

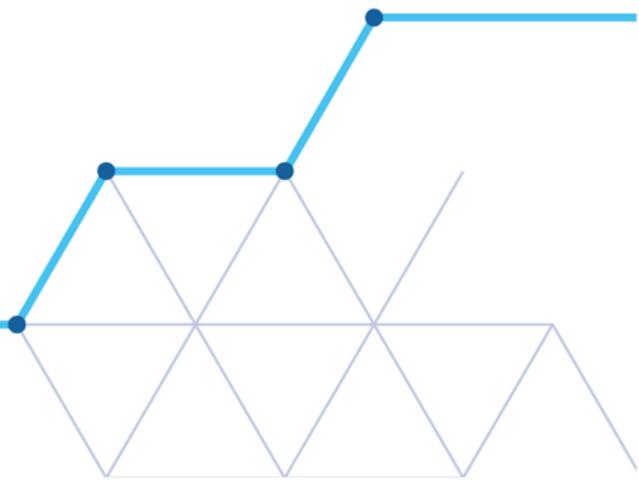


Ministry
of Justice

The representation of children in public law proceedings

Amy Summerfield
Ministry of Justice

Ministry of Justice Analytical Series
2018



Analytical Services exists to improve policy making, decision taking and practice by the Ministry of Justice. It does this by providing robust, timely and relevant data and advice drawn from research and analysis undertaken by the department's analysts and by the wider research community.

Disclaimer

The views expressed are those of the authors and are not necessarily shared by the Ministry of Justice (nor do they represent Government policy).

First published 2018



© Crown copyright 2018

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to us at mojanalyticservices@justice.gsi.gov.uk

This publication is available for download at <http://www.justice.gov.uk/publications/research-and-analysis/moj>

ISBN 978-1-84099-805-4

Acknowledgements

The author would like to thank the HM Courts and Tribunals Service (HMCTS) Data Access Panel and the Judicial Office for approving this research. The research would not have been possible without the judiciary taking the time to complete the data collection templates and HMCTS staff ensuring these were returned to Ministry of Justice. Thanks are due to individual members of the judiciary and the professionals – including lawyers, and representatives of Cafcass, Cafcass Cymru and local authorities – who provided valuable insight during interviews and focus groups. Finally, we would like to thank the two external peer reviewers for their independent and comprehensive review of the draft report.

The author

Amy Summerfield is a Principal Social Researcher in the Family Justice Research and Analysis Team, Access to Justice Analytical Services within the Analytical Services Directorate of the Ministry of Justice.

Contents

List of tables

1. Summary	1
2. Background and project aims	8
2.1 Context	8
2.2 Project aims	10
3. Methodology	11
3.1 Phase 1: judicial data collection	11
3.2 Phase 2: qualitative focus groups and judicial interviews	12
4. PHASE 1: Descriptive statistics from the judicial data collection	14
4.1 The Phase 1 sample	14
4.2 The representation of children	14
4.3 Judicial assessment of representation	15
5. PHASE 2: Qualitative findings from focus groups and interviews	18
5.1 The role of the guardian	18
5.2 The role of the legal representative	21
5.3 The distinction of roles	22
5.4 The assessment of representation at hearings	24
5.5 Implications at court	33
5.6 Flexibility in the tandem model	35
6. Conclusions and implications	40
References	43
Appendix A	44
Phase 1 data collection template	44
Appendix B	48
Focus group template	48
Appendix C	51
Descriptive statistics of the Phase 1 sample	51

List of tables

Table 3.1	Attendance at focus groups by professional role	12
Table 4.1	Representation status across all hearing types	15
Table 4.2	Representation status across hearings versus judicial assessment of 'necessary'	16
Table 4.3	Judicial assessment of 'necessary' representation by hearing type	17
Table 4.4	Judicial assessment of 'necessary' representation by application type	17
Table C.1	Responses by region	51
Table C.2	Responses by judicial tier	51
Table C.3	Ages of children subject to proceedings	51
Table C.4	Breakdown by application type	51
Table C.5	Breakdown by hearing type	52
Table C.6	Breakdown by outcome of the hearing	52
Table C.7	Breakdown by order made	52

1. Summary

Background and project aims

Public family law cases deal with families where local authority intervention is needed to protect a child from harm. Whilst there are a range of outcomes for children, the weight of the decisions in public law – including the option of permanent separation between a child and their birth parents – means that the processes within proceedings are necessarily thorough, robust and consistent, in order to protect children and ensure the rights of their parents are respected.

Children subject to public law cases are usually represented by both a publicly-funded legal representative and a Cafcass guardian. This is known as the ‘tandem model’ of representation. Whilst the Family Justice Review (FJR) in 2011 recognised the value of the tandem model, it raised some concerns in relation to the potential for duplication of work between these professionals and the local authority and concluded that a more proportionate approach should be considered. This approach included a pro-active assessment of whether, when, and how the respective contributions of the legal representative and the guardian were required during proceedings.

There has been no systematic review of the operation of the tandem model since the FJR. This study makes an important contribution to the evidence on the operation of the model in the current context. It explores how the tandem model is working in practice and whether the proportionate approach advocated in the FJR has been adopted. In light of rising care volumes and stretched public resources, the study also aims to understand whether any amendments to the model are feasible or appropriate in order to ensure the rights of the child are safeguarded, efficient judicial case management is supported and public resources are effectively allocated.

Methodology

This was a mixed-method, two-phased research study. Phase 1 was a data collection exercise across 12 courts in England and Wales over a four-week period in September 2016. Members of the family judiciary provided information detailing the case characteristics and representation of children for every public law hearing within this period. This included information on the application and hearing type, as well as the hearing outcome. Judges were asked to record who represented the child(ren) at the hearing and assess whether, in their view, the representation was necessary to manage and progress the case. In total, 745 responses were received from this exercise.

The second phase included four qualitative focus groups with family law professionals and eight in-depth interviews with family judges in November and December 2016. Focus group participants comprised a range of Cafcass guardians and managers; legal representatives (both solicitors and barristers); and local authority managers and social workers. Judicial interviewees were identified to encompass different judicial tiers, from magistracy to Designated Family Judge.

Phase 1 Descriptive statistics from the judicial data collection exercise

The representation of children

A total of 745 responses were received from the Phase 1 data collection exercise, providing a detailed snapshot of public law hearings within the four-week period. In 46% of all hearings, only a legal representative (either a solicitor or a barrister) was present to represent the children; in the same proportion (46%), the tandem model (both a legal representative and a guardian) were in attendance. In six percent of hearings no representation was in attendance for the child.

This analysis was broken down by specific hearing types. Across Case Management Hearings (CMH) and Issues Resolution Hearings (IRH), representation status was broadly split between those who had just a legal representative present (47% at CMH; 54% at IRH) and those with the tandem model (53% at CMH; 47% at IRH). At Final Hearings (FHs), only 28% had just a legal representative present, but consistently, in around a half (51%) both a legal representative and a guardian were in attendance. A fifth (21%) of FHs had no representation present. See section 4.2 for further detail.

Judicial assessment of representation

As well as recording who was actually in attendance at each hearing, the judiciary were asked which form of representation they considered 'necessary' to enable them to manage the case. In over half (55%) of all hearings, judges considered that the tandem model was necessary. This was higher than the proportion of hearings where both were actually in attendance (46%) and suggests that judges are managing a small proportion of hearings without the tandem model, despite their assessment that both a legal representative and a guardian were necessary.

This analysis was broken down by hearing and application type. Judges were more likely to say that a legal representative only was required at a CMH (37%) or IRH (32%) compared with a FH (13%). The judiciary assessed that a tandem model of representation was required

in around six in ten CMHs (61%), IRHs (62%), FHs (60%) and in 82% of urgent hearings. In a quarter of FHs (25%), no representation was required; the majority of these were uncontested hearings leading to a final order of adoption. With the exception of adoption applications, judges assessed that both forms of representation were necessary in half or more of all application types; this ranged from 50% of Supervision Order applications to 80% of Special Guardianship Order applications.

Hearings where the judiciary considered that the tandem model was necessary were more likely to lead to an order being made (in 31% of hearings where the tandem model was considered necessary an order was made, compared with 14% of hearings where only legal representation was required). This suggests that judges considered both forms of representation are required in hearings where they intend to make substantive decisions in the case.

Phase 2 Qualitative findings from focus groups and judicial interviews

The role of the guardian

Participants across all focus groups, as well as judicial interviewees, described the role of the guardian as to reflect the child's voice in public law proceedings. Guardians are responsible for assessing what care planning decisions are appropriate and proportionate to make sure the child's interests are met and their welfare needs protected.

The independence of the guardian was consistently cited as an imperative part of their role in public law cases. This included scrutinising the local authority's evidence and care plan for the child, and also extended to offering alternative approaches that the social worker may not have considered or the parents had thus far not been willing to accept. Participants agreed that the care plan for the child would often change as a result of the guardian's intervention.

Judicial reliance on the guardian's perspective during court proceedings was identified in focus groups and this view was supported by judges, who argued that the guardian's views were vital to the decisions in a case. Indeed, the guardian's independent analysis of a case was believed to be one of the key strengths of the tandem model.

The role of the legal representative

The role of the legal representative, either as a solicitor or a barrister, is to represent the child's legal interests in court. Solicitors were keen to stress that the child is their client – not the guardian – and their role is to take instructions from the professional guardian on behalf

of the child. The legal representative is required to ensure that the case is set within a legal framework and the guardian's assessment of what is in the child's best interests has met the legal threshold.

Participants, including the judiciary, highlighted the importance of the solicitor's role in organising the case and facilitating efficient case management, such as appointing expert witnesses, ensuring evidence is filed and paperwork is completed on time.

The distinction of roles

All participants described the distinction between welfare and legal-based arguments that underpinned the different roles of the guardian and the solicitor or barrister. Distinct responsibilities, both to the child and in relation to their respective contribution within court proceedings, led to consensus that the tandem model was not leading to duplication of effort. Conversely, it was argued that one of the strengths of the model was how the distinct value of both professional disciplines contributed to an appropriate outcome for the child.

