal hearings;
- limited cross examinations;
- removal of strict rules for evidence; and
- limitations on numbers of hearings and indeed the expectation of only one in the majority of cases.

4.127. Cases allocated to the simple track are likely to be those cases with a single issue for determination, cases without allegations of domestic abuse, and those where no findings of fact are required. The judge would be able if necessary to transfer the case from the simple to the complex track.

The complex track

4.128. The panel invited the President of the Family Division to consider how best to develop further the case management and trial skills of the family judiciary in relation to complex cases. The President has issued helpful guidance about case management.

4.129. As in the interim report the panel suggest that the following proposals might guide complex cases:

- 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 taken by each party and each witness in a proportionate manner.

4.130. The Family Law Bar Association (FLBA), who originally made these proposals to the panel, made further suggestions, including:

- there should be a requirement to set out the issues on the face of the application to assist court staff in allocating cases;
- a space on the form for parents to set out when they last saw their child; if they are seeking to suspend contact and why;
- that those who assert serious concerns should be required to produce evidence at an early stage; and
- those who seek suspension of contact should be made to stipulate in clear terms their reasons why and what harm they say will come to the child if their stipulations are not adhered to.

4.131. We agree, and recommend these additional suggestions.

Consulting and including children in private law proceedings

4.132. It is now generally accepted, as indeed we do, that it must be right for children and young people to be given every opportunity to have their voices heard in cases that are about them. Yet many children and young people may not even be aware that a case is underway, let alone have their views heard as part of it.

4.133. The key needs within the family justice system and private law generally are to:

- give clarity to the child about the process, their options for involvement and the likelihood of their view being taken into account;
- raise parental awareness, through education and support, of the effect disputes can have on their children;
- support parents to communicate with their children; and
- ensure consistency of approach and materials throughout the process – via the hub, mediators, legal practitioners, PIPs and in court.

4.134. We heard from many people who pointed out that informing and consulting children is a much more difficult exercise in private law than it is in public law, where the tandem model provides representation for the child in all cases.

I find it difficult to reconcile an aspiration that the child's voice, wishes and feelings are central to the Family Justice Service with the reality of practice where the majority of children whose parents are litigating over contact currently are not consulted at all within court processes and even fewer are consulted within out of court mediation.

Professor Liz Trinder, consultation response

4.135. It is important that children and young people should be given access to materials and support, through both the online hub and through other local and community based services such as schools and children's centres that enable them to understand the process and the decisions that are likely to be made.

A commitment to providing support will, of course, also raise questions of considerable complexity and interest regarding how the hub is to deal with children who want to communicate information and have some input themselves, indeed 'have a voice' in what is happening to and around them.

Association of Lawyers for Children, consultation response

4.136. We agree. The content on the hub should be both age appropriate and realistic. It should make clear to young people the intention that they should be heard if they wish but that their views will also be considered alongside other factors.

4.137. We have discussed the importance of involving children through child centred and child inclusive mediation (paragraphs 4.105 – 4.106).

4.138. Court social workers should continue to have a significant role. The extent of the involvement of Cafcass in private law proceedings will depend on the complexity of the case. Cafcass undertake initial safeguarding checks on receipt of all section 8 Children Act 1989 applications. Cafcass screens and triages cases so

that at the First Dispute Resolution Hearing Appointment (FHDRA) judges and magistrates are aware of any relevant risk factors and can take these into account when making decisions about residence and contact. Many cases are resolved at this stage.

- 4.139. Where cases go beyond the FHDRA a range of services are available for children and the court, including court ordered reports (as noted at paragraph 4.122) and other additional support.¹²⁴ And, in some cases where a child is deemed by a judge or magistrate to need separate legal representation, a children's guardian and solicitor will be appointed under rule 16.4 of the Family Procedure Rules 2010. The current position is that children are made a party to proceedings and separately represented in cases that involve an issue of significant difficulty, in 2010 around 3.5% of cases.¹²⁵ This appointment is made at the judge's discretion and before taking the decision to make the child a party the judge considers whether alternatively Cafcass should have a greater continuing involvement.
- 4.140. A child's wishes and feelings are always central to a Cafcass practitioner's case analysis, whether through one of the four types of section 7 report¹²⁶ or a rule 16.4 appointment. In many cases that go beyond FHDRA, practitioners will communicate with children to understand what they need and to try to bring that about through the court process. The means depend on the circumstances of the case, and what the court has asked Cafcass to do. This includes helping children to tell their story often using age appropriate toolkits. When it is in their interests, practitioners may help children to write letters to judges or magistrates, which can be therapeutic as well as influential.
- 4.141. Some respondents urged that current support and representation is inadequate and that the tandem model of guardian and legal representative should apply in private law as in public law.
- 4.142. We well understand the position of those who argue for separate representation as a matter of course. There is less clarity and consistency in the opportunity for children to make their voices heard in private law. We note recent research that suggests that separate representation in high conflict cases can lead to resolution without further hearings beyond the hearing where the separate representation began. Judith Timms reports that in 89% of cases in the NYAS survey¹²⁷ the children's views coincided with the decision made by the court and that separate representation put an end to repeated court proceedings – in some

¹²⁴ This is not the same as a 16.4 appointment, although reports may be provided under a 16.4 appointment.

¹²⁵ In 2010–11 Cafcass handled 43,738 private law cases, and 1,512 rule 9.5 (now rule 16.4) appointment requests, or 3.5%. This is an increase on 2009–10, where Cafcass received a total of 44,452 private law cases, and 1,293 rule 9.5 appointment requests, or 2.9%. Cafcass national case management system (CMS), to December 2010, unpublished.

¹²⁶ The welfare report requested by a court from the local authority or a Cafcass officer under section 7 of the Children Act 1989.

¹²⁷ Fowler, T. and Stewart, S., *Rule 9.5 Separate representation and NYAS* (2005), Family Law Jan 2005.

cases more than twenty – which had punctuated the life of children trapped in the revolving door of acrimonious disputes.¹²⁸

4.143. This is clearly an area that will need to be kept under review and where further research would be beneficial. To introduce separate representation as a matter of course could have disadvantages, including the risk that cases would take even longer, and cost alone rules this out in any event. In addition, many children do not want to be involved in the court proceedings, and where this is the case they should not be forced, or even encouraged inappropriately. We note that the number of children likely to be separately represented under section 16.4 appointments may increase in future as more parents represent themselves following proposed reductions in legal aid.

Protecting vulnerable witnesses

4.144. Protection of child witnesses and the cross examination of children in private law proceedings has been raised with us since publication of the interim report.

Children should be given the opportunity to speak directly to the court if that is what they want. They will require proper support and preparation to do this... Children addressing the court directly should under no circumstances be subject to any cross examination akin to what happens in cases of child abuse brought to the criminal courts. This must be sacrosanct in the process.

British Association of Social Workers, consultation response

4.145. It is now clear following a recent determination by the Supreme Court in the case of *Re W* in 2010 that children and young people may in principle be called as a witness and subject to cross-examination.¹²⁹ This means that a perpetrator acting as a litigant in person could carry out a cross-examination, as noted in the recent select committee report.¹³⁰

The increase in litigants in person will give rise to more cases in which an alleged abuser cross-examines the person he or she is alleged to have abused. We recommend the Ministry of Justice considers allowing the court to recommend that legal aid be granted to provide a lawyer to conduct the cross-examination in such cases.

4.146. The risk may be increased by a rise in litigants in person following the proposed legal aid cuts, highlighted by Resolution and FLBA.

This is an important point for the Family Justice Review. Because unrepresented victims of domestic abuse and unrepresented perpetrators of domestic abuse will stand face-to-face in the courts in many cases.

¹²⁸ Timms, J (2011, unpublished paper to panel) *Mediation, consultation and how the views and interests of children and young people are represented in private law.*

¹²⁹ *Re W* (2010) UKSC 12, which stated: “when the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child.”

¹³⁰ *Operation of the Family Courts Sixth Report of Session 2010-12, Volume I* (2011) House of Commons Justice Committee, paragraph 244.

Unrepresented perpetrators of child abuse may stand face-to-face with the child victim, being required to cross-examine the victim. This cannot be right.

Resolution and FLBA, joint letter to the Family Justice Review

- 4.147. The President of the Family Division has noted that in the criminal courts a person accused of sexual abuse cannot cross-examine their victim, but that no such provision exists in the family courts. A similar situation could arise in relation to cases involving domestic violence.
- 4.148. The Family/Criminal Interface Committee has considered this issue. A small-scale survey of courts in 2010 identified few relevant cases and suggested that the family courts were already well equipped to deal with any abuses of cross-examination. The Committee decided to take no action at that stage, but to keep the matter under review.
- 4.149. Lady Hale in the Supreme Court has suggested that judges are not sufficiently aware of the safeguards at their disposal.

The family court will have to be realistic in evaluating how effective it can be in maximising the advantage while minimising the harm. There are things that the court can do but they are not things that it is used to doing at present. It is not limited by the usual courtroom procedures or to applying the special measures by analogy. The important thing is that the questions which challenge the child's account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly. One possibility is an early videoed cross-examination..... Another is cross-examination via video link. But another is putting the required questions to her through an intermediary. This could be the court itself, as would be common in continental Europe and used to be much more common than it is now in the courts of this country.¹³¹

- 4.150. Further we also note concerns that children may be called to give evidence on more than one occasion, where criminal proceedings have also been brought. Close working between the criminal and family jurisdictions should seek to prevent this from happening.
- 4.151. The government and the judiciary should actively consider how children and vulnerable witnesses may be protected when giving evidence in family proceedings.

Enforcement

- 4.152. We set out in the interim report the enforcement powers currently available where an order is breached. In preparing that report we considered proposals to strengthen them, including suspension of driving licences, the use of curfews (enforced through electronic tagging) and increased use of orders to reverse residence. We noted however that even the current powers are rarely used,

¹³¹ *Re W* (2010) UKSC 12.

often because to use them would be against the interests of children.¹³² Other jurisdictions too struggle with this.

- 4.153. Failure to enforce orders leaves parents deeply disillusioned. The aim of course must be to avoid the issue arising, and our proposals on education, Parenting Agreements, and the process for separation are intended to contribute to that. But these cases will still arise. Then the need is to deal with them quickly.

There is a strong case for educational rather than strictly punitive forms of enforcement and I agree that swift redress is desirable.

The President of the Family Division, consultation response

- 4.154. The current provisions for contact activity directions and contact enforcement orders all depend on contact orders. Careful consideration will need to be given about how the new child arrangements order will be enforced. This means, amongst other things, that it needs to be clear on whom the obligations rest so that it can be properly enforced.

- 4.155. Where an order is breached 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 intention that the issue be resolved within a single hearing. If an order is breached after 12 months, parties should be required again to attend a MIAM with a view to further mediation if appropriate, before a return to court.

Contact and maintenance

- 4.156. Government asked us to consider whether there might be circumstances when it would be right to link maintenance and contact. We recommended:

- *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.*

- 4.157. If judges have the power to imprison recalcitrant parents, to have the power to reduce their maintenance seemed to us an acceptable intermediate step.

- 4.158. Predictably there was no consensus from the consultation. Some respondents felt we had not gone far enough. Others felt it wrong to introduce any link at all between contact and maintenance.

¹³² Professor Bala recently reported research from Canada to show that although a change of residence was perhaps the most extreme judicial remedy it was usually the only way to change successfully the most severe alienation of children from one or other parent (Prof Nicholas Bala *Parental Alienation & The Child's Voice in Family Proceedings* Seminar at Nuffield Foundation, London, 2011). In Canada residence was reversed in 63 out of 137 cases (46%) as compared to 6 out of 26 cases (23%) in the UK, though the position here was starting to change (*Re M (A child)*, [2004] EWVA Civ 1262, per Wall LJ).

We are at risk of fostering a 'can get away with it' approach where agreements are broken, contact is frequently withdrawn and court orders are broken without anything being done. Penalties would help in keeping agreements and resolving disputes much faster in my opinion.

Father, consultation response

We strongly oppose the recommendation to introduce an additional enforcement mechanism to alter or suspend the payment of maintenance. We note that the report states that there should not be an automatic link between contact and maintenance, but we do not believe there should be any link even at the discretion of the court. Maintenance does not 'buy' contact.

The Law Society, consultation response

4.159. Some questioned whether it would ever be right to use such a power.

I find it exceedingly difficult to conceive of any circumstances in which a reduction or suspension of child maintenance is likely to be in the best interests of the child.

His Honour Judge Clifford Bellamy, consultation response

4.160. In discussion with the Law Society and others we were told that those paying maintenance often in their own minds link payment with contact. They may feel it unjust if they pay maintenance but are unreasonably denied contact especially given the range of enforcement provisions available to Child Maintenance Enforcement Commission when payments are not made.