Participants discussed the interdependency of professionals involved in a public law case, explaining that case progression is dependent on effective liaison between multiple individuals and agencies, and specifically, the teamwork between the legal representative and the guardian.

The assessment of representation

Participants tended to agree that the 'ideal' situation was for both a guardian and a solicitor to attend throughout all public law hearings. The strength of this view, however, varied considerably across different professional groups and in relation to different hearing types. Whilst there was consensus that representation by a solicitor was essential for all hearings, this was not always the case for guardians. It was not unusual for the guardian's attendance to be excused. Driven largely by logistics and stretched resources, it was evidently common practice for professionals to make an informed assessment on where their time should be prioritised. Participants described how proportionate and efficient working practices had developed to support the effective operation of the tandem model.

The assessment of who is required in court was based on a decision – largely driven by the guardian, but always in consultation with the solicitor and with permission from the case management judge – on where their contribution can make the most difference. The efficiency of a hearing in the absence of a guardian was dependent on the solicitor being fully

briefed in advance and the guardian being contactable to provide updated instructions if necessary.

Judicial interviews suggested some variation in views and practice. Most agreed that if professionals are fully prepared for a hearing and the issues are manageable without a guardian, they will rely on the guardian's judgment and accept that their time may be better used making enquiries outside of the courtroom.

The main report details the rationale for participants' consideration of when each form of representation is required at different stages of proceedings. These views were mixed and complex. Overall, it was evident that the CMH can be effective without the guardian being present, subject to the solicitor being fully instructed in advance. The assessment for IRHs tended to be based on the likelihood of settlement of the case and the nature of issues for resolution. In contrast to other hearing types, there was broad consensus that both a solicitor and a guardian are required to attend and contribute to a FH. This was due to the requirement of a guardian to give evidence themselves as a witness as well as the importance of both hearing the evidence of other parties.

Implications at court

Participants identified challenges to the flexible and pragmatic approaches that had been adopted in respect of the guardian's requirements in court. They believed that it was important for the guardian to be present for the negotiations that take place outside the courtroom to narrow or resolve issues. Solicitors described being at a disadvantage if they had to chase the guardian for updated instructions and some felt taking instructions over the telephone was less satisfactory.

The risk of delay, disruption and adjournment was important. Participants agreed that the guardian's role in mediating between parties and encouraging parents to engage with proceedings meant cases without a guardian present were more likely to be contested, potentially causing delay to the child. It was not uncommon for hearings to be paused or disrupted if new welfare issues arose whilst the solicitor sought updated instructions from the guardian. Judicial experiences were mixed on the likelihood of this situation leading to an adjournment, although overall, it was uncommon.

Flexibility in the tandem model

All participants, including the judiciary, struggled to identify any type of public law case where both a guardian and a legal representative were not required at all to represent or act in the child's interests. The difficulty identified with proposing a 'type' of case or scenario where the tandem model may not be appropriate was due to the dynamic nature of care proceedings; seemingly straightforward cases often became complex. This presents significant barriers to making an assessment on whether a guardian is likely to be required at the outset of a case, and may lead to further delay if they are appointed later in proceedings. A more appropriate approach is to review and assess the need for representation as the case progresses towards the FH.

A minority of judicial interviewees suggested that there may be, in some circumstances, cases where they did not require the input of the guardian, for example, cases that were so 'clear-cut' they could make decisions without a welfare assessment. It was proposed that there may be scope within the process to make a formalised assessment on a case-by-case basis in relation to whether a guardian is required.

The consideration of flexibility within the model was largely deliberated in relation to specific stages within proceedings rather than entire cases. Some judges suggested that the process could be adapted from the 'default' position that a guardian should be present at each hearing (albeit with an assessment of prioritisation) to one whereby it is accepted that the guardian does not need to attend court unless they have a specific contribution that will influence case progression. Another suggestion was that the judge could review whether a guardian was still required once the trajectory of the case was established.

Conclusions and implications

Professionals emphasised the strength and value of the tandem model and overall did not believe that any amendments, or adoption of an alternative model of children's representation, was required. There was consensus that the model was working well with professionals adapting to stretched resources to ensure their respective roles contributed to making decisions in the best interests of the child. Judges tended to report that care planning decisions would be subject to increased risk without the guardian's independent scrutiny.

The more proportionate approach advocated in the FJR was being adopted to a large extent. The assessment and prioritisation of where a guardian's time is most effectively used was described as a collaborative process, although it was largely driven by the guardian. In line with the principles outlined in the FJR, there may be scope for the court to take a more active

role in this assessment and direct the proportionate input from representatives. However professionals in this study did not raise concerns with how the process had developed which may imply that the most appropriate and effective way of prioritisation has emerged through practice, even if it diverges from this specific aspect of the FJR guiding principles.

Some members of the judiciary proposed that there may be scope to introduce a process to proactively assess the representation required at the outset of a case, or strengthen the existing practice to assess who is required at each hearing. It may be beneficial to consider introducing guidance that outlines a formalised process for the court to assess and direct the respective roles of the solicitor and the guardian, on a case-by-case basis. This guidance could outline that the assessment must be continually reviewed by the judge, guardian and solicitor during the course of proceedings, and include the option to redirect attendance or excuse representatives as the case necessitates.

2. Background and project aims

2.1 Context

The public family law system deals with families where social services intervention is needed to protect a child from harm. Cases may be brought by the local authority or an authorised person (currently only the NSPCC)¹ against the parents, when they have reason to believe ‘the child has suffered, or is likely to suffer, significant harm’. To make an order, the family court must be satisfied that this threshold has been met and that making an order will better meet the child’s needs than not doing so. All cases within the public law system are subject to the paramountcy principle – as outlined in the legislative framework of the Children Act 1989 – that the child’s welfare must be the paramount consideration when determining any question with respect to the upbringing of a child.

There are several types of outcomes for children in public law cases. These range from local authority supervision of the family whilst legal parental responsibility remains with the parents; a child being placed in alternative care, such as with a relative or guardian who has parental responsibility; to children being permanently removed from the care of their parents and being placed in the care of local authorities or an adoptive placement.

A defining characteristic of the public law system in England and Wales is the emphasis on securing permanence for children. This is intended to secure stability for children which is beneficial for them in the longer-term.² The weight of the decisions in public law, including the option of permanent separation between a child and their birth parents, means that the processes within proceedings must be thorough, robust and consistent to safeguard children whilst ensuring the rights of parents are protected.

Representation in public law

When a public law case is brought by the local authority, people with parental responsibility for a child are made automatic parties to proceedings and entitled to publicly-funded legal representation. Children subject to public law proceedings are usually separately represented by their own publicly-funded legal representative, as well as a Cafcass

¹ The NSPCC is a children's charity fighting to end child abuse in the UK. They work to help children who have been abused to rebuild their lives, protect those at risk, and find the best ways of preventing abuse from ever happening.

² Relevant research findings are summarised in Wilkinson, J. and Bowyer, S. (2017) *The impacts of abuse and neglect on children and comparison of different placement options: Evidence review*. Department for Education and 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.

guardian.³ This is known as the 'tandem model' of representation. Under section 41 of the Children Act 1989, the guardian's statutory duty is to safeguard the interests of the child, whereas the solicitor's duty is to act as the child's advocate in court.

The Family Justice Review (2011) concluded that there was wide support for the tandem model as an important safeguard for children in public law proceedings.⁴ In the interim findings, the Review indicated that whilst 'on balance the tandem model adds value' and should be retained, it raised some concerns in relation to the quality of work provided by guardians and a risk of duplication between the guardian's work and that of the local authority.⁵ The Review concluded that the tandem model should be retained but a more proportionate approach should be considered. This included re-focusing the role of the guardian to assess whether the court's welfare decision is in the child's best interests – with less of a focus on quality assuring the local authority's plans – and the solicitor's role to act as advocate for the child in court. The following guiding principles for a more proportionate approach were proposed:⁶

- Every case is different and the level and type of representation will vary. There will be a need for a guardian and a solicitor at some point during proceedings, but not necessarily always at the same time. There will be times when one can take a back seat, while the other takes the lead.
- The child should be represented at every hearing where the other parties are represented, but not necessarily by both professionals. The solicitor will usually lead the court-based activity and the guardian much of the out-of-court activity. A well-established working relationship between the guardian and the solicitor is key. So too is the understanding of the courts that a guardian does not always need to attend every hearing.
- The courts will exercise a stronger case management role and will direct a more proportionate input from the guardian and the solicitor. The courts should take a much firmer role in deciding what input is needed and when.

The Review suggested that when a public law application is made to the court, an assessment should take place to ascertain the respective contribution of the solicitor and the guardian during proceedings. This assessment is intended to inform judicial decisions on

³ A guardian is appointed to specified proceedings under s41 of the Children Act 1989 and then appoints the child's solicitor.

⁴ Ministry of Justice (November 2011) Family Justice Review Final Report.

⁵ Ministry of Justice (March 2011) Family Justice Review Interim Report.

⁶ Ibid.

when and how a solicitor or guardian should be involved, and this assessment should be continually reviewed between all three professionals throughout the duration of proceedings.

Stakeholders were largely positive about the FJR's support for the tandem model in responding to the Review. There have been, however, concerns raised from some stakeholders that adopting a more proportionate approach in respect to the contribution of the guardian may present the risk of poorer and less consistent decisions for children.⁷

Since the FJR in 2011, there has been no systematic review of the operation of the tandem model. Against the context of increasing case volumes in public law⁸ and stretched public resources, this project was commissioned to provide evidence on whether, and how, the more proportionate approach advocated in the FJR is working and whether any further reforms may be required to ensure the rights of the child are safeguarded, efficient judicial case management is supported and public resources are effectively allocated.

2.2 Project aims

The overarching aim of this project was to explore how the tandem model is working in practice and to understand if any reform to the model is feasible or appropriate. The specific aims were three-fold:

- To explore the views of the judiciary, Cafcass guardians and legal representatives in relation to how the 'tandem model' of representation is working, including whether both a solicitor and a guardian are required for all children at all stages of public law cases, and if not, in what types of cases and at what stage each form of representation is considered necessary and why.
- To understand the factors that the judiciary, Cafcass guardians and legal representatives take into account when considering what form of representation is necessary.
- To explore whether an alternative model of representation for children in public law cases is feasible or appropriate, and how this could be implemented and work in practice.

⁷ See for example, the Association of Lawyers for Children (ALC) Response to the Family Justice Interim Report, published 22 June 2011: <http://www.alc.org.uk/publications/responses/?page=4>

⁸ In 2016 18,954 public law cases started; an increase of 18% from 2015. Ministry of Justice (March 2017) Family Court Statistics Quarterly, October to December 2016.

3. Methodology

This was a mixed-method, two-phased study. The first phase was a data collection exercise completed by the judiciary across 12 courts in England and Wales. The second phase included four qualitative focus groups with family law professionals as well as eight in-depth interviews with the family judiciary. The research was approved by the Judicial Office, HMCTS Data Access Panel and the Ministry of Justice (MoJ) Analytical Services Ethics Advisory Group.

3.1 Phase 1: judicial data collection

Twelve courts were identified to take part in Phase 1 of the research. Although the sample was not intended to be statistically representative, at least one court from each Local Family Justice Board region was selected in order to reflect a range of public law performance and geographical location. Courts were also identified based on a medium to high public law caseload volume to ensure a sufficient number of types of cases, across all types of hearings were captured in the exercise. It did not seek representativeness of all public law hearings but was intended as a snapshot of hearings within a defined timeframe.

Members of the family judiciary and lay magistrates (hereafter referred to collectively as the judiciary) were asked to complete a short template for every public law hearing during a four-week period, from 5 to 30 September 2016. These were collated by a nominated contact at each court and returned securely by email to analysts within MoJ Analytical Services Directorate (ASD).

The template required information to be completed on the characteristics of the case and the representation of the child(ren), including the application and hearing type, number and age of children and the outcome of the hearing. The judiciary were asked to record who was present to represent the child(ren) at the hearing and which form of representation, in their view, was necessary. The data collection template is included in Annex A. In total, 745 responses were received from this exercise (of which 743 had complete information on the representation status of children subject to that hearing). These responses were analysed to produce descriptive statistics.

3.2 Phase 2: qualitative focus groups and judicial interviews

Qualitative focus groups were conducted in four of the 12 court areas that were involved in Phase 1. These areas were identified to reflect a range in geographical location and public law performance. In line with qualitative research principles, the areas were not intended to be statistically representative of all court areas. Cafcass guardians and managers, legal representatives (including solicitors and barristers) and local authority representatives (including both social workers and managers) were invited to take part. Contacts were sought via the nominated contact at each court in Phase 1 and through the Local Family Justice Boards and were emailed an invitation by the MoJ ASD research lead.

The focus groups took place within each of the local court areas between 4 and 17 November 2016. Attendance ranged from nine to 15 participants. The total number of participants broken down by professional role is presented in Table 3.1. Each group was facilitated by a MoJ ASD social researcher and lasted an average of around one hour and 25 minutes.

Table 3.1 Attendance at focus groups by professional role

Professional	Number
Solicitor	16
Barrister	2
Cafcass: management	5
Cafcass: guardian (Family Court Advisor)	16
Cafcass: solicitor	1
Local authority: management	4
Local authority: social worker	3
Total	47

The judiciary that took part in Phase 1 were given the option of providing their contact details to take part in follow-up research. The judges who provided their details were split by judicial tier and, within these sub-groups, were randomly selected to be invited to interview. This ensured a range of judicial tiers were included in the research. Judges were sent an invitation by the lead researcher and a telephone interview was arranged at their convenience. A total of eight family court judges (including Designated Family Judges, District and Circuit judges and a lay magistrate) were interviewed. Each interview lasted around 30 minutes.

The qualitative focus groups and judicial interviews aimed to explore the views of professionals in relation to how the tandem model of representation was working in practice,

including the respective roles of guardians and legal representatives in different types of public law cases and at different stages of proceedings, and whether any flexibility within the model is feasible or appropriate. The template used to guide discussion in both the focus groups and interviews is included at Annex B.

Analysis and presentation of findings

Quantitative data collected from Phase 1 was collated into a spreadsheet, coded by responses and cleaned for incongruent responses. Data was analysed to produce descriptive statistics on all 745 cases received and then analysed broken down by type of representation (including what was considered necessary) and the type of hearing. The responses are presented in section 4 and then referred to throughout the report to corroborate or challenge the qualitative data where relevant.

All focus groups were audio recorded and transcribed verbatim with research participants' permission. Qualitative data was coded to identify common themes and analysed within this framework. Findings are presented under these themes in section 5. Verbatim quotes from participants in the focus groups and judicial interviewees are used to illustrate themes. Professionals who took part in focus groups and judicial interviews are referred to as 'participants' throughout the report, unless an individual professional role is specified.

4. PHASE 1: Descriptive statistics from the judicial data collection

4.1 The Phase 1 sample

A total of 745 responses were returned from across 12 courts.⁹ This reflected all regions in England and Wales as well as all tiers of the judiciary. The sample is not representative of all hearings but rather a snapshot of the timetabled hearings across a four-week period in September 2016. The sample reflected a good range of all public law hearing types, as shown in the descriptive statistics outlined in Annex C.

The most common application type in the cases within the sample were applications for a care order, accounting for 62% of all hearings. Case Management Hearings (CMH) were the most common hearing type (38%) but Issues Resolution Hearings (IRH) and Final Hearings were also well represented in the sample, accounting for 21% and 19% of all hearings respectively. Correspondingly, the most common outcome from the hearings were case management directions (48%), followed by a final order (18%). Most hearings (60%) did not lead to an order, but where at least one order was made, it was most commonly an interim care order (38%).

4.2 The representation of children

In 46% of all hearings, only a legal representative (either a solicitor or a barrister) was present to represent the children; in the same proportion (46%), the tandem model (both a legal representative and a guardian) were in attendance.

Broken down by representation status more specifically: in 37% of all hearings, only a solicitor represented the child/ren subject to proceedings; in the same proportion of hearings (37%), both the solicitor and a Cafcass guardian were in attendance at the hearing to represent the child. In nine percent of hearings a barrister only was present, and in another nine percent, a barrister was present with a Cafcass guardian. In only one case, all three types of representation were present; and in six percent of hearings there was no representation.

The data on representation was analysed by hearing type. Across all 275 CMHs, almost half (47%) had either a solicitor or a barrister only present. In 53% of CMHs, both a guardian and

⁹ Information on representation status was completed for 743 hearings.

a solicitor or barrister were present. The representation across IRHs was also broadly evenly split between those who just had a solicitor or barrister present (53%) and those with both a guardian and a legal representative (47%).

At FHs, only 28% had only a solicitor or barrister present, but consistently, around half had a guardian as well as a legal representative (51%). In over a fifth of FHs (21%) there was neither a guardian nor a legal representative present. In 23 of these 28 hearings a final order was made; these were all for adoption. Six in ten urgent hearings were attended by a legal representative only. These findings are presented in Table 4.1.

Table 4.1 Representation status across all hearing types

	Case Management Hearings	Issues Resolution Hearings	Final Hearings	Urgent Hearings
Solicitor only	37%	47%	23%	50%
Barrister only	10%	7%	5%	10%
Legal representation only	47%	54%	28%	60%
Solicitor and Cafcass guardian	44%	39%	35%	29%
Barrister and Cafcass guardian	9%	8%	16%	12%
Tandem model of representation	53%	47%	51%	41%
No representation	1%	0	21%	0
<i>Base number of hearings</i>	<i>275</i>	<i>154</i>	<i>137</i>	<i>44</i>

Figures may not add to 100% due to rounding.

4.3 Judicial assessment of representation

As well as recording the representation that was actually present at each hearing, the judiciary were asked which form(s) of representation they considered ‘necessary’ to enable case management and progression. Judges were asked: ‘In your assessment, was a [solicitor/Cafcass guardian/barrister] necessary at this hearing to represent the child(ren) involved in the case?’

Overall, judges assessed that in 30% of hearings, only a legal representative (either a solicitor or barrister) was necessary to represent the child. In over half of hearings (55%) the tandem model was considered necessary (both either a solicitor or a barrister and a Cafcass guardian). A comparison of this assessment alongside the representation that was actually present across all hearings is presented in Table 4.2. This indicates that the judiciary assessed that the tandem model was required to facilitate case progression in a greater proportion of hearings (55%) than the proportion where both were present in reality (46%).

Similarly, whilst in 46% of hearings only a legal representative was present, judges assessed that a legal representative alone was sufficient representation in only 30% of hearings. This suggests that some judges are managing some hearings in the absence of a guardian, despite their assessment that both a legal representative and a guardian were necessary.

This descriptive analysis should be interpreted with a degree of caution. The base numbers for the ‘necessary assessment’ question were notably lower due to a number of blank responses, and therefore responses are not directly comparable. The assessment of which representation was required across public law cases was explored in further depth in the qualitative phase of the research (see specifically sections 5.4 and 5.6).

Table 4.2 Representation status across hearings versus judicial assessment of ‘necessary’

	In attendance (across all hearings and case types)	Judicial assessment as ‘necessary’
Legal representative only (solicitor or barrister)	46%	30%
Tandem model of representation: both legal representative (either solicitor or barrister) and a Cafcass guardian	46%	55%
‘Full’ representation: solicitor, Cafcass guardian and barrister	1%	7%
No representation	6%	7%
<i>Base number of hearings</i>	743	510*

Figures may not add to 100% due to rounding

**Base numbers are lower for this question due to blank responses*

The assessment of ‘necessary’ was applied to the hearings where each form of representation were actually in attendance. In the vast majority of hearings, judges reported that the respective professional was necessary at the hearing they attended (98% of hearings with solicitors; 90% of hearings with a tandem model of representation), indicating that both professionals contribute effectively in the hearings they attended.