4.161. We have reconsidered our recommendation against this background. We have concluded that to introduce any connection between contact and maintenance would risk reinforcing this problem, even if it is at the discretion of a judge. For the sake of a power that may be rarely if ever used it would in our view be wrong to risk strengthening the view that it is acceptable not to pay maintenance when there are contact difficulties or for that matter, that contact can be withheld when maintenance is not being paid. The existence of the power could also undermine private arrangements and encourage litigation. For these reasons we recommend there should be no link of any kind between contact and maintenance.

Final recommendations

Where we refer to the Family Justice Service, we envisage that these functions would be performed initially by an Interim Board.

- The Family Justice Service should ensure for cases involving children that safeguarding checks are completed at the point of entry into the court system.
- HMCTS and the judiciary should establish track system according to the complexity of the case. The simple track should determine narrow issues where tailored case management rules and principles would apply.

- The First Hearing Dispute Resolution Appointment should be retained. Parenting Agreements could also be helpful at this stage. Where further court involvement is required after this, the judge should allocate the case to either the simple or complex track according to complexity.
- The judge who is allocated to hear the case after a First Hearing Dispute Resolution Appointment must remain the judge for that case.
- Children and young people should be given the opportunity to have their voices heard in cases that are about them, where they wish it.
- The government and the judiciary should actively consider how children and vulnerable witnesses may be protected when giving evidence in family proceedings.
- Where an order is breached, within the first year the case should go straight back to court to the same judge to resolve the matter swiftly. 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.
- There should be no link of any kind between contact and maintenance.

Divorce and financial arrangements

4.162. We proposed that:

- *people in dispute about money or property should be expected to access the information hub and should be required to be assessed for mediation;*
- *ancillary relief should be separately reviewed;*
- *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;*
- *the current two-stage process of decree nisi/decree absolute should be replaced by a single notice of divorce; and*
- *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.*

4.163. Respondents to the consultation generally supported these proposals, though some useful changes were suggested and we have also taken the opportunity to develop and clarify the proposed processes.

We welcome the proposals for new processes to manage divorce and separation, and the proposal to establish a user facing 'online information hub' for England and Wales to provide a single point of access for information, legal documents and applications for family related issues via an online divorce portal, supplemented with a telephone helpline, and paper based information. We also welcome the recommendation that uncontested divorce cases should be processed on administrative rather than judicial basis.

Citizen's Advice Bureau, consultation response

4.164. The panel has considered only the process of divorce not the grounds. We did receive submissions both on the grounds of divorce and the need for action to prevent relationship breakdown and divorce.

The Law Society believes that the adversarial grounds for divorce should be removed and a 'no fault' system introduced. By 'no fault' system we mean that no grounds would need to be shown as to why the marriage has irretrievably broken down when submitting a divorce petition.

The Law Society, consultation response

[The Family Justice Review's] remit failed to recognise prevention of relationship breakdown as the key policy priority. Given that this is a primary driver of demand for the hard-pressed system, we warned that this review could fall short in effecting the magnitude of change desired and required. It may only deal with the symptoms, not the causes. Its dramatic treatment of those symptoms is mostly commendable but should not disguise the underlying problems.

The Centre for Social Justice, consultation response

4.165. These are important matters but outside our remit.

Divorce¹³³

4.166. There is scope to increase the use of administrators in the courts to reduce burdens on judges and create a more streamlined process in the 98% of cases where divorce is uncontested.¹³⁴ The current process requires judges to spend time in effect to do no more than check that forms have been filled in correctly, with accurate names and dates. This is a waste. To change it would not make any difference to the ease or difficulty of obtaining a divorce. It would just make more judge time available for more important things. (Divorce applications in which the ground for divorce is contested of course require judicial determination. A judge should also determine applications for nullity in view of their complexity and the potential need for fact finding.)

¹³³ For ease of reference we refer only to divorce in the body of the report. However, the process set out should also be applied to dissolution of civil partnerships.

¹³⁴ HMCTS 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.

4.167. The process we propose for divorce is largely unchanged from that set out in the interim report. However the panel no longer recommends that the two-stage process of decree nisi/decree absolute should be removed. This would need a scale of legislative and procedural change that would not be worth the gain. The norm for many divorcing couples is to resolve outstanding issues between the decree nisi and the decree absolute. It could also disadvantage some people were a decree made absolute before financial issues had been resolved, as a former spouse may not be entitled to some benefits to which they would be entitled as a current spouse.

Our members report that the two-stage process is important for families who have to adjust to the huge emotional change that divorce has on their lives and there could be consequences for life assurance, pensions, and tax were the divorce to happen before a financial order was made.

Resolution, consultation response

We express considerable concerns in relation to this proposal. The Divorce (Religious Marriages) Act 2002 and the Family Proceedings (Amendment) Rule 2003 (the Rules governing procedures under the Act) are of considerable importance to the Jewish Community and have greatly assisted in reducing the number of 'limping marriages' in the jurisdiction.

The Board of Deputies of British Jews, consultation response

4.168. The terms decree nisi and decree absolute are outmoded. It had been intended to change them as part of the changes to the Family Procedure Rules. Remarkably this could not be done on grounds of the IT cost.

4.169. As we noted in the Interim report, we received anecdotal evidence that some couples do not realise that they are still legally married until they receive the decree absolute. This must be made clear on the information hub and as part of the advice and instructions given both to those seeking a divorce and those responding to a divorce petition.

Financial orders

4.170. Those in dispute about money or property should also use the information hub and be required to be assessed for mediation. We see merit in combining the determination of all issues in dispute following separation. This should be done through greater availability of 'all issues' mediation. Further, where a number of issues require court determination the same judge in a single case should likewise deal with these. This would often lead to speedier resolution of disputes rather than the conflict being displaced to a different dispute.

A priority in private law cases should be to devise a system (a 'one-stop shop') whereby all these matters can be dealt with comprehensively by the same judge in the same court with one application form, one file, and one set of witness statements and other evidence.

Lord Phillips and Lady Hale, Supreme Court, call for evidence submission

4.171. However, we note that this approach would not work in every case and, for example, resolution of disputes about money should not hold up resolution of disputes about children. Where parties have made an application for determination of a single issue, a mediator or judge should not seek to discuss or resolve wider possible issues, with the aim of preventing them from arising in the future. Rather, only items relevant to the issue requiring resolution should be discussed.

4.172. We are aware that the application of the law on financial orders and its practice have evolved and changed over the years. Responses to the call for evidence suggested that legislative change, to establish a codified framework, could reduce the need for judicial intervention. Reviews of family law almost invariably recommend that financial orders need separate review and indeed responses to our consultation urged this.

The Interim Report said that there was greater scope for disputes over ancillary relief being resolved outside of court through ADR, dispute resolution service. However complex legislation that governs ancillary relief and the incredibly large body of associated and often contradictory case law makes it hard to envisage a significant reduction in litigation by reform to the process alone. The complexity of the position on money and property creates great uncertainty and adds both animosity and legal expense. The FJR said it was not equipped to comment further but recommended to the Government that ancillary relief should be separately review. We considered that this was a very urgent issue.

The Centre for Social Justice, consultation response

4.173. We agree and continue to recommend that financial orders should be the subject of a separate review, including examination of the law.

Fees

4.174. In principle we believe that fees in private law should reflect the cost of providing the service. But the panel had received little evidence about the cost of private law proceedings, and we make no recommendations, recognising that we could not assess the likely level of the fees and their effect on families and children. Any fee increases would need careful consideration. Further, there should be a clear and transparent remissions policy to support those who need it.

Legal aid

4.175. We set out in the interim report our concerns about the proposals which had then been made in the Green Paper, *Proposals for the Reform of Legal Aid in England and Wales* published by the MoJ in November 2010. The main proposed change relevant here was for a substantial reduction in legal aid for private law. The MoJ received over 5,000 responses. Government published a response in June this year, which set out a revised programme of reform. In private law, government widened the criteria for evidence of domestic violence, and provided for legal aid to be retained for cases involving child abuse and for the prevention of international child abduction. The legal aid reforms are now before Parliament in the Legal Aid, Sentencing and Punishment of Offenders Bill.

4.176. Respondents to our consultation and further submissions from sector experts reinforced our concerns.

The Government estimates that 54,000 fewer people will receive legal aid for representation in the family courts in the future; affecting 34,000 fewer private law children cases (compared to 2009-10) involving thousands more children (Justrights estimate that 68,000 children whose cases will be considered by the Court will be affected).

While both of our Associations support mediation and other forms of ADR, we do not believe that significant additional numbers of people in relationship breakdown will successfully resolve their differences out of the court setting. The upshot is that large numbers of people will enter the family courts ill-equipped to deal with its processes. It is not their lack of knowledge of evidence or procedure, terminology or court etiquette which will be the main problem. The significant difficulty will be that these people, in the throes of relationship breakdown, are at a point of crisis in their lives, and are emotionally going to struggle to deal with the issues. Many will have mental health difficulties, or personality disorders; their lives may have been ravaged by drink/drugs; English may be an unfamiliar language. These are people for who mediation and ADR will be likely to be unsuitable in any event. We cannot underestimate the additional trauma for them of trying to present their cases in court.

Resolution and FLBA, joint letter to the Family Justice Review

4.177. We also recognise the significant role solicitors play in supporting clients to resolve disputes, helping many to reach agreement without court proceedings.

Lawyers have an important and positive role to play in the family justice system. Unrepresented litigants in person, who do not have access to good legal advice, can and do issue proceedings and persist with those proceedings when they would not have done so had they had proper legal advice at the outset.

Lawyers are the gatekeepers. They have experience in detecting issues such as domestic violence and child abuse. They know when a client is ready to listen to and take advice, and when that client should more properly be referred to counselling or some other therapeutic service in order to be able to heed advice when it is given. They have the authority to reassure clients that Dispute Resolution Services other than litigation can be effective.

Family Justice Council, consultation response

4.178. The legal aid cuts may lead to a reduction in numbers of family solicitors and barristers and the closure of some firms. There is also a risk that lower funding may dissuade future entrants to this area of the profession. The effects will be felt directly in private law but may also reduce the availability of family lawyers for public law particularly outside the largest cities.

4.179. The impact of the reforms will need to be carefully monitored by the LSC and MoJ. The supply of properly qualified family lawyers is vital to the protection of children.

4.180. We are particularly concerned that a consequence of the proposed changes in legal aid will inevitably see a rise in the number of litigants in person coming before the family courts. In June 2011 the MoJ carried out a literature review of research on litigants in person.¹³⁵

- They tend to be younger, and have lower income and educational levels, than those who obtain representation.
- They face problems in court, of understanding evidential requirements, identifying legally relevant facts and dealing with forms. One study found these problems also existed for those engaging in mediation without legal representation.
- They create an extra burden for court staff and judges.
- Help given to them could breach requirements for impartiality.
- The weight of the evidence indicated that lack of representation negatively affected case outcomes.
- There were indications that procedural familiarity rather than knowledge of substantive law had the greatest impact on case outcomes.
- Users and court staff appreciate court based support services, though there is little evidence about their impact.

4.181. HMCTS are producing a *Guide for parents without a solicitor - Children and Family Courts* which offers the advice and information for parents without a solicitor.

4.182. Self-representation is common across the United States and various forms of support are offered. For example, a report published in California, *Statewide Action Plan for Serving Self-Represented Litigants*, found that court based staffed self-help centres, supervised by attorneys, have been productive.¹³⁶ Several states also provide extensive online information hubs. The New York Courts Service, for example, provides an online service for filling in forms.¹³⁷ People are asked questions and the programme fills in the legal forms automatically based on their responses. Experience in the US should be studied by government.

4.183. Our recommendations on process should improve the situation mainly by helping more people to stay out of court, but they are by no means a full answer.

¹³⁵ Williams, K. (2011) *Litigants in person: A literature review*, Ministry of Justice.

¹³⁶ Judicial Council of California, Task Force on Self Represented Litigants (2004), *Statewide Action Plan for Serving Self-Represented Litigants*, <http://www.courts.ca.gov/documents/selfreplitsrept.pdf>, Last Accessed 12/10/11.

¹³⁷ More detail is available at <http://www.nycourts.gov/courthelp/diy/familycourt.html>. Last accessed 12/10/11.