The analysis of which form(s) of representation were considered ‘necessary’ by the judiciary was broken down by hearing and application type. These findings are presented in Tables 4.3 and 4.4. The judiciary assessed that a tandem model of representation was required in around six in ten CMHs (61%), IRHs (62%) and FHs (60%) and in 82% of urgent hearings. Judges considered that only a legal representative (either a solicitor or barrister) was sufficient in around a third of CMHs (37%) and IRHs (32%). In a quarter of FHs (25%) no

representation was considered necessary. In 21 of these 24 FHs, the initial application was made for adoption, and 19 led to a final order of adoption.

Table 4.3 Judicial assessment of ‘necessary’ representation by hearing type

Judicial assessment of ‘necessary’ representation	Case Management Hearing	Issues Resolution Hearing	Final Hearing	Urgent hearings
Legal representative only	37%	32%	13%	18%
Guardian only	0.6%	5%	2%	-
Tandem model	61%	62%	60%	82%
No representation	1%	1%	25%	-
<i>Base number of hearings</i>	<i>178</i>	<i>114</i>	<i>96</i>	<i>33</i>

Table 4.4 outlines the assessment of which form of representation was necessary by application type. With the exception of adoption applications, judges assessed that both forms of representation were necessary in over half of all cases, ranging from 50% of Supervision Order applications to 80% of Special Guardianship Order applications. In 85% of adoption applications, no representation was considered necessary, largely due to these being uncontested hearings following a placement order.

Table 4.4 Judicial assessment of ‘necessary’ representation by application type

Judicial assessment of ‘necessary’ representation	Supervision Order	Special Guardianship Order	Interim Care Order	Care Order	Placement Order	Adoption
Legal representative only	50%	20%	34%	33%	36%	-
Tandem model	50%	80%	65%	65%	64%	15%
No representation	-	-	1%	1%	-	85%
<i>Base number of hearings</i>	<i>20</i>	<i>25</i>	<i>95</i>	<i>356</i>	<i>42</i>	<i>34</i>

Caution should be applied with some hearing types with small base numbers

Of all hearings where the tandem model was considered necessary, 31% led to an interim or final order being made. This compares to 14% of hearings where a solicitor only was required. This may suggest that judges consider that both a legal representative and a guardian are required in hearings where they intend to make substantive decisions in the case.

5. PHASE 2: Qualitative findings from focus groups and interviews

5.1 The role of the guardian

The voice of the child

Participants across focus groups described the guardian's role in public law cases as to reflect the child's voice. The guardian's primary responsibility is to focus on the child's needs and assess the case entirely from the child's point of view. It was suggested that the guardian is often the only consistent professional that is acting in the child's interests throughout the duration of a case.

'The [child] does not have a voice. That's what the guardian is.' Solicitor, focus group (FG) 1

During public law proceedings, the guardian will make enquiries and assessments on behalf of the court. As well as getting to know the child and their parents, this may include evaluating the local authority assessment of extended family members or interviewing other witnesses. A guardian's assessment is based on welfare and safeguarding. Participants explained that a guardian's professional background and expertise is the basis for analysis of the child's welfare needs, for assessing any risks they are exposed to in their current situation and making a judgment on the likely impact of different care planning decisions on the child. One guardian described how the guardian's qualifications in child development theory as well as their training in child protection meant that they are able to hypothesise the impact of the child's situation on their welfare. This enabled them to provide advice and make recommendations on what the longer-term future of the child should be.

Independence and scrutiny

A common theme across all focus groups and judicial interviews was the importance of the guardian's role in scrutinising the local authority care plan for the child. This was consistently referred to as a 'check and balance'. Participants said that it was the responsibility of the guardian to challenge the local authority's plan if they have assessed, following their own enquiries, that the plan was not in the child's best interests. Participants described how the guardian's 'fresh pair of eyes' could highlight potential weaknesses in local authority care planning and lead them to propose alternative approaches that the local authority may not

have considered. Social workers said that discussing the care plan with the guardian could 'set you back on track' with the family.

Guardians are also responsible for validating or challenging the evidence provided by the local authority where necessary. The judiciary noted that it was not uncommon for the guardian and the local authority to 'be at odds with one another'. Research participants – including social workers – noted that quite often as a result of the guardian's assessment as a critical friend, the local authority will change their plan for the child. This level of scrutiny was deemed especially important by some research participants because, firstly, they believed that cases coming to court were increasingly more complex, and secondly, because fewer experts were being appointed in public law proceedings.

The independence of the guardian was consistently highlighted as an imperative part of their contribution in public law cases. It was emphasised across all professional groups, including by the judiciary, how the guardian's independence could encourage families to reflect objectively on their situation. They explained that it provided a new opportunity for the parents to engage with someone and the fact that their lawyers encouraged them to do so provided parents with further incentive. Participants believed that parents find the plan for the child more 'palatable' coming from an independent person rather than the local authority. Whilst this was referenced in relation to all public law cases, it was found to be particularly important when the positions of the parents and the social worker are polarised and in cases where the relationship between the family and the local authority had broken down.

"You just get somebody independent who is not a lawyer and then the parents listen to it and thinks, "oh yes, actually I will work with this person."" Barrister, FG1

Participants believed that social workers may have to make decisions or plans for the child that are influenced by local authority resources or management. It was therefore argued that the guardian's advice enabled the judge to consider what could and should happen for the child, based solely on their interests without the constraints of local authority resources and funding. Participants questioned whether Independent Reviewing Officers were able to make decisions with the same level of independence or indeed, whether they could allocate sufficient time to each child on their caseload to make decisions in the child's best interests. It was strongly felt, therefore, that one of the strengths of the tandem model is knowing that there had been an independent analysis of the situation, even when the outcome is to endorse the local authority's plans.

'The local authority have often got it very wrong in terms of what their plans are and the guardian is the most respected person in the room at that stage [when a case reaches court].' Solicitor, FG2

Impact on case progression

The guardian must form a view on the issues of harm under the 'welfare checklist'¹⁰ and on this basis, assess what orders are proportionate and appropriate for the child subject to proceedings. They will provide instructions to the solicitor, who is advocating for the child in court. The guardian will also make recommendations and directly advise the court. At some stages of proceedings, the guardian will be responsible for providing evidence to the court as a witness.

Participants said that some cases will be entirely steered by the guardian, who will support the judiciary in streamlining and narrowing the case, advising the court on what is in the best interests of the child's welfare. Guardians, solicitors and social workers emphasised the reliance of the judiciary on the guardian's perspective, particularly so if there is any dispute in relation to welfare or if new evidence has come to light. It was proposed that a judge would find it very difficult to make a decision on a case without the guardian's input – and as the largely non-inquisitorial system meant that judges have limited time to hear a case, the guardian's independent assessment and depth of evidence was key. Some participants suggested that judges are 'still suspicious' of local authorities and reiterated the importance of this independent voice.

'I mean nobody else can substitute the guardian.' Social worker, FG1

'They know the case, they know the people. They can bring such depth to the case through their evidence. I can't see how it would be replicated without them being heavily involved in the proceedings.' Barrister, FG3

These perceptions were supported by judicial interviewees who argued that the guardian's views are 'imperative to the decisions in a case' and a judge must have strong justification from departing from the recommendation of the guardian. They cited cases where the guardian faced strenuous opposition from both the local authority and the child's parents and only persistence from the guardian, with legal advice from the child's solicitor was effective in amending the care plan.

¹⁰ The 'welfare checklist' is outlined in section 1 of the Children Act 1989.

'That was all down to the guardian representing the best interests of the children, saying, "No I am not going along with this." That just shows you how pivotal, not only the guardian, but the guardian's legal representative is to a case.'

Judge (J) 1

As many guardians are experienced social workers, both solicitors and the judiciary also highlighted the usefulness of their professional and experienced 'eye over the paperwork'.

5.2 The role of the legal representative

The role of the legal representative, either as a solicitor or a barrister, is to represent the child's legal interests in court. Solicitors were keen to stress that the child is their client – not the guardian – and their role is to take instructions from the professional guardian on behalf of the child.

'I think it's sometimes thought that the guardian is our client; it's the child who's our client, not the guardian. We take our instructions from the guardian because the child isn't competent or is too young to give their own instructions.' Solicitor, FG2

Participants explained that the legal representative is responsible for ensuring the guardian's recommended plan for the child is set within a legal framework and the correct legal procedures are undertaken. Lawyers will provide legal advice to the guardian on whether their social work evidence has met the legal threshold for the order or removal of a child which the guardian has assessed is in their best interests. They may provide advice to the guardian on what legal options are available and where necessary, advise on their legal challenge to the local authority's plan.

Solicitors in focus groups said that they are responsible for keeping abreast of fast-moving developments in case law in order to ensure the guardian's recommendations to the court are up to date. When presenting the case to the court, they are responsible for ensuring the evidence is appropriately tested via the cross-examination of witnesses.

'Well it's a mutual benefit because I do rely on solicitors a hell of a lot to make sure I'm keeping within the legal profession of things.' Guardian, FG4

Participants, including the judiciary, highlighted the role of the solicitor in organising the case and the value of this in facilitating effective case progression. These tasks included the

appointment and instruction of expert witnesses, and other administrative tasks to 'keep the case moving'.

'And that's where your solicitor is really the lead person in the case because virtually every case management responsibility in public law proceedings now falls on the solicitor to the child.' Solicitor, FG2

5.3 The distinction of roles

All participants emphasised the distinction of roles between the guardian and the legal representative and their respective responsibilities to the child. It was argued that they analyse the case from unique perspectives, drawing on their respective expertise. The guardian analyses the case in relation to the welfare and safety of the child and their assessment of the social work evidence whereas the lawyer analyses the case in terms of whether this evidence has met a legal threshold.