Final recommendations

- The process for initiating divorce should begin with the online hub and should be dealt with administratively by the courts, unless the divorce is disputed.
- People in dispute about money or property should be expected to access the information hub and should be required to be assessed for mediation.
- Where possible all issues in dispute following separation should be considered together whether in all issues mediation or consolidated court hearings. HMCTS and the judiciary should consider how this might be achieved in courts. Care should be taken to avoid extra delay particularly in relation to children.
- Government should establish a separate review of financial orders to include examination of the law.
- The Ministry of Justice and the Legal Services Commission should carefully monitor the impact of the reforms. The supply of properly qualified family lawyers is vital to the protection of children

5. Financial implications and implementation

Financial implications

- 5.1. 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.
- 5.2. We were asked in our terms of reference to take account of value for money and resource considerations in making any recommendations. The lack of data and unit costs has made it impossible to consider the costs and benefits to the system as a whole. Since our interim report was published the Ministry of Justice (MoJ) and Department for Education (DfE) have continued work to produce unit costs. There are still major gaps and these will need to be addressed by government in considering the next steps. Even then some of our recommendations will require more detailed specification taking account of the timing of implementation.
- 5.3. There would need to be initial investment to support system reform, greater efficiency and less duplication. This should not be substantial. Savings should be invested to reduce delay.

System reform

- 5.4. We have recommended the creation of a Family Justice Service. The cost will depend on the model adopted by government and its functions. There would be some transitional cost in terms of estates and staffing.
- 5.5. Other costs are substantially separate from structural changes and are needed with or without them. They include:
 - better IT, an absolute requirement for greater speed, effectiveness and efficiency. We are not in a position to estimate the cost. There may be scope to adapt and improve existing systems whether from within family law or from other jurisdictions, for example crime which we were told was ahead of family; and
 - investment in training, for particular groups, for example judges on case management, and generally to improve induction and interdisciplinary working.

Public law reform

- 5.6. Our proposals should shorten and simplify many public law cases requiring less time from judges, court resource, expert witnesses, and saving the resource of Cafcass and local authorities. The resource released will be needed to handle the strains on capacity.

Private law reform

- 5.7. Online support for relationship breakdown and divorce will have a cost, shared between Department for Work and Pensions, MoJ and DfE. This will help couples resolve their disputes independently or through mediation, reducing costs for the individuals and the courts.
- 5.8. Our proposals should reduce the number of court cases and simplify processes when they do go to court with the opportunity then to reduce backlog. Greater use of mediation may incur cost for the Legal Services Commission.
- 5.9. The changes to legal aid provision mean that further savings on this score in private law are unlikely.
- 5.10. Administrative handling of divorce applications could release perhaps 10 000 judicial hours on a crude estimate.

Implementation

- 5.11. Some of our recommendations will need primary legislation; others can be implemented quite quickly. A phased approach to implementation will be needed should they be accepted by government. This will not be easy and will need collaboration by institutions and people across the system, with significant culture change.
- 5.12. We recommended in chapter 2 that a training strategy should be developed. It will need to support implementation.

...the extent of the culture change required to progress these reforms should not be underestimated, nor should there be any presumption about any elements of the workforce having the willingness or skills to take things forward.

Association of Directors for Children's Services

The proposals are ambitious and they deserve resourcing accordingly: half measures will not succeed, and the opportunity will be lost. It is better that reform is planned and implemented properly, than change introduced piecemeal and quickly.

Law Society

- 5.13. We asked respondents to the consultation to comment on how the proposals might best be implemented. Responses included the need to:
- ensure strong programme and project management principles;
 - work with the Munro implementation team to determine joint priorities and develop shared implementation plans for local authority reform;
 - ensure any training associated with the launch of the proposals links to other recent developments, for example the introduction of the Family Procedure Rules;
 - develop an effective communications strategy, that engages the families who use the system as well as those that work within it, to give awareness of what is happening and when; and
 - draw on the experience of those who work in the system so change is not seen as top down.

5.14. We agree these are all relevant.

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, Chair of PensionsFirst, 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.

Lord Justice Andrew McFarlane

McFarlane LJ was a judge of the High Court, Family Division from 2005 until July 2011. He was Family Division Liaison Judge for the Midlands prior to his appointment to the Court of Appeal in July 2011.

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 represents children's interests and provides 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, Her Majesty's Courts and Tribunals Service, Ministry of Justice

Catherine Lee

Director, Justice Policy Group, Ministry of Justice

Shirley Trundle CBE

Director, Families Group, Department for Education

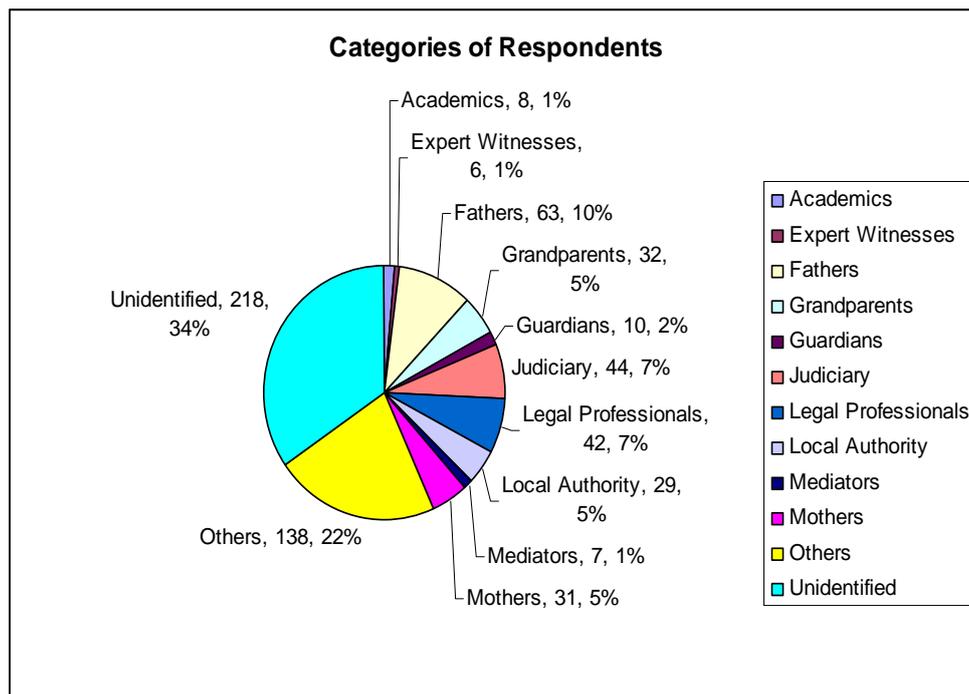
Robert Pickford

Director of Social Services, Department of Health and Social Services, Welsh Government

Annex C – Analysis of consultation responses

Background

1. The Family Justice Review consultation on the interim report closed on 23 June 2011. 628 responses were received either via the online questionnaire, email or in hard copy by post. Responses varied greatly in length, with some respondents sending in additional materials and evidence for the panel's consideration. Within these 628 responses, there were 166 responses who didn't answer the questions directly. The responses came from a variety of individuals and organisations. Individual respondents included fathers, grandparents and mothers as well as professionals involved in the family justice system.
2. A full list of the organisations who responded to the consultation can be found at the end of this Annex. These organisations included children's charities, parental rights groups, local authorities, government departments, academics, professional bodies, and law firms. A breakdown of the responses by type of respondent has been included in the chart below.



Summary of Responses

3. The responses were broadly supportive of the proposals in the interim report with the 'Yes' vote far outnumbering the 'No' vote on the 15 questions where an explicit 'Yes/No' vote was requested. However, this broad appraisal disguises particular areas of strong support and greater doubt over certain issues.

4. With regards to the **family justice system**, there was strong support for the proposals for the Family Justice Service (FJS). However, there were many requests for further detail and clarity on the envisaged role of the FJS. There was also strong support for judicial continuity, specialism and training though this was tempered by doubts over feasibility and questioning of certain proposals. Foremost amongst this, magistrates were opposed to the proposal to remove the rule that they should have two years experience working on crime before being able to hear family work.
5. The proposals on **public law** generated a broadly supportive response, though with many dissenting views. The issue of limiting court scrutiny of care plans received much comment with a clear split between those who deemed it necessary to reduce delay and those who worried that it would put the child's welfare at risk. There was also a mixed response to the idea of imposing a six month case limit through legislation, with, amongst a generally supportive response, some doubting the feasibility of the proposals and others worrying that this would be detrimental to the interests of the child.
6. The statistics indicate wide support for the **private law** proposals, however much of this support was heavily caveated with a number of important concerns being raised. The proposal to introduce legislation in support of children having a meaningful relationship with both parents post separation, while broadly praised, saw significant concerns raised over the real implications of such a change. There was cautious support given for Parenting Agreements, though many made clear that they would not be appropriate in all cases. Proposals on the removal of the terms contact and residence were welcomed though this was tempered by doubts over whether the change would have any impact. Finally, against the background of legal aid cuts, many respondents raised the issue of the need of giving more support to litigants in person.

Responses to specific questions

7. This section provides an analysis of the answers that respondents gave to the specific questions raised in the consultations paper. The numerical analysis is based on the 462 direct responses received. There were a further 166 responses from individuals and organisations who made comments on certain aspects of the proposals, but did not answer specific questions. These comments have been considered in the textual commentary below. Though there were a total of 462 direct responses, not all of these respondents answered every question. As a result, the number of respondents for each individual question is lower than the overall total.

The family justice system

Q1 - Do you agree with the proposed role that the Family Justice Service should perform?

8. This question was answered by 449 respondents, of these 308 (69%) respondents answered Yes, 63 (14%) answered No, and 78 (17%) respondents did not answer Yes or No but made comments on the question.
9. Support for the proposal came from a broad swathe of individuals and organisations. Those who supported the proposals said that it would help to join the current fragmented system more closely together, with clearer governance arrangements. Some highlighted that it was likely to result in reduced bureaucracy, fewer bodies involved and less confusion for children and families.
10. Even amongst supportive responses, however, there were requests for further clarity over the role that the FJS would play. Among these respondents, there was a feeling that greater detail needed to be given on the specific responsibilities the FJS would have.
11. There were also concerns as to how the FJS would be funded with some respondents believing improvements would only be achieved through the provision of greater resources.
12. While broadly supportive, there were concerns from within the judiciary over the extent to which the FJS could compromise judicial independence. This was based on a fear that FJS oversight could affect the autonomy of judges to take decisions in individual cases.

Q2 - 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?

13. This question was answered by 362 respondents. The responses received were a mixture of specific suggestions and more general comments.
14. There were many comments on the child's position within the system. There were a number of suggestions on innovative ways to engage the child including the option for the child to write a letter, the use of interviews by trusted individuals, and the possibility of having discussions at school. There were also responses related to the age at which a child could be an active voice in proceedings. Some argued that these types of decisions should be taken by experts, while others felt that a general threshold should be established based on accepted criteria.
15. There were also a number of responses related to the roles that professionals in the system should play. Some of these focused on the importance of the guardian as a safeguard. There were calls for the guardian's role to be strengthened and for greater resources for training to be applied. With regards to judges, there were mixed opinions on the suitability of them speaking to children. Various respondents argued that judges should receive training in speaking to

children. In contrast to this, others argued that the court was an intimidating place for a child and thus it was unlikely to be appropriate for a child to speak directly to the court.

16. Responses related to the issue of bias within the system were generally on the subject of shared parenting. The bulk of these respondents self-identified themselves as fathers. There was a feeling amongst some respondents that shared parenting would ensure the child didn't come under pressure from one parent and was able to give a balanced opinion. Other respondents, particularly mothers, raised concerns about the difficulties of incorporating the child's voice in cases of domestic violence and/or abuse.

Q3 - 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?

17. This question was answered by a total of 431 respondents, of these 314 (73%) respondents answered Yes, 40 (9%) answered No, and 76 (18%) did not answer Yes or No but made comments on the question. Many of the comments were similar to those made in response to question two.
18. There was broad support about the importance of the child's voice being heard and of the child being given the choice of how this would occur. Many of the supportive responses were caveated with concerns about the appropriate age to engage the child and the best ways to judge this, whether through independent experts or the use of fixed criteria. There were differing opinions on whether the child should speak directly to the court. There was particular concern about the implications of the child speaking to the court in abuse cases.
19. Amongst the minority of respondents who answered 'No' to the question, fathers were the dominant group. The reasons given were the same as those given in response to question two (see above).

Q4 - Do you agree that there should be a single family court?

20. This question was answered by a total of 412 respondents, of these 309 (75%) answered Yes, 23 (6%) answered No, and 80 (19%) respondents did not answer Yes or No but made comments on the question.
21. This proposal was supported by respondents from across the spectrum. Those who supported the proposal felt that it was likely to lead to greater clarity for the public and more effective working between the different tiers of court. Greater efficiencies, better case management, service provision and accessibility, improved judicial expertise, and judicial continuity were all put forward as benefits likely to arise from these changes. Many also highlighted that significant steps had been made towards a single family court, so this was a natural next step.
22. While expressing general support, a number of respondents made technical points about the proposal. A number of concerns were raised about the difficulties of the High Court's links to a single court. A few respondents

highlighted the importance of ensuring that there were appeal mechanisms between the different tiers of the family court.

23. Amongst the small number of respondents who said No, there were a variety of opinions given. The general sense amongst this group, however, was that the change would be wasteful and would not address the real problems of the system. As well as this, in common with some who responded Yes, there were comments on the need to ensure that the appeal of decisions was still possible within the new structure. Finally, a number of magistrates worried about the implications of only having a single point of entry given the existing heavy workload in the Family Proceedings Courts.

Q5 - Do you agree that the changes we have proposed to the judiciary- including greater continuity, specialism and management- will lead to improvements in the operation of the family justice system?

24. This question was answered by a total of 412 respondents, of these 268 (65%) answered Yes, 49 (12%) answered No, and 96 (23%) respondents did not answer Yes or No but made comments on the question.
25. There was strong support for judicial continuity. Respondents felt that this would improve the consistency of approach and the efficiency of court proceedings. Respondents from the judiciary argued that judges would feel a stronger sense of accountability given that they would remain with the case throughout. A number of individuals raised the issue of High Court judicial continuity. Amongst this group, it was widely held that High Court judges should be subject to the same changes, though there were some who argued that they shouldn't be. Respondents argued that it is the hardest and most complicated cases which reach the High Court and thus where the principles of continuity, specialism and management are the most important.
26. There was widespread support for greater performance management for judges. It was argued that this would assist in establishing a more efficient framework and consistent approach to cases. However, amongst the judiciary there were concerns regarding the impact that this could have on judicial independence.
27. The majority of responses were in favour of judicial specialism. It was seen as a way of ensuring greater consistency and accuracy of decisions. There was however opposition to proposals for greater specialism from magistrates. A number of magistrates argued that an understanding of the total package of justice is essential for lay magistrates. There were also concerns that enforcing a specialism would discourage people from becoming magistrates.

Q6 - Do you agree that case management principles, in respect of the conduct of both private and public law proceedings, should be introduced in legislation?

28. This question was answered by a total of 391 respondents, of these 230 (59%) answered Yes, 55 (14%) answered No, and 106 (27%) respondents did not answer Yes or No but made comments on the question.

29. Those who supported the proposal felt that it would offer consistency and reduce delay. Some respondents argued that legislation on case management principles would increase accountability and add structure to cases.
30. A number of respondents, while being broadly supportive, caveated their responses with additional provisions. Amongst responses from parents and grandparents, the most common caveat was that legislation would only be effective if accompanied by enforcement provisions. In contrast to this, other supportive respondents argued that legislation was necessary but that it must allow for sufficient flexibility on a case by case basis.
31. Some respondents argued that introducing legislation for case management principles would have a negative impact. The key argument amongst these responses was that legislation would be too prescriptive and would not allow for sufficient flexibility on a case by case basis.
32. There were also some respondents who argued that the necessary case management principles were already in place through the Children Act 1989 and the Family Procedure Rules 2010. These respondents felt that legislation would simply be a duplication of these and was therefore not necessary.
33. Some respondents raised the issue that more holistic changes including better training and more efficient IT systems were necessary to improve case management. Amongst these respondents, many cautioned against viewing legislation as a panacea.

Q7 - What changes are needed to the culture and skills of people working in family justice and how best can they be achieved?

34. This question was answered by 327 respondents. There was a clear sense across all responses that culture change was necessary within the family justice system.
35. There were, however, differing opinions on exactly what that culture change would entail. These differences were indicative of a split between those who work in the system and those who find their families involved. For some professionals, there was a perception that the culture was not child focused enough with parent's rights being prioritised over the needs of the children. In contrast to this, many responses from parents and grandparents argued that professionals needed to have a better understanding of the needs of the individuals caught up in the family justice system.
36. In terms of the best ways to achieve cultural change, more training and improved skills were widely thought to be a good thing for professionals. The responses were supportive of increased and improved interdisciplinary training opportunities for all those working within the family justice system. It was also felt that increased training for social workers, particularly with regards to the presenting of evidence to court, should be included as a recommendation in the final report.

Q8 - Do you have any other comments you wish to make on our proposals for system management and reform?

37. This question was answered by 250 respondents. Comments were raised about a wide range of issues.
38. An issue which featured in a wide range of comments was that of the use of technology within the system. There were supportive comments made about proposals for an online information hub. A number of respondents argued that the family justice system had to have a far more integrated IT system. There were also calls for better data management.
39. There were a number of comments on how extensive the reforms should be. A number of respondents argued that far reaching and ambitious changes needed to be made to all areas of the system. Others, however, warned that the Family Justice Service must not simply be another level of bureaucracy.
40. There were a number of individuals who argued that a presumption of shared parenting was the only change which would allow for progress in the private law system.

Public law

Q9 - Do you agree with our proposals to refocus the role of the court?

41. This question was answered by a total of 372 respondents, of these 213 (57%) answered Yes, 45 (12%) answered No, and 114 (31%) did not answer Yes or No but made comments on the question.
42. Above all, the proposals on care plans generated the most scrutiny. The nature of this debate, with opinion being split along professional lines, was indicative of much of the mistrust which exists within the system. Local authority responses were in favour of reducing the court's scope to scrutinise care plans. Amongst these responses, it was felt that the court's scrutiny was both time-consuming and led to deadlock between the court and local authorities. In contrast to this, a number of respondents, particularly from experts, magistrates and judges, argued that scrutiny of care plans was necessary due to a lack of confidence in the quality of local authority work. Amongst this group, some felt that court scrutiny of care plans was not a time consuming process and therefore cases would not be speeded up by reducing this practice.

Q10 - Do you think a six-month limit, with suitable exceptions, for all section 31 care and supervision cases should be introduced?

43. This question was answered by a total of 359 respondents, of these 177 (49%) answered Yes, 64 (17%) answered No, and 117 (33%) did not answer Yes or No but made comments on the question.
44. There were a wide variety of comments given to this question, ranging from very strong support to clear rejection. The majority of responses were made up of guarded support with a number of Yes answers being caveated.

45. Those who most strongly supported the provision argued that only a definitive limit would tackle the delays within the system. However, many of these respondents stressed that the limit would not in itself be sufficient but that it could provide the focus around which system reform could be built
46. Amongst the respondents who offered a more guarded Yes the overriding concern was that there should be exceptions to the six month limit. Suggestions for these exceptions included issues such as whether the parent is showing genuine interest in changing and allegations of non-accidental injury. At the same time, there were a few respondents who argued that there could be no exceptions as this would undermine the proposal.
47. There were also a number of respondents who were not opposed to the proposal but had strong doubts about its feasibility. Typically these responses placed the cause of the delay on problems such as delays in expert reports, a lack of cooperation between the courts and local authorities, and poor case management. They argued that there would have to be big changes to the system in order to meet the target.
48. Opposition to the proposal encompassed a number of arguments. The first was a rejection on the principle that the six month limit was an arbitrary requirement and that the correct approach must always be to manage cases according to the needs of the child. Secondly, there were concerns that the time limit would lead to cases being rushed and poor assessments and submissions being made due to time pressures. As well as this, some respondents feared that the time limit was simply an attempt by the government to 'will' a change in behaviour in place of tackling the fundamental problems. Finally, a small minority rejected the proposals on the principle that six months was still too long a timeframe.

**Q11 - 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?**

49. This question was answered by a total of 347 (76%) respondents, of these 217 answered Yes (63%), 24 (7%) answered No, and 106 (30%) respondents did not answer Yes or No but made comments on the question.
50. The majority of respondents supported the proposal to strengthen the timetable for the child with wide support for the notion that the timetable must be strengthened in line with the child's needs. There was, however, much disagreement over how this timetable would be constructed. Amongst those who said No there was a feeling that the existing framework was adequate.
51. There were a large number of suggestions on the elements to be taken into account in the formulation of the timetable. The majority of these focused on child development criteria and included child and family history, the age of the child, school dates, and the child's emotional state. Other respondents argued that the parental situation should be significant with issues such as the potential of the parents changing and the level of risk to the child suggested as important considerations.

52. Even amidst broad agreement that the timetable should be strengthened, there was much debate over how the timetable should be structured. A number of respondents, generally consisting of family members but also some professionals, argued that the timetable must be simple and clear to all people. Views varied on the rigidity of the timetable with some arguing for flexibility while others thought a timetable should be set out at the first meeting and strictly followed. Finally, there were differing views on the extent to which the existing Public Law Outline timetable should be amended with a few respondents arguing that it was already sufficient.

Q12 - Do you think our approach to the strengthening of judicial case management is correct?

53. This question was answered by a total of 334 respondents, of these 197 (60%) answered Yes, 31 (9%) answered No, and 106 (31%) did not answer Yes or No but made comments on the question.
54. There was broad support for the argument that case management needed to be improved. However, as with a number of previous questions, there was little consensus over the details of how this should be achieved.
55. The majority of responses supported the increased role of the judge as case manager. Respondents agreed with the proposal that judges should be responsible for timetabling, case management and ensuring that experts submit their reports on time. A number of respondents argued that the judge should be able to hand out punishments for non-compliance. There was also broad support for the extension of the duration of interim care orders to six months.
56. Amongst respondents who answered No to the question the largest group were fathers. These responses focused on the problems of bias within the system and their lack of trust in judges.

Q13 - What criteria should be used in the decision whether or not to appoint experts? And should the judge draft the letter of instructions?

57. This question was answered by 249 respondents. The majority of responses focused on the issue of whether the judge should draft the letter of instruction, with some attention paid to the criteria upon which experts should be appointed.
58. The issue of judges drafting the letter of instruction received mixed responses. However, even amongst those who expressed support there were doubts about whether the judge would have time to do this.
59. There was a strong feeling in the responses that too many expert reports were being ordered, though there were some dissenting views. Most respondents argued that there was still a place for experts but that this should only be in restricted circumstances. The sense was that experts should only be called if their evidence was both crucial to making a final decision, and beyond the scope of social worker's skills.

Q14 - Under a proportionate working system, what are the core tasks that a guardian needs to undertake in proceedings?

60. This question was answered by 204 respondents. A significant range of tasks, activities, roles and responsibilities were suggested.
61. Many saw the core tasks as those set out in the Family Procedure Rules 2010. The tasks which received the most suggestions were duties such as representing the voice of the child, focusing proceedings on the child's best interests, reading all of the local authority files on the case, meeting and interviewing parents, offering a professional view to the court on the local authority care plan. Other suggestions for the tasks which guardians should carry out included having an increased mediation role, being involved in the court process at all stages, and deciding which experts would be needed.
62. Though a direct question was not posed, a number of respondents expressed views on the Cafcass proportionate model which aims to target resources to the areas where they are most needed. Though some were supportive, the overall tone was a concern that the interim report was endorsing and adopting the Cafcass proportionate approach.

Q15 - Could there be a greater role for other Dispute Resolution Services in support of the public law court process?

63. This question was answered by a total of 348 respondents, of these 116 (48%) answered Yes, 55 (16%) answered No, 127 (36%) did not answer Yes or No but made comments on the question.
64. Those who were positive felt that Dispute Resolution Services could be an effective way to resolve disputes and should be encouraged before proceedings. Amongst these respondents, it was argued that the court process undermined relationships and therefore anything which avoided court was positive. Within the broad framework of Dispute Resolution Services, Family Group Conferencing (FGC) was singled out for its potential by respondents, with arguments that it should be encouraged, mandatory and offered at earlier stages. Mediation was also popular though many added caveats on the importance of having well trained mediators.
65. Amongst those who responded No, there was a feeling that Dispute Resolution Services would not work in public law cases. It was argued that FGC and mediation were particularly dangerous in cases of abuse and were unworkable in the face of stubborn parents.

Q16 - Do you have any other comments you wish to make on our proposals for public law?

66. This question was answered by 192 respondents. A significant range of comments were made, with many supporting proposals made in the interim report.
67. Examples of these supportive comments included praise for proposals to simplify the system and support for lengthening interim care orders. Critical responses included opposition over the proposal to limit the use of adoption panels and independent social workers.
68. There were a number of new suggestions made. One respondent argued that case duration should be measured from the moment that the child is first thought to be at risk, rather than the time it takes to go through the court system. Another argued that the court environment should provide space for intimate discussions with family members.

Private law

Q17 - Do you agree that there is a need for legislation to more formally recognise the importance of children having a meaningful relationship with both parents post separation?