'You have that kind of safety net of somebody looking at welfare and somebody looking at the legal aspect, and those two people coming together to actually make sure you get the best outcome for the child.' Guardian, FG3

Participants agreed that the guardian and the legal representative have very different roles to play within proceedings and believed that these roles did not cross over. A key example cited was the role of advocacy. Guardians are not expected to advocate on behalf of a child before a court, make submissions to the court or cross-examine witnesses. On the other hand, lawyers are not expected to work with the child on a one-to-one basis to ascertain their wishes and feelings and make assessments of their welfare. Participants said that solicitors may be detached from the 'true' welfare issues that the court must deal with. Whilst legal professionals may understand why, and even how, these tasks are undertaken, they will generally not have the expertise to do it themselves.

Given the distinct roles, participants did not believe that the tandem model approach was leading to any duplication of work. There were some tasks both were involved in, for example, in meeting the child of the case, but it was argued that the guardian and the solicitor would be coming to this meeting with different perspectives. Professionals in one focus group debated whether there was some duplication of effort in writing statements.

'If both are doing their jobs properly there shouldn't be any overlap... one is a client that is forming a view, and the other is a legal advisor saying, well, that's possible, that's not possible. So they are very different.' Solicitor, FG2

Participants from across all professions, including the judiciary, suggested that one of the key strengths of the tandem model was the value of both professional disciplines that contributed to an appropriate outcome for the child. Others were keen to point out that the model was not 'dual representation' because acting in the best interests of the child as the guardian does, is distinct from representing or advocating for the child.

'The guardian is actually acting in the best interests of the child in [their] professional opinion.... It's not dual representation, it's representation through a lawyer on instruction of the guardian.' Solicitor, FG2

Role of the barrister

The quantitative data collection found that in just one hearing a barrister was present alongside a solicitor and a guardian. When a barrister was present, this was either alone (in place of a solicitor; 9%), or alongside a guardian (9%). This finding was corroborated across the qualitative fieldwork, where participants were generally unable to recall a situation with all three forms of representation were present at a hearing. It was explained that a barrister was likely only to be present if the case solicitor was unavailable. The judiciary supported these findings and highlighted that they would expect the case solicitor to have sufficient experience to proficiently carry out the advocacy role.

'We certainly don't get two lawyers; it just doesn't happen.' J6

Teamwork and collaboration

There was strong consensus that guardians and solicitors were working well together in their areas, 'hand in hand' throughout the proceedings.

'They work very well together and it's very much a team effort and a double act.'

J6

Participants talked about the interdependency of professionals involved in a public law case, both outside of court as well as during proceedings, explaining that case progression is dependent on effective liaison between multiple individuals and agencies.

'We're dependent on the local authority filing its evidence; the local authority are dependent on the court processing that evidence; you're dependent on the parents responding to it; and the guardian responding to that.' Solicitor, FG2

Specifically, the team work between the solicitor and the guardian was seen as important to efficient case progression. Some judges reported that they worked together to make sure the case remained on track, for example, chasing the local authority to ensure their evidence is filed on time or informing the court if parents are not complying with directions. Other professionals supported this observation, reporting that the guardian may seek the support of the solicitor to speak with the local authority's legal representative to check the progress of agreements made in the care plan.

'There is an ongoing process where actually the guardians use their solicitors as a means of pushing things along within the process... we are constantly chasing up evidence that's late; assessments that have not been completed that may cause delays.' Guardian, FG2

Outside of the courtroom, guardians and solicitors said they would communicate with each other efficiently via telephone and email. They said it was quite unusual, rare even, for both a solicitor and a guardian to attend planning meetings, unless there was a very contentious issue.

'It would be very rare for me to go along with a lawyer to a meeting because it would be one or the other of us.' Guardian, FG1

5.4 The assessment of representation at hearings

Research participants were asked which form of representation,¹¹ either a guardian and/or a legal representative, was required to be present for different hearings at each stage of a public law case, and the respective role and contribution they make to judicial decisions and case management. As noted in the preceding section 5.3, the participation of barristers was identified as very limited on the whole so hereafter the report will refer to solicitors as the legal representative.

¹¹ It is acknowledged that some research participants said that the guardian does not 'represent' the child, but instead acts in their interest, and the legal representative is the 'representation'. For the sake of simplicity and conciseness, the term 'representation' is used to encompass both the guardian and the legal representative roles in this report unless specified.

Many participants agreed that the ideal situation would be that both guardian and a solicitor would be in attendance throughout all public law hearings. The strength of this view, however, varied both within and across focus groups, amongst different members of the judiciary, and in respect of different hearings (and to a lesser extent, case) types.

Some participants said that since the implementation of the Public Law Outline (PLO),¹² public law cases are a streamlined process with front-loaded proceedings. They argued that for this reason, it was imperative for all professional parties to be present during all hearings as this is where the 'community of interest' gains its deepest understanding of what is happening in the case.

'In tightly managed cases, every hearing is an important hearing, because you wouldn't be having a hearing unless there was something important to be done.'

J3

'At court, it's extremely important for everybody to be present because people's understanding crystallises mainly at hearings.' Solicitor, FG3

The judicial perspective on whether both forms of representation was required for all hearings was mixed; some said both were always required because it was difficult to predict what developments may take place, others said they would make an assessment on whether a guardian is required. Others again indicated that the distinction of roles from both professionals meant that they rarely needed both at the same hearing. They argued that their respective contributions were required for different elements and at different stages of a public law case. For example, a solicitor would be required for presenting the factual basis of the care order, serving of the documents and to contribute to the case management of legal issues, whereas the guardian was required when considering the social welfare aspect of the case and promoting the best outcomes for the child.

'In an ideal world the guardian is such an important person in the care proceedings that ideally they should be available throughout.' J4

¹² The Children and Families Act (2014) introduced a statutory time limit of 26 weeks for the completion of non-exceptional care and supervision proceedings. Guidance to support case management is outlined in Practice Direction 12a - Care, Supervision and other Part 4 Proceedings.

'They have important roles but at different stages of the proceedings, and... they need to have a part in the proceedings, but they don't need to be there all of the time, both of them.' J7

There was consensus across the focus groups and the judiciary that representation by a solicitor at all hearings is essential. This was supported in the quantitative data collection, whereby a solicitor (or barrister) was considered necessary in 92% of hearings overall, and in 98% of the hearings where they were in attendance. It was argued that because 'at day one now the key decisions are made' it would be difficult for a solicitor to come into a case a few weeks or months into proceedings.

'In every case I would expect to see legal representation because you cannot expect a guardian to be advancing legal arguments... I'd always expect the guardian to give instructions but I wouldn't necessarily expect or insist on the guardian being physically present in the courtroom.' J6

Conversely, it was clear that despite the 'ideal' situation of both professionals present, in practice, it was not uncommon for the guardian to be excused from a hearing. Some participants estimated that up to half of hearings would be facilitated without a guardian present. Our quantitative data collection showed that a guardian as well as a legal representative were present in 46% of all hearings (although both were considered necessary in 55% of hearings). This situation had largely been driven by logistics and stretched resources which meant professionals had to make a practical assessment on where their time should be prioritised. The process by which this consideration is made is explored in further detail later in this section.

'Guardians are very overworked and simply, although they would like to be, cannot attend each and every hearing, and they have to make a decision.'
Solicitor, FG4

'I think we need to get really, really targeted on actually how we're using what we've got.' Cafcass manager, FG1

Logistics

It was not unusual for a guardian to have a clash in their timetable and listings. Some participants said the guardian's availability was not always sought and they were often double-booked to hearings as a result. They believed that the expectation that cases should

be completed within 26 weeks meant that hearings would be booked regardless of the guardian's availability. Solicitors described the importance of getting the balance right between the child's timetable and ensuring the right professionals were involved. Some judges felt that timeliness was more important than risking delay and rescheduling a hearing.

'How I proceed with these cases are [sic] more a matter of expediency than because it is the right thing to do.' J4

On the other hand, some participants reflected that judges would liaise with each other when there was conflict within the guardian's diary. A judicial interviewee corroborated this and described how they saw listing as a collaborative process, and because their 'starting point' was that the guardian should be present, they would accommodate the availability of the guardian wherever possible.

The assessment process

It was evidently common practice for professionals to make an informed assessment on when a guardian was required, and participants described how proportionate and efficient working practices had developed to support the efficient operation of the tandem model. One judge described the model as a 'regulatory piece of machinery'.

'There is already a good deal of self-regulation involved, with guardians saying "I don't need to be here" and solicitors regularly asking the court in those circumstances to dispense with the guardian's attendance.' J2

Participants said that the assessment of who is required in court was based on a decision – largely driven by the guardian, but always in consultation with the solicitor and with permission from the case management judge – on where the guardian's time and contribution should be prioritised. It was explained that all professionals involved should have the required information and the outstanding issues to resolve at the end of each hearing to reasonably assess whether the guardian needs to be in attendance at the next hearing.

All focus group participants and judicial interviewees agreed that the efficiency of a hearing in the absence of a guardian was dependent on the solicitor being briefed with full instructions in advance and the guardian being available on the phone to provide updated instructions if necessary.

'... [The guardians] are almost always on the other end of a phone, and I will have taken full instructions before going to court.' Solicitor, FG4

It was agreed that the case management judge would always be required to give permission for the guardian to be excused. Indeed, some participants did not agree that the guardian generally led on making this assessment and felt instead it was up to the court to decide.

'We have to be pragmatic... so long as the solicitor is fully instructed and if you can contact the guardian if necessary, it's ultimately up to the court actually to dispense whether they need a guardian in a hearing.' Cafcass manager, FG1

Judicial interviews suggested some variation in practice. Most tended to agree that they tried not to be too prescriptive and relied on the guardian's judgment on which hearing they should attend. Many said they assessed whether the guardian's request to be excused from a hearing was reasonable based on the likelihood of evidence being required or heard, or whether it was likely to be largely a procedural hearing.