69. This question was answered by a total of 401 (88%) respondents, of these 198 (49%) answered Yes, 74 (18%) answered No and 129 (32%) did not answer Yes or No but made comments on the question.
70. Supporters of the proposal were generally split into two groups. The first group, made up mainly of fathers and grandparents, expressed support for the proposal, although they claimed that it didn't go far enough. Instead they argued that the law had to be amended to include a presumption of shared parenting. Many of these respondents adopted forthright positions, citing gender imbalance, bias and institutional wrongdoing. The second group were made up of professionals who supported the proposal in principle but expressed caution. Typical of these respondents was an insistence that care must be taken to avoid misinterpretation of any legislation to the detriment of the child's welfare.
71. Opposition to the proposal came from variety of individuals, with mothers and academics the most strongly opposed. For some mothers, the proposal risked undermining the safety of the child by exposing them to abusive fathers. These respondents argued that it would be dangerous for legislation to force a meaningful relationship onto families if such a relationship had not been established prior to separation. A number of respondents cited evidence from the Australian experience as the basis of their opposition. They argued that the evidence suggested that legislating for a meaningful relationship led to worse outcomes for children and to confusion in courts over how the term should be interpreted. Finally, some respondents, mainly from the judiciary, argued that the change was unnecessary as the existing case law already reflected the principle of a meaningful relationship.

Q18 - Do you agree with the proposals to remove the terms 'contact' and 'residence' and to promote the use of Parenting Agreements?

72. This question was answered by a total of 381 respondents, of these 188 (49%) answered Yes, 61 (16%) answered No and 132 (35%) did not answer Yes or No but made comments on the question.
73. The proposal on Parenting Agreements (PAs) received broad support. They were seen as a positive move towards encouraging greater cooperation between parents. Many of these positive responses were tempered by arguments that PAs must not be seen as a panacea and were not appropriate in all cases. The few who disagreed with PAs did so out of concern that they do not yet offer sufficient protections where there are welfare or power imbalances.
74. The response to the proposals to remove the terms contact and residence was more mixed. Though there were pockets of strong support, the general reaction was more muted. Some argued that the removal of the terms would be helpful alongside a broader shift in the attitudes of those involved in private law disputes. There was concern, however, that there be clarity over the exact meaning of terms which replaced the existing practice.
75. A common argument against the proposal to remove the terms was that it would not achieve the desired effect of reducing disputes in cases that go to courts. In a similar vein, other respondents argued that the changes would involve a large amount of effort for little appreciable reward. Another argument was that the change would make things worse by increasing confusion and doubt over what exactly was at stake. This concern was seen to be particularly pertinent in light of the expected increase in litigants in person as a result of legal aid cuts.

Q19 - Do you agree that there should be a requirement to consider Dispute Resolution Services prior to making an application to court?

76. This question was answered by a total of 398 respondents, 226 (57%) answered Yes, 44 (11%) answered No, 128 did not answer Yes or No but made comments on the question.
77. The proposal received broad support. Some of these respondents wanted the proposal to be made mandatory, while the majority added caveats to their support. The general tenor of the responses was that, through avoiding court, Dispute Resolution Services (DRS) could save time and money and create an environment more conducive to considering the needs of children.
78. The most significant issue to emerge from the consultation was the concern of respondents about the dangers of DRS in the case of domestic abuse. Many who supported the proposal argued that it would not be appropriate in cases of domestic abuse. Equally, many who rejected the proposal cited the incompatibility of domestic abuse and DRS as their reason.

79. There were also respondents who worried that the proposal would simply cause more delay. This was based on a feeling that many cases will inevitably end up in court, and thus DRS would simply prolong the process. Others worried that one party may deliberately use DRS as a delaying tactic.

Q20 - Do you agree with the processes we outline for the resolution of private law disputes?

80. This question was answered by a total of 330 respondents, of these 168 (51%) answered Yes, 49 (15%) answered No and 113 (34%) did not answer Yes or No but made comments on the questions.
81. The question received a broad array of responses. Many who answered Yes argued that the proposals would speed up the resolution of disputes and achieve better outcomes for children. Those who responded No or made comments gave a variety of reasons. For some respondents, mediators were not trained to be gatekeepers to the legal system and thus there were concerns that this added responsibility would be difficult to fulfil. Linked to this, there were a number of comments which argued that the report had ignored the crucial role that lawyers play within the system. A number of respondents were concerned about whether the proposals would work in the case of domestic abuse.

Q21 - Which urgent and important circumstances should enable an individual to be exempt from this assessment process for Dispute Resolution Services?

82. This question was answered by 230 respondents. A broad range of comments were made with a couple of issues dominating.
83. Domestic abuse was the urgent and important circumstance most frequently cited by respondents. Within these comments all forms of domestic abuse were mentioned including physical and emotional abuse. There was, however, disagreement between those who felt that the abuse should be proven and those who felt that the risk of abuse and alleged abuse should be included.
84. A significant number of respondents made reference to issues related to the child's welfare. These child welfare concerns involved risk of significant harm, sexual abuse and neglect. The issue of child abduction/removal from the country was also mentioned by a number of respondents.
85. A minority of respondents suggested that mediation should not be required if one or more party is unwilling to participate. Reasons for this varied from a concern about a violation of an individual's Article 6 rights (European Convention on Human Rights) to a feeling that mediation would only work if both sides were willing to cooperate.
86. Other suggestions included cases of serious criminal behaviour which has led to convictions, issues connected to occupation of property, and cases involving mental illness and/or learning difficulties.

Q22 - What do you think are the core skills required for mediators undertaking an assessment?

87. This question was answered by 246 respondents. The majority of responses focused on the personal qualities required while others drew attention to the necessary accreditation and qualifications for the position.
88. Respondents listed a large number of personal qualities that they deemed would make somebody a good mediator. These suggested personal characteristics included good judgement of character, listening, common sense, good communication, impartiality, ability to relate to children, empathy, analytical skills, conflict management skills, patience, consistency and professionalism.
89. The minority of respondents who referred to the necessary training required brought up a number of issues. There was a strong sense that there was a need for a standardised appraisal system. Mediators were thought to need knowledge of both social work issues and family law. A number of respondents also made specific mention of the necessity of mediators being trained to recognise indicators of emotional, physical and substance abuse as well as mental health issues.

Q23 - 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?

90. This question was answered by 345 respondents, of these 127 (37%) answered Yes, 91 (26%) answered No and 127 (37%) did not answer Yes or No but made comments on the question.
91. The majority of those who argued in favour of a fee charging regime felt that a penalties regime was the only way to ensure compliance. Respondents in this group typically spoke of the need to speed up resolution, provide a stick to those who wouldn't comply and ensure that all parties focused on reaching agreement.
92. Those, mainly mothers and experts, who rejected the proposal made number of different arguments. Many believed that penalties would be counter-productive and would only increase bitterness between parties. This was particularly pertinent given that the aim of the DRS was to focus on cooperation as a solution to the adversarial process within the courts. Others who rejected the proposal believed that the penalties would be difficult to enforce. Respondents within this group also made the argument that penalties were not in the interest of the child.
93. A separate group of respondents argued that penalties were necessary but that a fee charging regime was not the most effective way to ensure compliance. Within this group there were a number of innovative suggestions including mandating community service, a loss of voice at subsequent meetings, forced attendance at PIPs, and the temporary removal of residence rights.

Q24 - Do you have any other comments you wish to make on our proposals for private law?

94. This question was answered by 214 respondents with comments on a wide range of issues.
95. The greatest amount of comments related to the issue of shared parenting. A number of individuals, almost entirely fathers, argued that the proposals did not address the problems of bias within the system and that shared parenting had to be recommended. In contrast to this, an almost equally large group, consisting of a greater variety of individuals and organisations, argued that the proposal in support of a meaningful relationship risked undermining the paramountcy of the child principle which had been established in the Children Act 1989. Above all, these respondents argued that the proposal risked exposing children to abusive parents. There were also a large number of grandparents who argued for greater rights for grandparents to see their grandchildren.
96. Another recurrent issue was that of legal aid with a number of respondents arguing that the proposed cuts in legal aid threatened to have a negative impact on the family justice system. These respondents argued that the proposals to reduce delay would struggle to be achieved if the expected increase in litigants in person occurred.

Q25 - Do you have any comments about how these proposals might best be implemented?

97. This question was answered by 203 respondents.
98. The issue most commonly mentioned was that of the timing of implementation with an equal two way split in views. On the one side were a number of individuals and professionals who argued that the changes must be implemented as soon as possible. On the other side were respondents, including many magistrates, who argued that the changes must be introduced gradually and carefully. Many of these respondents argued that the proposals should be tried out in pilots before being introduced nationally.
99. Amongst a broad variety of responses, two other issues were prominent. Firstly, a number of respondents argued that the changes could only be successfully introduced through the use of primary legislation. Secondly, many respondents referred to the importance of training staff and achieving changes from the bottom up.

List of the organisations who responded

- Action against Domestic Abuse
- Association of Directors of Children's Services (ADCS)
- Adoption UK
- Asian Women's Resource Centre
- Association of Her Majesty's District Judges
- Association of Lawyers for Children (ALC)
- Association of Residential Family Centres (ARFC)

- British Association of Adoption and Fostering (BAAF)
- British Association of Adoption and Fostering Cymru (BAAF Cymru)
- Bar Council
- Barnardos
- British Association of Social Workers (BASW)
- Berkshire, Buckinghamshire and Oxfordshire Law Society Committee
- Bilton Hammond LLP
- Birketts LLP
- Birmingham Safeguarding Children Board
- Blandy & Blandy LLP
- Bournemouth Borough Council
- Brighton and Hove Council
- Bristol Family Panel
- Bristol Grandparents Support Group
- Browning House
- Brunel University
- Buckinghamshire County Council
- Children and Family Court and Advisory Service (Cafcass)
- Cardiff Law School
- Carter Brown Associates
- Central and South West Lancashire Family Panel
- Central Devon Magistrates Court
- Centre for Social Justice
- Ceredigion Justices
- Child Support Agency
- Childhood First
- Children First Family Mediation
- Children in Wales/Plant yng Nghymru
- Children's Voice in Family Law
- Children's Workforce Development Council (CWDC)
- Citizen's Advice
- City of Westminster Magistrates' Court
- City University London and The Expert Witness Institute
- Collaborate LLP
- Concateno
- Co-ordinated Action Against Domestic Abuse (CAADA)
- Council of Her Majesty's Circuit Judges
- Coventry and Warwickshire Justice Council
- Coventry Magistrates
- Darby's Solicitors LLP
- Dawson Cornwell Solicitors
- Derby City Council
- Devon Safeguarding Children Board
- Doncaster Magistrates' Court
- Dorset Family Panel
- East Berkshire Family Panel
- East Riding of Yorkshire Council
- Essex County Council
- Families Need Fathers
- Families Need Fathers Cymru
- Family Justice Council (FJC)
- Family Law Bar Association (FLBA)
- Family Mediation Cardiff
- Family Rights Group
- False Allegations Support Organisation
- Fatherhood Institute
- Fathers 4 Justice
- Flintshire County Council
- Forced Adoption
- Gingerbread

- Grandparents Apart
- Grandparents Association
- Grandparents Plus
- Halton Borough Council
- Harrogate/Skipton family panel
- Hartnell Chanot & Partners
- Hertfordshire County Council
- Her Majesty's Courts and Tribunals Service (HMCTS)
- Independent Social Workers' Association (ISWA)
- Institute of Family Therapy Family Mediation Service
- Isle of Wight Family Proceedings Court
- Kent County Council
- Kirklees Council
- Latimer Hinks Solicitors
- Law Society
- Legal Services Commission (LSC)
- Lincolnshire County Council
- Liverpool Law Society
- Local Borough of Bromley
- Local Government Group
- Local Government Ombudsman
- London Borough of Barnet
- London Borough of Brent Legal Department
- London Borough of Ealing
- London Borough of Hackney
- London Borough of Hammersmith and Fulham
- London Borough of Islington
- London Borough of Southwark
- London Borough of Sutton
- London Borough of Wandsworth
- London Safeguarding Children Board Hammersmith & Fulham
- Magistrates' Association
- Maypole Women
- Mediation Herefordshire
- Mediation Works
- Men's Aid
- Middlesbrough Council
- Money Advice
- National Association of Child Contact Centres (NACCC)
- NAGALRO
- The Trade Union and Professional Association for Family Court and Probation Staff (Napo)
- National Bench Chairmen's Forum
- National Children's Bureau
- National Youth Advocacy Service
- Neath Port Talbot County Borough Council
- Network on Family, Regulation and Society (NFRS)
- New Fathers 4 Justice
- NHS Bristol
- NHS Bristol Public Health End Violence and Abuse Against Women and Girls Team
- North Devon Family Proceedings Court
- North Yorkshire Magistrates.
- Northamptonshire Family Proceedings Panel
- Nottingham City Council
- Nuffield Foundation
- National Youth Advocacy Service (NYAS)
- Oxford Centre for Family Law & Policy
- Oxfordshire County Council
- Oxfordshire Family Mediation
- Patrocinium Interventus

- Public and Commercial Services Union (PCS)
- Piper Smith Watton LLP
- Pontefract Family Court
- Relate
- Relate Cymru
- Relationships Foundation
- Release
- Resolution
- RESPECT
- Royal Borough of Kensington and Chelsea
- Royal College of GPs
- Royal College of Paediatrics and Child Health
- Scunthorpe Magistrates' Court
- Solace Women's Aid
- Solicitors in Local Government Child Care Lawyers Group
- Solihull Children's Social Work Services
- Somerset County Council
- South Devon Family Panel
- South London & Maudsley NHS Foundation Trust
- Southall Black Sisters
- St Michael's Fellowship
- Starting Over a Show
- Suffolk Adoption Agency
- Suffolk County Council
- The Academy of Experts
- The Association of Her Majesty's District Judges
- The Black Country Family Panel
- The Board of Deputies of British Jews
- The Child and Family Practice
- The Children's Legal Centre
- The Children's Society
- The Family Law Society
- The International Family Law Group LLP
- The Manchester Family Law Bar Association Committee
- The Mediation Centre
- The Shrewsbury and North Shropshire Family Proceedings Court
- The University of Melbourne
- The Who Cares? Trust
- Torbay Council
- Triangle
- Trinity College
- Turpin & Miller LLP
- University of Exeter
- University of London
- University of Oxford
- University of Sheffield
- Voice
- Warwickshire and Coventry Family Justice Council
- Welsh Local Government Association
- Welsh Women's Aid
- West Berkshire Council
- West Glamorgan Family Panel
- West Midlands Regional Family Placement Consortium
- West Wales Mediation
- Western Bench Family Panel
- Welsh Local Government Association
- Women's Aid
- Women's Resource Centre
- Woolley & Co, Solicitors
- Young Barristers' Committee
- Young Legal Aid Lawyers

Annex D – Estimated costs of the family justice system

The estimates here are a rough attempt to estimate the cost of the family justice system to the government in 2009-10. We have no reliable information on the costs to individuals of using the family justice 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.

	(£m)		
	Public	Private	Total
HMCS (gross costs)	50	170	220
Legal Services Commission	330	320	650
Cafcass and Cafcass Cymru	80	60	140
Local Authority	590		590
Total	1,060	550	1,600

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. 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 £15,000 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 for 12 months (including social care support and the fee or allowance paid for the placement). These costs are based on volumes and costs from 2009-10. 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 E – List of data gaps

The list below sets out the data gaps we have identified, building on a similar list published with the *Review of the Child Care Proceedings System in England and Wales* in 2006.¹³⁸

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

¹³⁸ (2006) *Child Care Proceedings Review, Desk Research Report*, London, Department for Constitutional Affairs, p.67.

- 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

Annex F – Pre-application protocol for mediation information and assessment

Copy of Practice Direction 3A - Pre-application Protocol for Mediation Information and Assessment

This Practice Direction supplementing the Family Procedure Rules 2010 is made by the President of the Family Division under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and is approved by the Parliamentary Under Secretary of State, by authority of the Lord Chancellor.

This Practice Direction comes into force on 6th April 2011.

PRACTICE DIRECTION 3A - PRE-APPLICATION PROTOCOL FOR MEDIATION INFORMATION AND ASSESSMENT

This Practice Direction supplements FPR Part 3

1. Introduction

- 1.1 This Practice Direction applies where a person is considering applying for an order in family proceedings of a type specified in Annex B (referred to in this Direction as ‘relevant family proceedings’).
- 1.2 Terms used in this Practice Direction and the accompanying Pre-action Protocol have the same meaning as in the FPR.
- 1.3 This Practice Direction is supplemented by the following Annexes:
 - (i) Annex A: The Pre-application Protocol (‘the Protocol’), which sets out steps which the court will normally expect an applicant to follow before an application is made to the court in relevant family proceedings;
 - (ii) Annex B: Proceedings which are ‘relevant family proceedings’ for the purposes of this Practice Direction; and
 - (iii) Annex C: Circumstances in which attendance at a Mediation Information and Assessment Meeting is not expected.

2. Aims

- 2.1 The purpose of this Practice Direction and the accompanying Protocol is to:
 - (a) supplement the court’s powers in Part 3 of the FPR to encourage and facilitate the use of alternative dispute resolution;
 - (b) set out good practice to be followed by any person who is considering making an application to court for an order in relevant family proceedings; and

- (c) ensure, as far as possible, that all parties have considered mediation as an alternative means of resolving their disputes.

3. Rationale

- 3.1 There is a general acknowledgement that an adversarial court process is not always best-suited to the resolution of family disputes, particularly private law disputes between parents relating to children, with such disputes often best resolved through discussion and agreement, where that can be managed safely and appropriately.
- 3.2 Litigants who seek public funding for certain types of family proceedings are (subject to some exceptions) already required to attend a meeting with a mediator as a pre-condition of receiving public funding.
- 3.3 There is growing recognition of the benefits of early information and advice about mediation and of the need for those wishing to make an application to court, whether publicly-funded or otherwise, to consider alternative means of resolving their disputes, as appropriate.
- 3.4 In private law proceedings relating to children, the court is actively involved in helping parties to explore ways of resolving their dispute. The Private Law Programme, set out in Practice Direction 12B, provides for a first hearing dispute resolution appointment ('FHDRA'), at which the judge, legal advisor or magistrates, accompanied by an officer from Cafcass (the Children and Family Court Advisory and Support Service), will discuss with parties both the nature of their dispute and whether it could be resolved by mediation or other alternative means and can give the parties information about services which may be available to assist them. The court should also have information obtained through safeguarding checks carried out by Cafcass, to ensure that any agreement between the parties, or any dispute resolution process selected, is in the interests of the child and safe for all concerned.
- 3.5 Against that background, it is likely to save court time and expense if the parties take steps to resolve their dispute without pursuing court proceedings. Parties will therefore be expected to explore the scope for resolving their dispute through mediation before embarking on the court process.

4. The Pre-application Protocol

- 4.1 To encourage this approach, all potential applicants for a court order in relevant family proceedings will be expected, before making their application, to have followed the steps set out in the Protocol. This requires a potential applicant, except in certain specified circumstances, to consider with a mediator whether the dispute may be capable of being resolved through mediation. The court will expect all applicants to have

complied with the Protocol before commencing proceedings and (except where any of the circumstances in Annex C applies) will expect any respondent to have attended a Mediation Information and Assessment Meeting, if invited to do so. If court proceedings are taken, the court will wish to know at the first hearing whether mediation has been considered by the parties. In considering the conduct of any relevant family proceedings, the court will take into account any failure to comply with the Protocol and may refer the parties to a meeting with a mediator before the proceedings continue further.

- 4.2 Nothing in the Protocol is to be read as affecting the operation of the Private Law Programme, set out in Practice Direction 12B, or the role of the court at the first hearing in any relevant family proceedings.

Signed

President of the Family Division
Date

Signed

Parliamentary Under Secretary of State
Date

Annex A

The Pre-application Protocol

1. This Protocol applies where a person ('the applicant') is considering making an application to the court for an order in relevant family proceedings.
2. Before an applicant makes an application to the court for an order in relevant family proceedings, the applicant (or the applicant's solicitor) should contact a family mediator to arrange for the applicant to attend an information meeting about family mediation and other forms of alternative dispute resolution (referred to in this Protocol as 'a Mediation Information and Assessment Meeting').
3. An applicant is not expected to attend a Mediation Information and Assessment Meeting where any of the circumstances set out in Annex C applies.
4. Information on how to find a family mediator may be obtained from local family courts, from the Community Legal Advice Helpline – CLA Direct (0845 345 4345) or at www.direct.gov.uk.
5. The applicant (or the applicant's solicitor) should provide the mediator with contact details for the other party or parties to the dispute ('the respondent(s)'), so that the mediator can contact the respondent(s) to discuss that party's willingness and availability to attend a Mediation Information and Assessment Meeting.
6. The applicant should then attend a Mediation Information and Assessment Meeting arranged by the mediator. If the parties are willing to attend together, the meeting may be conducted jointly, but where necessary separate meetings may be held. If the applicant and respondent(s) do not attend a joint meeting, the mediator will invite the respondent(s) to a separate meeting unless any of the circumstances set out in Annex C applies.
7. A mediator who arranges a Mediation Information and Assessment Meeting with one or more parties to a dispute should consider with the party or parties concerned whether public funding may be available to meet the cost of the meeting and any subsequent mediation. Where none of the parties is eligible for, or wishes to seek, public funding, any charge made by the mediator for the Mediation Information and Assessment Meeting will be the responsibility of the party or parties attending, in accordance with any agreement made with the mediator.
8. If the applicant then makes an application to the court in respect of the dispute, the applicant should at the same time file a completed Family Mediation Information and Assessment Form (Form FM1) confirming

attendance at a Mediation Information and Assessment Meeting or giving the reasons for not attending.

9. The Form FM1, must be completed and signed by the mediator, and counter-signed by the applicant or the applicant's solicitor, where either
 - (a) the applicant has attended a Mediation Information and Assessment Meeting; or
 - (b) the applicant has not attended a Mediation Information and Assessment Meeting and
 - (i) the mediator is satisfied that mediation is not suitable because another party to the dispute is unwilling to attend a Mediation Information and Assessment Meeting and consider mediation;
 - (ii) the mediator determines that the case is not suitable for a Mediation Information and Assessment Meeting; or
 - (iii) a mediator has made a determination within the previous four months that the case is not suitable for a Mediation Information and Assessment Meeting or for mediation.
10. In all other circumstances, the Form FM1 must be completed and signed by the applicant or the applicant's solicitor.
11. The form may be obtained from magistrates' courts, county courts or the High Court or from www.direct.gov.uk

Annex B

Proceedings which are 'relevant family proceedings' for the purposes of this Practice Direction

1. Private law proceedings relating to children, except:
 - proceedings for an enforcement order, a financial compensation order or an order under paragraph 9 or Part 2 of Schedule A1 to the Children Act 1989;
 - any other proceedings for enforcement of an order made in private law proceedings; or
 - where emergency proceedings have been brought in respect of the same child(ren) and have not been determined.

('Private law proceedings' and 'emergency proceedings' are defined in Rule 12.2)

2. Proceedings for a financial remedy, except:
 - Proceedings for an avoidance of disposition order or an order preventing a disposition;
 - Proceedings for enforcement of any order made in financial remedy proceedings.

('Financial remedy' is defined in Rule 2.3(1) and 'avoidance of disposition order' and 'order preventing a disposition' are defined in Rule 9.3(1))

Annex C

A person considering making an application to the court in relevant family proceedings is not expected to attend a Mediation Information and Assessment Meeting before doing so if any of the following circumstances applies:

1. The mediator is satisfied that mediation is not suitable because another party to the dispute is unwilling to attend a Mediation Information and Assessment Meeting and consider mediation.
2. The mediator determines that the case is not suitable for a Mediation Information and Assessment Meeting.
3. A mediator has made a determination within the previous four months that the case is not suitable for a Mediation Information and Assessment Meeting or for mediation.
4. *Domestic abuse*
Any party has, to the applicant's knowledge, made an allegation of domestic Violence against another party and this has resulted in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months.
5. *Bankruptcy*
The dispute concerns financial issues and the applicant or another party is bankrupt.
6. The parties are in agreement and there is no dispute to mediate.
7. The whereabouts of the other party are unknown to the applicant.
8. The prospective application is for an order in relevant family proceedings which are already in existence and are continuing.
9. The prospective application is to be made without notice to the other party.
10. Urgency
The prospective application is urgent, meaning:
 - (a) there is a risk to the life, liberty or physical safety of the applicant or his or her family or his or her home; or
 - (b) any delay caused by attending a Mediation Information and Assessment Meeting would cause a risk of significant harm to a child, a significant risk of a miscarriage of justice, unreasonable hardship to the applicant or irretrievable problems in dealing with the dispute (such as an irretrievable loss of significant evidence).

11. There is current social services involvement as a result of child protection concerns in respect of any child who would be the subject of the prospective application.
12. A child would be a party to the prospective application by virtue of Rule 12.3(1).
13. The applicant (or the applicant's solicitor) contacts three mediators within 15 miles of the applicant's home and none is able to conduct a Mediation Information and Assessment Meeting within 15 working days of the date of contact.

Copy of Family Mediation Information and Assessment Form (FM1)

Family Mediation Information and Assessment Form FM1

This form is to be used in connection with family proceedings to which Practice Direction 3A applies. It should be completed in accordance with the Pre-application Protocol annexed to the Practice Direction and be filed with the court with any application made in proceedings to which the Practice Direction applies.

Where either Part 1 or Part 2 applies, the form must be completed and signed by the mediator concerned and counter-signed by the applicant or the applicant's solicitor.

Where either Part 3 or Part 4 applies, the form must be completed and signed by the applicant or the applicant's solicitor

Part 1

- The applicant has attended a Mediation Information and Assessment meeting

Part 2

The applicant has not attended a Mediation Information and Assessment meeting because:

- The mediator is satisfied that mediation is not suitable because another party to the dispute is unwilling to attend a Mediation Information and Assessment Meeting and consider mediation.
- The mediator determines that the case is not suitable for a Mediation Information and Assessment Meeting.
- A mediator has made a determination within the previous four months that the case is not suitable for a Mediation Information and Assessment Meeting or for mediation.