'The guardian themselves will know which one of those two or three cases really requires their input more... and I leave that to their discretion.' J5

The preparation for each hearing was important. Some judges believed that as long as all issues had been agreed beforehand, that there had been a productive advocate's meeting where the solicitor had been fully briefed and instructed, and a clear draft order had been produced, they could effectively manage a hearing with only the legal representative present. They argued that experienced public law solicitors were capable of running a hearing without a guardian.

'I do not find that that holds up the progress of the case because usually the solicitor is instructed by the guardian. They know what they are doing if the guardian is not present.' J4

All professionals were mindful of the workload of guardians and stressed that they should not be spending time in court unless it was really justified. Judges tended to believe that if the issues within a hearing were manageable, they will accept that the guardian's time is more effectively spent elsewhere. A proportionate and collaborative approach was described where professionals adopt a flexible practice to keep cases moving and completed within 26 weeks, without jeopardising the fairness of proceedings.

'I'm very much in favour of people only doing what they're doing and not doubling up.' J7

'I think it's operated here incredibly efficiently. If one person at the hearing is sufficient then one person attends the hearing. If you're likely to need both, then to avoid an adjournment, both would be there.' Solicitor, FG2

Prioritisation

Participants were keen to stress that the assessment of whether a guardian is required is made on a case-by-case basis, although the analysis identified a number of important themes that were taken into consideration. Notably, these included the level of risk within a case and the impact the guardian's input is likely to have on case progression. Guardians described prioritising their time according to where they can make the most difference.

'You just have to choose the most risky one or the one you think you're going to make the most impact on, when you need to be there.' Guardian, FG4

The nature of the case and, sometimes, the relationship between the guardian and the solicitor was important. As some cases 'hang on legal issues' the solicitor will take the lead, whereas others will be focused on complex welfare needs and therefore the guardian will need to be more heavily involved. These themes are developed in the next section in relation to the representation required at each stage of public law hearings.

The Case Management Hearing

There were considerable differences in views, both across and within professional groups, including the judiciary, in relation to which form of representation was required at the CMH.

'I think that we're supposed to be in there for case management hearings, so clearly there's a difference of opinion about when we should prioritise cases.'
Guardian, FG4

Those who felt strongly that both a solicitor and a guardian should be in attendance argued that the CMH sets the timetable, path and management of the whole proceedings, and to do this without presence of the guardian was described as 'fait accompli' as to what was going to happen. It was argued that the guardian should be present if there is to be a discussion around experts, disclosure and the matters on which key case decisions will be taken. Some judges felt that having a guardian present was essential for case management, including

their contribution on what assessments need to take place and the directions the local authority should follow.

'Think about the CMH... you are setting the whole future of the case in train. Well if you are going to do that then you've got to have the best information available to you, if you are going to case manage effectively. You cannot case manage effectively without the guardian because, to put it bluntly, you're shooting in the dark.' J1

Conversely, there was a strong perception that the guardian was not always necessary at the CMH. Some professionals believed that hearings which are intended only to make case management decisions and set the trajectory of the case – and not 'evidential' hearings – only required the solicitor. It was noted that the solicitor's input at a CMH can result in a lot of changes at the early stages of a case.

'[The] CMH, which is simply diarising dates, which the guardian can do beforehand, there's no need for them to be physically there. That's a low priority.'
Solicitor, FG1

Overall, it was evident that the CMH can be effective without the guardian being present and in practice the guardian is often excused. Our quantitative data collection found that 47% of CMHs were managed with a legal representative only (although importantly, in 61% CMHs judges assessed the tandem model was required). The effectiveness of the CMH without a guardian in attendance was subject to the solicitor being fully instructed in advance. Participants reflected that if all relevant parties had attended an advocates meeting in preparation for the CMH where key decisions had been agreed and a solicitor was fully briefed, it would enable the direction and the management of the case to be set at the CMH without a guardian.

'It's not fair to say that every single one would grind to a halt or be ineffective.'
Solicitor, FG4

Members of the judiciary agreed that if a CMH is primarily focused on setting dates for case management then they could progress the hearing with either form of representation, although a solicitor was deemed preferable because the CMH often led to administrative requirements that the solicitor took responsibility for, such as making appointments, filing evidence and documents and diary management. One judge said that in many cases the

case will not be ready to proceed at the CMH so 'nothing much is achieved and the attendance of the guardian is irrelevant' as long as everyone can identify what needs to be done to have a further CMH. Given this assessment, participants suggested that the guardian's time could be better spent outside the court conducting assessments and enquiries on behalf of the child.

'I think bearing in mind the burden on guardians to make enquiries, I think they can usefully be excused.' Solicitor, FG2

The difficulties and exceptions to facilitating an effective CMH without a guardian included when new information arises during the hearing and the guardian is required to update their instructions. It was suggested that the solicitor and the guardian will work hard to ensure that they have prepared in advance for all eventualities as far as possible and as aforementioned, would be available on the phone. One judge described this as a 'good compromise' but could add to the stress of the courtroom situation. This is developed further in section 5.5.

The Issues Resolution Hearing

Views on whether both a solicitor and a guardian are required at an IRH were mixed and complex, and perceptions tended to be dependent on the nature of the IRH and likelihood of settlement at this hearing. Some participants suggested that if you know that a case will not settle at the IRH then the guardian will be excused on the basis that they will be made available for the FH. Some judges agreed that 'if you know from day one that the case is destined for a FH' then the guardian does not need to be at the IRH as it is more of a 'stocktake exercise' whilst all parties prepare for the FH.

Participants, including the judiciary, said that a guardian would not be required at the IRH, even if the case will settle, as long as they have provided their evidence and the case is not contested.

'If everyone has done what they are supposed to have done then you don't necessarily need the guardian at the IRH but the reality is that the local authority inevitably has some sort of delay... or the parents haven't responded and then the guardians are the main focal point.' J8

However, in IRHs where issues are required to be narrowed or resolved (both contested and uncontested), participants argued that it was helpful for the guardian to be present or at least available to provide updated instructions to the solicitor. Judges highlighted that a guardian

should be present to resolve welfare related issues, and without the guardian's input there is a risk that the case could stall and the opportunity to resolve the case is missed.

The Final Hearing

In contrast to other hearing types, there was consensus across focus groups and judicial interviews that both a solicitor and a guardian are required to attend and contribute to a FH. This was primarily because the guardian is required to give evidence themselves as a witness, but also because of the importance of guardians hearing the evidence of other parties.

Most judges believed that it was not possible to achieve a FH without a guardian for these two main reasons. They argued that a solicitor is required to present the legal case and cross-examine the witnesses (because guardians are not in a position to do so) and as a witness themselves, the guardian needs the legal advice of their lawyer in that regard. Judges also emphasised the importance of listening to the evidence of the parents and seeing this evidence challenged in a forensic way which can cause a shift or confirm the guardian's view of the plan for the child. They argued that often new evidence will come to light in a FH and without the opportunity to hear this, they will be handicapped in making a decision and their recommendations will be open to challenge by other parties. Having evidence relayed second hand via the solicitor was described as a 'poor substitute'.

There were, however, discussions in relation to what was deemed proportionate attendance at lengthy FHs for guardians. Judges said that they may have to accept, 'with a degree of reluctance', that a guardian may not be available throughout the entire duration of a FH because of their caseload pressures. Some judges took the view that it may be possible to manage part of a FH if the solicitor has taken full note of the evidence and appraises the guardian before they return to the hearing. It was emphasised that this would not be possible in many cases where the guardian is required to hear oral evidence of the parents and other witnesses to determine whether they need to amend any of their final recommendations. In these situations, the judge may have to stand down the hearing whilst the solicitor speaks to the guardian (as detailed in section 5.5).

Fact-Finding Hearings

Fact-Finding Hearings (FFH) were described as quite rare in public law proceedings but generally participants agreed that they expected the court not to direct the attendance of the guardian. The attendance of the guardian was deemed unnecessary because the purpose is

for the child's solicitor to test the strength of the evidence from the local authority and for the judge to make a finding on the evidence they hear.

Participants described using their discretion in this assessment, however. Guardians and lawyers said they would decide whether, and which, evidence they should hear. For example, in a non-accidental injury case, it was acknowledged that sitting through up to 12 days of evidence was not the best use of the guardian's time. It may, however, be important for the guardian to listen to the other types of evidence, including that from the parents and they may, as an example, attend for two days out of a ten-day FFH.

'It's sort of trying to focus the work where we can make a difference, where it's important.' Guardian, FG2

There was some frustration expressed by guardians, however, that they could not attend FFHs to hear all the evidence, particularly from the parents, as this situation is likely to present some illuminating insight to the case. This view was shared by some solicitors, who said it is very difficult for the guardian to get the 'flavour' of evidence without being at the hearing themselves.

'When people are giving evidence and they're tested in their evidence you get to hear the best version of the truth that you're ever going to get and it's hugely valuable.' Guardian, FG3

'I always find it amazing that the judge will place such huge reliance on hearing live evidence from people, and having it tested and it massively contributes to the decision-making... and yet somehow they don't think that we should be afforded the same opportunity.' Guardian, FG3

5.5 Implications at court

Stalled discussions outside of the courtroom

Participants within all focus groups referred to the commonality of discussions that take place between the guardian, solicitor and parties outside of the courtroom to narrow and resolve issues of the case. Solicitors said that despite efforts to agree proposed directions in advance of the CMH, the reality is that they are often still finalising discussions immediately prior to the hearing. They argued that it was important for the guardian to be there for these discussions – to negotiate with the social worker and the parents and to firm up details of the care plan, for example. Solicitors felt they were at a disadvantage if the guardian was not in

attendance and if they have to 'chase' the guardian's instructions via the telephone. Some felt that taking instructions over the phone or via email was far less effective.