Part 3

The applicant has not attended a Mediation Information and Assessment meeting because:

- A party has, to the applicant's knowledge, made an allegation of domestic violence against another party and this has resulted in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months.
(Please attach evidence confirming the date of any civil proceedings or police investigation)

- The dispute concerns financial issues and the applicant or another party is bankrupt.
- The parties are in agreement and there is no dispute to mediate.
- The whereabouts of the other party are unknown to the applicant.
- The prospective application is for an order in relevant family proceedings which are already in existence and are continuing.
- The prospective application is to be made without notice to the other party.
- The prospective application is urgent, meaning:
 - (a) there is a risk to the life, liberty or physical safety of the applicant or his or her family or his or her home; or
 - (b) any delay caused by attending a Mediation Information and Assessment Meeting would cause a risk of significant harm to a child, a significant risk of a miscarriage of justice, unreasonable hardship to the applicant or irretrievable problems in dealing with the dispute (such as an irretrievable loss of significant evidence).

<p><i>Please give details here:</i></p> <p>1.</p>

- There is current social services involvement as a result of child protection concerns in respect of any child who would be the subject of the prospective application.
- A child would be a party to the prospective application by virtue of the Family Procedure Rules 2010, r 12.3(1).
- The applicant (or the applicant’s solicitor) has contacted three mediators within 15 miles of the applicant’s home and none has been able to conduct a Mediation Information and Assessment Meeting within 15 working days of the date of contact.

Part 4

- The applicant has not complied with the Pre-application Protocol and has not attended a Mediation Information and Assessment meeting for the following reason (not being a reason specified in Parts 2 or 3 of this Form).

<p><i>Please state reason here:</i></p> <p>1.</p>

Signed.....[solicitor for] the applicant
Signed.....mediator

Annex G – Helen Rhoades evidence in relation to shared parenting

Submission in response to the family justice review- interim report

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INTRODUCTION

This submission responds to two questions raised in relation to Chapter 5 of the Family Justice Review Interim Report on Private Law, namely:

Question 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?

Question 19: Do you agree that there should be a requirement to consider dispute resolution services prior to making an application to court?

The first of these questions relates to the proposal that judicial officers be required take into account two particular factors when determining arrangements for children, namely, the benefit to the child of having a 'meaningful relationship' with both parents and the need to protect children from both physical and psychological harm (at paragraph 5.78). The second stems from the recommendation that assessment for an alternative dispute resolution process become a compulsory pre-requisite for parents applying for court orders (at paragraph 5.125).

These proposals are familiar to those who work in the Australian family law system, where similar reforms were enacted in 2006, as part of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (hereafter 'the Shared Parental Responsibility Act'). However, in March this year, the Australian Government introduced further legislation, the *Family Law Legislation Amendment (Family Violence & Other Measures) Bill 2011* (hereafter 'the Family Violence Bill'), which will substantially amend a number of the provisions introduced in 2006, including the provision requiring judicial officers to have regard to 'the benefit to the child of having a meaningful relationship' with both parents. The *Family Violence Bill* represents a response to evidence from a series of research reviews and evaluations of the 2006 reforms, which indicated that

the current family law system in Australia does not deal adequately with issues of family violence and child abuse, and which suggested that some of the *Shared Parental Responsibility Act* provisions were implicated in this problem.

This submission is based on the relevant research reports and reported cases from Australia. A list of the reports is provided at the end of this submission.

QUESTION 17: THE 'MEANINGFUL RELATIONSHIP' PROVISION

In response to Question 17, this submission argues that there should not be any formal legislative recognition of the importance of children having a meaningful relationship with both parents post separation for the following reasons:

The risk that it will compromise children's safety

The reviews of Australia's 2006 *Shared Parental Responsibility Act* reforms included a comprehensive three year evaluation conducted by the Australian Institute of Family Studies (AIFS),¹³⁹ and a Family Violence Review conducted by Professor Richard Chisholm, a former Family Court Judge (the Chisholm Review).¹⁴⁰ The AIFS evaluation suggested a picture of substantial success. However, it also indicated that shared care time arrangements had often been made in situations where there were ongoing safety concerns,¹⁴¹ and that many of these inappropriate care arrangements had resulted from court proceedings.¹⁴² The Chisholm Review suggested that the operation of the 'meaningful relationship' provision – the provision requiring the courts to have regard to the benefit to the child of a 'meaningful relationship' with both parents – had played a role in this problem. In particular, it suggested that the juxtaposition of this factor with a provision requiring the courts to have regard to the need to protect the children from harm had contributed to an assumption that there are 'two basic types of case', namely 'the ordinary case', in which the courts endeavour to ensure that children spend time with both parents, and 'the case involving violence or abuse'.¹⁴³ The AIFS report suggested that rather than functioning as an exception to the provision focusing judicial officers on the need to maintain a relationship with both parents, the tension between these factors had seen the development of advisory practices in which parental

¹³⁹ R. Kaspiew, M. Gray, R. Weston, L. Moloney, K. Hand and L. Qu, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies: 2009).

¹⁴⁰ R. Chisholm, *Family Courts Violence Review* (27 November 2009); Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (December 2009).

¹⁴¹ Kaspiew et al, above n 1, at 233.

¹⁴² *Ibid* at 235.

¹⁴³ Chisholm, above n 2, at 9 and 128.

involvement with children was often emphasised ‘at the expense of protection for family members’.¹⁴⁴

A case that illustrates this problem is the trial judgment in *Partington and Cade*, which was the subject of a successful appeal in 2009.¹⁴⁵

This case involved a dispute over care arrangements between the parents of two young children who lived together in Tasmania for the latter part of their relationship. After separation, the mother had moved to New South Wales with her new partner, who had a nine year old son living there with whom he had regular contact. The father, Mr Cade, successfully sought interim orders in the Family Court for the mother and children to return to Tasmania. Ms Partington, who had by this time re-married, returned to Tasmania for a short time but did not remain there continuously. At trial, the father sought final orders for the mother and children to live in Tasmania so that he could have a meaningful relationship with his children. Ms Partington, who was by this time living with the children and her new husband and baby in New South Wales, resisted the father’s application. She alleged that he had sexually abused the children and that it was not safe for them to spend time with him. The trial judge found there was ‘strong evidence’ to suggest that Mr Cade had sexually assaulted one of the children, and that he was ‘comfortably satisfied’ on the relevant burden of proof that both children ‘would be at an unacceptable risk of abuse by the father if they remained in his unsupervised care’.¹⁴⁶ However, his Honour went on to criticise the mother’s behaviour in flouting the earlier court orders, and made adverse findings about her willingness to facilitate the children’s relationship with their father. Burr J concluded that in order for the children to establish a meaningful relationship with their father they would need to spend time with him, and that the risk to their safety could be ‘eliminated by his time spent with them being supervised for some time into the future’.¹⁴⁷ The result was an order for the mother to return with the children to Tasmania where the paternal grandmother could supervise the father’s contact with his children.

It should be noted that this decision was overturned on appeal, with the Full Court of the Family Court criticising Burr J’s failure to consider the impact of his findings about the risk of abuse on the father’s parenting capacity.¹⁴⁸ Nevertheless, the trial judge’s reasoning process, and the pivotal role played by the meaningful relationship principle, illustrates the potential dangers of a ‘meaningful relationship’ provision.

These dangers have been recognised by the present Australian Government, which recently responded to the evaluation findings by introducing Family

¹⁴⁴ Kaspiew et al, above n 1, at 235.

¹⁴⁵ *Partington and Cade (No 2)* [2009] FamCAFC 230.

¹⁴⁶ *Ibid* at paras 19, 39 and 40. See for an explanation of the ‘unacceptable risk’ test, *M v M* (1988) 166 CLR 69.

¹⁴⁷ *Ibid* at para 53.

¹⁴⁸ *Ibid* at para 56.

Violence Bill, which was passed by the House of Representatives on 30 May 2011. The Family Violence Bill aims to enhance protective outcomes for families. Key to this legislation is a third 'primary' best interests consideration which seeks to overcome the current problems created by the 'meaningful relationship' principle by providing that wherever there is an 'inconsistency in applying' the two primary best interests considerations (the 'meaningful relationship' and 'protection from harm' principles), protection from harm must take priority.¹⁴⁹ The Bill will also amend the present adviser obligation (which requires lawyers to suggest a shared time arrangement to parents) to require legal practitioners to advise clients that protection from harm should take priority over maintaining a relationship with both parents where the latter is not consistent with the child's safety.¹⁵⁰

Uncertainty of meaning

A central message of the Australian evaluations was that the law had become overly complex as a result of the *Shared Parental Responsibility Act* reforms. Legal practitioners reported that they had found the 2006 amendments 'difficult to apply', and that a number of the Act's key principles were 'hard for lay people to understand'.¹⁵¹ These difficulties reflect the ongoing confusion about the meaning of the 'meaningful relationship' provision in the reported cases. In *McCall v Clark*,¹⁵² decided three years after the Australian reforms were enacted, the Full Court of the Family Court reviewed the reported cases on this point and concluded that there were 'three possible interpretations' of the provision:

(a) one interpretation is that the legislation requires a court to consider the benefit to the child of having a meaningful relationship with both of the child's parents by examination of evidence of the nature of the child's relationship at the date of the hearing, to make findings based on that evidence, which findings will be reflected in the orders ultimately made ('the present relationship approach');

(b) a second interpretation is that the legislature intended that a court should assume that there is a benefit to all children in having a meaningful relationship with both of their parents ('the presumption approach'); and

(c) the third interpretation is that the court should consider and weigh the evidence at the date of the hearing and determine how, if it is in a child's best interests, orders can be framed to ensure the particular child has a meaningful relationship with both parents ('the prospective approach').

¹⁴⁹ Proposed Family Law Act 1975 (Cth), s 60CC(2A).

¹⁵⁰ Proposed Family Law Act 1975 (Cth), s 60D.

¹⁵¹ Kaspiew et al, above n 1, at 335-336.

¹⁵² *McCall v Clark* [2009] FamCAFC 92.

The Full Court was unable to reach a definitive position, concluding that the 'preferred interpretation of benefit to a child of a meaningful relationship is 'the prospective approach' although, depending upon factual circumstances, the present relationship approach may also be relevant'.

Added to this confusion has been continuing judicial discussion about what constitutes a meaningful parent-child relationship, and what attributes should determine whether it is beneficial to the child. This debate has seen the production of a number of case law lists designed to help judicial officers establish whether a child's relationship with a parent is 'meaningful' and whether its continuation would benefit the child. In *Cave and Cave*,¹⁵³ for example, a 2007 decision, Justice Benjamin set out a non-exhaustive list of considerations to aid this assessment, including the 'social behaviour' of the parent in question and the kind of 'role model' that he or she would provide for the children.¹⁵⁴

The reported cases also reveal a range of different views about the extent of the courts' responsibility to facilitate a meaningful relationship between children and parents. This debate has been most starkly evident in relocation cases, where a successful application will usually see a reduction in one parent's time with the children. For example, in *Godfrey v Sanders*, Justice Kay took the view that relocation should not be prevented simply because it would result in a 'diminution of quality of the relationship' between a parent and child. In contrast, other judicial officers have held that rendering a relationship 'meaningful' involves ensuring parents and children are able to spend regular face-to-face time with one another, including both weekend 'fun' time and weekday 'mundane' activities.¹⁵⁵

The meaningful relationship principle has also given rise to considerable academic debate about the kinds of parenting activities that are central to this concept, and the extent to which the legislation requires the courts to evaluate the parties' parenting performance.¹⁵⁶ Richard Chisholm, for example, looked to the 'social science findings about children's developmental needs' to produce a catalogue of positive parenting behaviours - such as 'nurture and care', 'stimulation, encouragement and support', acting as 'a role model', giving children the 'feeling that they belong to a family or community', and providing 'encouragement and help in educational, artistic and sporting matters' - that

¹⁵³ *Cave and Cave* [2007] FamCA 860.

¹⁵⁴ *Ibid* at paras 140-142.

¹⁵⁵ *P and P* [2006] FMCAfam 518, at para 258.