'The thing is, about the court hearings in care proceedings, is a lot of what goes on is negotiation outside [of the courtroom].' Solicitor FG4

'That dynamism is actually quite important because that's part of the process of getting it right before you get to the judge.' Guardian, FG1

Disruption, delay and adjournments

Although it was evident that professionals are already adopting a flexible and pragmatic approach to the requirements of the guardian in respect of their role in court, participants identified a number of difficulties with this approach. This included the risk of delay if the guardian is required to give a view on the evidence. Some judges described how they have to pause the hearing and 'tend to be in and out of the courtroom' whilst the solicitor seeks updated instructions from the guardian on the phone.

As noted in section 5.1, one of the strengths of the guardian was perceived to be their influence on parent's engagement with proceedings and the likelihood of them accepting the position. Guardians were considered key during and between hearings in mediating between the social worker and the parents and defusing tense and difficult issues between different parties. There was broad agreement that without the guardian a case is therefore much more likely to be contested.

'One of the important things a guardian can do, from an independent point of view, is to come into [the polarised situation] and express a view... and that saves an awful lot of time because the parties will often listen to what the guardian is saying.' Guardian, FG3

Judges were mindful that the potential 'short-term gains' of a guardian not attending some hearings may lead to 'longer-term losses' due to lengthier hearings and overall case duration. They recognised that guardians 'were spread too thinly; and have to accept the situation' and trust that the legal representative has taken full instructions from the guardian but said that hearing will be stalled when welfare issues arose and the solicitor is unable to take instructions.

Judicial experiences were mixed on the likelihood of this situation leading to an adjournment. Some indicated that if welfare issues were unmanageable without the guardian's view, they would have no alternative than to adjourn the case. Others could not recall a case where a hearing had to be adjourned for this reason, although the key to the case proceeding was often the quality of the representation by very experienced children's lawyers.

Impact on case progression

Some participants suggested that the 'quality' of the outcome of the hearing was affected by the guardian's presence by virtue of their narrowing issues and informing the judge's decision. In some cases or hearings, such as emergency orders, participants said the judge was unlikely to be able to make a decision at all for the child and would have to adjourn the hearing to enable the guardian to make their assessment.

5.6 Flexibility in the tandem model

Assessment of representation by case

The vast majority of participants, including the judiciary, struggled to identify a type of case where neither a guardian nor a legal representative were required to represent or act in the child's interests. They were keen to stress that this view was not only applicable to section 31 care applications but extends to other public law proceedings.

'It's hard to imagine a situation where, as a category of cases, you could say we don't need guardians in that category of cases because the local authority will never try to take any inappropriate action.' J3

There were some specific types of cases or scenarios that were discussed in this respect, including:

- Representation of a new-born baby – guardians argued that their expertise and training in child development theory was required to assess whether a new-born child could be discharged from hospital with their birth parents; the likely impact of a baby being born addicted to substances and withdrawing; and how much contact is appropriate between the new-born and their parent.
- Discharge or revocation of care or placement orders – some participants suggested that a guardian's input may not be required in applications made by the local authority to discharge a care order, although others said that they would be required if there are associated issues with contact.

- Age and competence of child – participants discussed whether it may be appropriate to dispense with a guardian if the child is competent to provide their own instructions to their solicitor. Similar situations may arise if a child disagrees with their guardian’s recommendations and they request the court’s permission to directly instruct their solicitor.

‘But when you’re there and you’re approached by the judge to do A, B and C, you tend to just try and get on with it and do the best job you can, but it isn’t always comfortable because we are not lawyers and we can’t replicate the dual role.’ Guardian, FG4

- Other cases (sometimes described as ‘straightforward’ or without a significant welfare aspect) such as parental responsibility applications.

The dynamic nature of care proceedings

The difficulty identified with proposing a ‘type’ of case or scenario where the tandem model may not be appropriate was the dynamic nature of care proceedings. Research participants agreed that it was common for a seemingly straightforward, simple case to turn into a complex case. Examples were consistently cited where the issues of the case are agreed at the advocates meeting only for positions to change and new issues to emerge in court. In such a situation, the plan for the hearing must change and without the guardian’s view (in person or via the telephone) and the weight the judiciary place on the guardian’s evidence, it is difficult to finalise matters. Participants reflected that if any issue arises within the hearing that is different from the guardian’s documentation, the judge will generally err on the side of caution and wait to seek the view of the guardian. The dynamism of care proceedings was therefore identified as a barrier of assessing whether a guardian is likely to be required in advance.

‘You do tend to still be debating, even as you go into court, because things change. That’s the nature of care proceedings.’ Solicitor, FG1

Judges agreed that there were very few public law cases where all issues are agreed before you come in. They highlighted the vulnerabilities of families in such proceedings and the chaotic nature of their lives which meant that families often did not act in predictable or rational ways. They agreed that it was not uncommon for ‘something completely unexpected’ to arise in the hearing, thereby making it difficult to make an assessment of who is required

beforehand, and potentially raising more challenges when a guardian has to be brought in at a later stage in the case.

The perspective of the judiciary

Some members of the judiciary argued that there may be, in some circumstances, cases that do not require the input of the guardian. These judges believed that some cases were so straightforward that they could make case decisions without a welfare assessment. One example provided included where a new-born baby had been abandoned and there was no family to care for them. Conversely, it was suggested that very serious cases – for example, where the child had suffered serious injuries and the judge found the parents to be responsible – did not need the views of the guardian to contribute to that care decision. Other judges believed that it would not be appropriate for there not to be both a solicitor and a guardian for the child in cases where there is permanent removal of the child because the ramifications are so serious.

A minority of judicial interviewees proposed that there may be scope within the process to make a more formalised assessment on a case-by-case basis in relation to whether a guardian is required. One judge suggested that judges should have the option to decide at the outset of a case whether they need a guardian in a case at all, with the option of changing this if the position of the case changes. This judge felt this flexibility – to dispense with the services of the guardian – would be beneficial, as long as there is no disagreement from any party, including from Cafcass.

The consideration of whether both a solicitor and a guardian are required, was however, largely identified by judges in relation to certain stages or hearings within proceedings. Some suggested an extension of the existing proportionate working practices (as described in section 5.4) from the default position that a guardian should be present at each hearing to a situation whereby there is acceptance that a guardian does not need to attend court unless they feel their presence will be valuable. The risk was acknowledged that a hearing may change unexpectedly from simple to complex which then may create more work if a guardian comes to the case at a later stage. This risk was, however, seen as more proportionate than the model where a guardian is present by default.

‘I wonder whether there could actually be a positive consideration... and say “does the guardian need to attend each time?”’ J3

Another suggestion was that an assessment could be made once the case management judge knew the trajectory of the case. For example, in some straightforward cases, after the guardian has recommended that the child should be placed within the extended family and there are no contested issues, then both a solicitor and a guardian may not be required. Judges highlighted that this assessment may be difficult to make at the beginning of proceedings and it would be relatively uncommon to be sure of the outcome until assessments had been completed prior to the IRH. It was suggested that a decision could be made at the IRH who is required for a FH, and if there are no contested issues, both forms of representation may not be necessary.

'If it's perceived as quite straightforward and there's not really much by way of contest, then I can question whether in the later stages whether you need both the guardian and solicitor for the child, but obviously the difficulty is that you don't know that in the earlier stages. Maybe there could be some sort of process for reviewing it because at the moment, I think once people are appointed, they're appointed until the end and we're not in this culture of thinking, "Ok, well we don't need you anymore so you can be released."' J8

This point about 'culture' was touched upon in a focus group, where guardians noted that there were existing provisions to discharge a guardian from proceedings but participants could not recall this happening with any frequency.

'If it was a case where the children's guardian felt that they weren't adding value, there is provision within the Children Act already for them to be discharged from those proceedings. I've only ever known two cases for it to happen, but it's there and it's got a provision there.' Guardian, FG4

Challenges and risks of adapting the tandem model

Participants across all focus groups cited the role of the tandem model in protecting Human Rights, specifically, Article 6 Right to a fair trial and Article 8 Right to respect for private and family life.¹³

'We're making the most fundamental decision that anyone can make, aren't we? In a lot of these cases, we're looking at permanently separating children from their parents and the court has to be satisfied before making its order that this

¹³ Human Rights Act 1998

plan is the right plan for the child and there has to be a system to do that by the enquiry that the guardian makes presented on behalf of the child's solicitors.'
Guardian, FG1

'... For me it's fundamental to do with human rights... that when they get to an age where they're old enough to say "Hang on, what's gone on here when I was six?" that we know that there's been a proper job done on their behalf. Some might not agree with the decisions that were made but they were represented, that their views, however they came across, were listened to, and I think that's where the very different roles in the tandem model work well today.' Professional not identifiable in focus group transcript, FG1

Participants, including the judiciary, strongly believed the tandem model was working well, with professionals adapting to stretched resources to ensure their respective roles contributed to ensuring that the decisions in the best interests of the child were made. Judges overall believed that the model of representation did not require improvement: *'If it ain't [sic] broke, don't fix it.'* J2

Judges warned that the decisions made within a case will be open to increased risk if there is no independent scrutiny of the local authority. As noted in section 5.1, it was not unusual for the guardian to make a different recommendation to the court from that of the local authority and provides the judge with options to enable them to make a decision. Professionals believed that taking either the legal representative or the guardian out of the process would ultimately extend the case. This was because they would not be able to gather the knowledge required to narrow the issues from the case outset.

'So without lawyers being involved, it's likely that matters perhaps couldn't be advanced as far as that and the court would need to hear more than it otherwise might have to.' Solicitor, FG4

Participants recalled a period where there was a significant shortage of guardians which stalled cases because the solicitor was unable to put forward what was in their client's best interests. Conversely, participants also argued that the absence of a lawyer to advise guardians on the complexity of the law could disadvantage the children subject to proceedings.