¹⁵⁶ See for example, B. Fehlberg and J. Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press: 2008), at para 6.4.4.

might assist the courts to determine whether or not a relationship is meaningful.¹⁵⁷

Non-recognition of family diversity

The meaningful relationship provision, which applies exclusively to ‘parents’, runs counter to developments in other areas of family law which seek to facilitate inclusion and diversity of family forms and child rearing practices. Its impact has been particularly felt in cases involving gay and lesbian parents and families from ethnic communities and kinship-based cultures where extended family members often take on a significant care role with children.¹⁵⁸ The 2009 decision of *Aldridge and Keaton* is a case in point.¹⁵⁹

A key issue in this case was the non-applicability of the meaningful relationship provision to a person who, in the words of the trial judge, had ‘played a major role in the child’s life’, ‘was actively involved in caring for’ her and to whom the child had a ‘close attachment’,¹⁶⁰ but who was not a parent for the purposes of the *Family Law Act*. The case involved an appeal by the mother of a three year old girl (Ms Aldridge) against orders giving her former lesbian partner (Ms Keaton) contact with the child even though Ms Keaton, who had not been living with the mother at the time of child’s conception, was not a parent of the child for the purposes of the *Family Law Act*.¹⁶¹ The child, who was the biological daughter of Ms Aldridge, had been conceived by artificial insemination with sperm from an unknown donor. The parties had moved in together while the mother was pregnant. Ms Keaton was present at the child’s birth and had been a central parent figure since that time. However, the women’s relationship broke down and the mother moved out before the child was a year old. Chief Federal Magistrate Pascoe made a number of parenting orders in response to Ms Keaton’s application for contact, including orders that the child spend short periods with the applicant each week, gradually increasing to overnights each third weekend.

On appeal from this decision, Ms Aldridge submitted that the Chief Federal Magistrate had erred in applying parts of the *Family Law Act*, such as the meaningful relationship provision, which refer exclusively to parents.¹⁶² As parliament had expressly excluded non-parents from the meaningful relationship consideration, she argued, the courts were required to take ‘a more cautious approach’ in facilitating a non-parent’s relationship with a child than when an application is made by a biological parent.¹⁶³ Accordingly, her counsel submitted, the trial judge should not have considered the benefit to her daughter of having a

¹⁵⁷ R. Chisholm, ‘The meaning of ‘meaningful’: Exploring a key term in the Family Law Act amendments of 2006’ (2009) 22 *Australian Journal of Family Law* 175.

¹⁵⁸ See *Donnell and Dovey* (2010) FLC 93-428; *Lawson & Warren and Ors* [2011] FamCA 38; *Mulvany and Lane* (2009) FLC 93-404; *Dunstan and Jarrod and Another* [2009] FamCA 480.

¹⁵⁹ *Aldridge and Keaton* [2009] FamCAFC 229.

¹⁶⁰ *Ibid* at paras 37 and 41.

¹⁶¹ See Family Law Act 1975 (Cth), s 60H.

¹⁶² *Aldridge and Keaton* [2009] FamCAFC 229 at para 48.

¹⁶³ *Ibid* at para 81.

meaningful relationship with Ms Keaton, no matter how significant or ‘warm’ the attachment between them.¹⁶⁴

The Full Court rejected this argument. It stressed that children’s best interests remained the paramount consideration for the courts when making parenting orders, not ‘the circumstances of their conception or the sex of their parents’, and that the Act’s overall framework offered ‘the flexibility to recognise and accommodate’ different family forms.¹⁶⁵ In particular, it noted the catch-all provision in the best interests checklist which allows judicial officers to consider ‘any other fact or circumstance that the court thinks is relevant’.¹⁶⁶ Moreover, it found that the trial judge had been ‘exquisitely aware’ that he was not required to consider the meaningful relationship principle in the applicant’s case, but that he was permitted to - and did - rely on the catch-all section to the same end.¹⁶⁷ Nevertheless, the Full Court noted there had been a number of parenting cases where questions about the exclusion of non-parents had been raised, and confirmed that as ‘the legislation currently stands’, the court could ‘only reach its determination’ by applying a more limited range of considerations than are applicable to parents.¹⁶⁸

Impeding inter-professional collaboration

There is also evidence that the meaningful relationship principle has impeded collaboration between legal practitioners and family dispute resolution professionals. While family dispute resolution practitioners draw on their required knowledge of child development to advise parents, and are prohibited from giving legal advice to clients, family lawyers are obliged to advise parents about the law, including the ‘meaningful relationship’ principle, and to shape settlement negotiations around an understanding the courts’ interpretation of this provision. The AIFS survey of family lawyers revealed that they had found it increasingly difficult since the reforms to achieve child-focused agreements, with many clients, particularly fathers, negotiating from a parental rights’ perspective rather than a child-focused stance.¹⁶⁹ In contrast, the evaluation suggested that the advisory work of family dispute resolution practitioners had not suffered the same fate, and that they continue to use a broad understanding of children’s developmental needs when working with separated parents. The reviews suggest that, among other things, these different advisory approaches

¹⁶⁴ Ibid at paras 80 and 86.

¹⁶⁵ Ibid at para 77. See for a discussion of this case, R. Chisholm, ‘Did the 2006 amendments downgrade non-parents? *Aldridge v Keaton*’ (2010) 24 *Australian Journal of Family Law* 123.

¹⁶⁶ Family Law Act 1975 (Cth), s 60CC(3)(m).

¹⁶⁷ *Aldridge and Keaton* [2009] FamCAFC 229 at paras 109 and 113.

¹⁶⁸ *Mulvany and Lane* (2009) 41 Fam LR 418; (2009) FLC 93-404, at paras 15-16.

¹⁶⁹ Kaspiew et al, above n 1, at 365.

have impeded the ability of the two professions to work collaboratively with family law clients.¹⁷⁰

4. COMPULSORY ASSESSMENT FOR ALTERNATIVE DISPUTE RESOLUTION

In response to Question 19, this submission offers qualified support for the proposal. It argues that assessments for alternative dispute resolution are important to ensuring clients are screened out of inappropriate dispute resolution processes and are referred to appropriate support services. However, it argues that the value of intake assessments for family law clients will be critically dependent on the extent to which they are properly resourced and well supported by a range of low-cost legal, counselling, domestic violence and financial services.

Whilst not synonymous with mediation, what is known as ‘family dispute resolution’ in Australia involves the same central concept of impartial facilitation by an independent person designed to assist the parties to resolve family disputes.¹⁷¹ The main providers of these programs in Australia are longstanding community based family relationships organisations, such as Relationships Australia, Anglicare and Centacare,¹⁷² that are funded by the Australian government and by fees from clients, generally charged on a sliding scale according to income.¹⁷³ Prior to the 2006 reforms, the primary client population for these services were voluntary recently separated couples, many of whom had not engaged (and had not wanted) the services of a legal adviser before approaching the service. As part of the 2006 reforms, the Australian government supplemented these programs by establishing 65 Family Relationship Centres around the country to provide family dispute resolution and referrals to related services (such as counselling, anger management and domestic violence services).¹⁷⁴

The *Shared Parental Responsibility Act* introduced a requirement that anyone wanting to file an application for parenting orders with the family courts must first attend a family dispute resolution program.¹⁷⁵ However, before proceeding

¹⁷⁰ Kaspiew et al, above n 1, at 109-110. See also H. Rhoades, H., Astor, A, Sanson, and M., O'Connor, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (The University of Melbourne, 2008).

¹⁷¹ Family Law Act 1975 (Cth), s 10F.

¹⁷² See for a list of family dispute resolution providers, <http://www.frfa.org.au>.

¹⁷³ Note that the *Shared Parental Responsibility Act* reforms also allow for registration of private family dispute resolution practitioners.

¹⁷⁴ P. Parkinson, ‘Keeping in Contact: Family Relationship Centres in Australia’ (2006) 18 *Child and Family Law Quarterly* 157.

¹⁷⁵ Family Law Act 1975 (Cth), s 60I(7). Note that exceptions exist where there are reasonable grounds to believe there is a risk of family violence or a risk of abuse to the child or where the matter is urgent: s 60I(9).

to provide this service, the program is required to conduct an intake assessment and be satisfied that family dispute resolution is appropriate in the circumstances.¹⁷⁶ This includes a requirement to be satisfied that neither party's ability to negotiate freely is affected by a history of family violence, inequality of bargaining power, or by their own or the other party's emotional, psychological or physical health.¹⁷⁷ If, after considering these matters, the service is not satisfied that a party has the capacity to negotiate, it 'must not' proceed to provide family dispute resolution.¹⁷⁸ In such cases, the program will issue a certificate to this effect so that the parties can issue proceedings in court if they wish.¹⁷⁹

The AIFS evaluation showed that the population of separated parents who access the family law system tend to have multiple and complex support needs.¹⁸⁰ This is particularly the case for clients who are assessed as unsuitable for family dispute resolution, the traditional client base of the family courts. Hence, for the organisations that provide family dispute resolution services, the compulsory assessment requirement has meant not just an increase in dispute resolution work, but also an increase in assessment and referral work. Given the complex problems of their client families, this work is both time consuming and resource intensive, with referrals to counselling, domestic violence and legal services commonplace. As an illustration, the 2010 workload statistics of one New South Wales Family Relationship Centre show that just under a quarter of all cases were assessed as unsuitable for family dispute resolution.¹⁸¹ Although they are fewer in number than those that proceed to alternative dispute resolution, the complexity of the issues they involve means that they take significantly longer in assessment. A typical case that is assessed as unsuitable for dispute resolution might involve the following work:

- Assessment interview with Person 1 (90 minutes)
- Phone consultation with other services involved with Person 1, which might be a domestic violence worker, the party's lawyer and/or a psychiatrist (60 minutes)
- Phone contact with Person 1 making referrals (60 minutes)
- Assessment interview with Person 2 (90 minutes)
- Consultation with supervisor or senior practitioner (30 minutes)
- Phone contact with Person 1 advising them the case is not suitable for family dispute resolution and following up referrals (60 minutes)

¹⁷⁶ Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth), Reg 25.

¹⁷⁷ Ibid, Reg 25(2).

¹⁷⁸ Ibid, Reg 25(4).

¹⁷⁹ Family Law Act 1975 (Cth), s.60I(8).

¹⁸⁰ Kaspiew et al, above n 1, at Chapter 2.

¹⁸¹ Data provided by FRSA. Copy on file with the author.

Phone contact with Person 2 advising them the case is not suitable for family dispute resolution and making referrals (30 minutes)
Writing letters and certificates (30 minutes)
Writing file notes/doing data entry (90 minutes)
A total of 9 hours over a period of 4 - 8 weeks

Moreover, the referral work of these services is not confined to cases that are assessed as unsuitable. The workload statistics of another Family Relationship Centre, based in Western Australia, shows that over half of the cases that proceeded to dispute resolution in 2010 involved referrals of one or both parties to counselling, domestic violence and legal services, and half involved referrals of children to counselling services.¹⁸²

These data suggest that any proposal to establish a requirement of assessment for alternative dispute resolution will need to include funding for well-resourced assessment services backed up by a range of support services for family law clients.

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¹⁸²Data provided by FRSA. Copy on file with the author.

Annex H – The revised process for divorce

The proposed process is as follows.

- a. Where a person seeks a divorce they should go first to the information hub, where they will be able to access an online divorce portal. This would explain the process and possible grounds for divorce and give access to the necessary application forms. The person initiating divorce would complete the application online.¹⁸³ The system should have in built checks to prevent the now frequent administrative errors. The individual would also be prompted to consider arrangements for children, financial and religious issues and be directed to further information and support services as appropriate. The applicant would not be expected to provide details of arrangements for children or money, as for all other separating couples. . Where there are disputes over children or money parties would make an application under the relevant section of the Children Act 1989 or the Matrimonial Causes Act 1973.
- b. The online form would then be submitted to a centralised court processing centre. The application would not be processed unless it was accompanied by a fee or a remissions form and verification, and approved identification documents, such as an original copy of the marriage certificate.
- c. The application would be received by a court officer who would check that the application had been filled out correctly, acknowledge receipt and serve the application on the other party. The other party would then return the forms to the processing centre indicating whether or not they contested the divorce or whether they wished to make a cross application.
- d. *Where the ground for divorce is uncontested* the court officer would issue both parties with a decree nisi.¹⁸⁴ Parties then would be able to make further arrangements and resolve any outstanding issues with regard to their divorce. As now, after six weeks the applicant would be able to apply for the decree to be made absolute. After a further three months the respondent would be able to apply for the decree to be made absolute. If the applicant does not apply for the decree to be made absolute, the respondent may apply 3 months from the earliest date on which the applicant could have applied. The ability to apply for an expedited decree should remain.
- e. *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 would transfer the application to the applicant's local court for judicial consideration. The judge would then examine the case and determine whether the decree nisi should be issued.

¹⁸³ These changes are designed to operate in so far as practicable through an online system. However, the panel accepts that provision will need to accommodate the needs of all users, which may include submission in hard copy.

¹⁸⁴ We note that the terms 'decree nisi' and 'decree absolute' were changed to 'conditional order' and 'final order' respectively in the Family Procedure Rules. However these were not implemented due the costs attached to updating the IT system. The IT system should be updated at the first opportunity and these terms changed.

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 Government

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