'I think it would be a real disaster to say that guardians must do the job, of the independent role, on their own without the advice.' Barrister, FG3

6. Conclusions and implications

The strength and value of the tandem model was recognised and strongly supported in this study; there was broad consensus that the model was working well and that overall, any reform of the current model, or consideration of an alternative model, was not required. The more proportionate approach advocated in the Family Justice Review (FJR) was being adopted to a large extent – in 46% of hearings both a solicitor and a guardian were present, and in just over half (55%) the judiciary considered that both were necessary. This suggests that one of the principles proposed in the FJR that both a solicitor and a guardian will not necessarily be required at the same time, and a guardian does not need to attend every hearing, has been widely implemented in practice. Some challenges and implications to this approach were identified, including the impact of the guardian's absence on the negotiations outside the courtroom, in liaising between parties, and on the efficiency of the hearing itself. The data also suggests that there is a small proportion of hearings where judges manage in the absence of the tandem model, despite their assessment that both a legal representative and a guardian are necessary.

The respective roles and responsibilities of the guardian and the solicitor identified in this study challenge the assertion that a re-focusing of their roles may be required to avoid any duplication of work as advocated in the FJR. The Review stated that the guardian's role should be to inform the court's welfare-related decisions, with less emphasis on the 'quality assurance' of the local authority's care plan. Whilst informing court decisions was the guardian's key role – and the weight the judiciary placed on their evidence is testament to this – professionals, including social workers themselves, considered that the independent scrutiny of the local authority's care plan was an imperative part of the guardian's role. This indeed was considered one of the key strengths of the tandem model, particularly against the context of rising care volumes and case complexity.

Similarly, the FJR found that children's solicitors were often called upon to fulfil case management responsibilities and administrative tasks. It argued that improvements to the system should reduce the call on solicitors to fulfil this role and focus on advocating for the child in court and advising on legal matters. This study indicates that solicitors are still being relied upon for these responsibilities to facilitate effective case management.

It was largely routine for guardians to make an informed decision on where their contribution within proceedings was required most. The findings suggested that both a solicitor and a guardian were required at substantive hearings; this was supported as hearings with both

forms of representation present were more likely to lead to an order being made. Both were more likely to be deemed necessary at FHs where the guardian may have to give evidence as a witness and the judiciary felt it was important for the guardian to hear the evidence of other parties. This is with the exception of FHs for adoption where professionals assessed that representation was not required; likely to be because the case would be uncontested at this stage.

The assessment of when a guardian's input was required was described as a collaborative process, largely led by the guardian in consultation with the solicitor. This was dependent on positive and efficient relationships and ongoing communication between the professionals. An established working relationship is another facet of the principles proposed in the FJR to support the operation of an efficient model that was evident from this study. In relation to assessment, the FJR also proposed that the courts should 'take a much firmer role in deciding what input is needed and when'. In this study, whilst it was clear that the case management judge would give permission for the guardian to be excused, the decision would largely rest on the guardian's judgment. There may be scope, therefore, for the judiciary to exercise a stronger case management role and to direct the input from the guardian and solicitor during proceedings. Whilst this may be something worth exploring, this study implies that an appropriate process for prioritisation has emerged effectively through practice.

Some judicial interviewees suggested further that there may be scope to introduce a formalised process whereby an assessment is made on a case-by-case basis in relation to whether a guardian is required. Others proposed that standard or 'default' practice could be that a guardian only attends a hearing if they have a contribution to make (as opposed to the understanding that ideally a guardian is present but does not attend due to resourcing or logistical issues). These suggestions are broadly in line with the proposal outlined in the FJR that an assessment should be made to ascertain the contribution of the solicitor and the guardian during proceedings when a private law application is made to the court, and this should be continually reviewed throughout proceedings.

In light of these findings, it may be worth exploring whether the courts would find it beneficial to develop guidance for a formalised process to assess and direct the respective roles of the solicitor and the guardian. This guidance could outline that the assessment must be continually reviewed by the judge, guardian and solicitor during proceedings, and include the option to redirect or excuse representatives as the case necessitates. As professionals within public law cases are already working to maximise resources to ensure efficient case

progression, the introduction of any standardised process or formal guidance will need to be balanced against the need for professionals to continue to make flexible and informed decisions for the child.

References

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.

Ministry of Justice (2011) *Family Justice Review Interim Report*. Ministry of Justice.

Ministry of Justice (2011) *Family Justice Review Final Report*. Ministry of Justice.

Ministry of Justice (2017) *Family Court Statistics Quarterly, October to December 2016*. Ministry of Justice.

Wilkinson, J. and Bowyer, S. (2017) *The impacts of abuse and neglect on children and comparison of different placement options: Evidence review*. Department for Education.

Appendix A

Phase 1 data collection template

Children’s representation in public family law: Judicial data collection

The Ministry of Justice (MoJ) is conducting a research study exploring the use of children’s representation in public law proceedings. As part of this, we are collecting data on the type of representation that is involved in all types of public law cases and at all stages in proceedings. This data collection has been authorised by both HMCTS and the Judicial Office.

Members of the family judiciary are asked to complete this data collection form for every public law hearing that takes place between 5 and 30 September 2016.

After completing this form please give to your nominated contact at HMCTS, who will forward to the MoJ. The nominated contact at this court is: [\[insert here\]](#). They will return all completed forms to MoJ analysts, and have received separate guidance on how to do this. If there are more than three children in a case, please complete a separate form and attach it to this one.

Court	
Case Number	
Level of judge	
Date of hearing	

Part A Details of the case

1) What are the age(s) of the children involved in this case?

	Under 1	1-2	3-5	6-9	10-12	13-15	16 or over
Child 1							
Child 2							
Child 3							

2) What application has been made in this case?

	Supervision order	Special Guardianship Order	Interim care order	Care order	Emergency protection care order	Placement order	Adoption	Other, please specify
Child 1								
Child 2								
Child 3								

3) What is the type of hearing?

	Case management hearing	Issues resolution hearing	Fact finding hearing	Directions hearing (please state at what stage in proceedings)	Final hearing	Other, please specify
Child 1						
Child 2						
Child 3						

4) What was the outcome of this hearing?

	Case management directions	Other directions, please specify	Interim order	Final order	Other outcome, please specify
Child 1					
Child 2					
Child 3					

5) If an order was made, please specify what this was:

	Supervision order	Special Guardianship Order	Interim care order	Care order	Emergency protection care order	Placement order	Adoption	Other, please specify
Child 1								
Child 2								
Child 3								

Part B Details of children’s representation

6) Who represented the child(ren) at this hearing?

	Solicitor	Cafcass guardian	Barrister	Other, please specify.
Child 1				
Child 2				
Child 3				

7) If there is more than one child in this case, did they all have the same representation?

Yes	
No	
If no, please explain how representation differed.	
N/A	

8) In your assessment, was a solicitor necessary at this hearing to represent the child(ren) involved in the case?

	Yes	No	Please explain your response.
Child 1			
Child 2			
Child 3			

9) In your assessment, was a Cafcass Guardian necessary at this hearing to represent the child(ren) involved in the case?

	Yes	No	Please explain your response.
Child 1			
Child 2			
Child 3			

10) In your assessment, was a barrister necessary at this hearing to represent the child(ren) involved in the case?

	Yes	No	Please explain your response.
Child 1			
Child 2			
Child 3			

11) Do you have any further comments about the representation of children in this hearing?

Child 1	
Child 2	
Child 3	

As part of this research, MoJ Analytical Services would like to interview some members of the judiciary about their views on the current model of representation in public law proceedings. This will involve a short telephone interview with a social researcher. If you are willing to be contacted in relation to this, please provide your name and contact details below.

Name	
Email address	

Many thanks for your support and co-operation in this exercise.

Appendix B

Focus group template¹⁴

Exploring children's representation in public law proceedings Discussion group template

Good afternoon and thank you very much for attending this discussion group today. My name is Amy Summerfield and I'm a social researcher within the Analytical Services Directorate at the Ministry of Justice.

As you are aware, you have been invited here today because I am leading a research study on the use of children's representation in public law proceedings. The first phase of this study included the collection of data on the representation involved in all public law hearings across 12 courts. This second phase seeks to understand in more detail, your professional views and experiences of the current model of children's representation in public law.

The main areas that I would like to explore in this discussion group today are:

- Your views on the current model of representation for children in public law proceedings, and specifically, what type of representation is necessary in different stages or different types of public law cases.
- The factors that you take into account when considering what form of representation is necessary and why.
- How the current model is working and whether any improvements could be made.

This should take no longer than 90 minutes. Your views and experiences are incredibly important to us. They will help develop our understanding of how the current model of representation of children is working and whether any improvements can be made.

I am bound by the professional and ethical standards of the Government Social Research profession. Whilst your professional role may be named, you as an individual will not be identifiable in any reports that may arise as a result of this research. You are not expected to discuss details of individual cases or parties, although any cases we do discuss will be anonymised. Please do not attribute any discussions that take place to any particular individual after this group.

¹⁴ The judicial interview guide covered the same themes and broadly followed the same format, with minor amendments to account for the specific judicial role.

With your permission, I am audio recording this discussion group to help me with the analysis. Therefore, please try not to talk over one another or the recorder will struggle to capture your views. I may also make notes as I go, but these will just be things I would like to follow up with you. Using the audio recorder means that I do not have to attempt to write down everything you say. Please let me know if you don't feel comfortable with answering any questions and we'll move on.

Does anyone have any questions before we get started?

1. We'll start with some introductions. Please can you include your name, role and organisation?
2. In your experience, what type of cases are both a legal representative and a Cafcass Guardian necessary to represent the child and why?

If not raised, prompt in the following areas:

- What are the characteristics of cases where both a legal representative and a Cafcass Guardian are required?
 - What specific roles or contribution does each form of representation have in such a case? [and how does this differ? Is there any duplication of effort?]
3. In your experience, what type of hearings are both a legal representative and a Cafcass Guardian necessary to represent the child, and why?

If not raised, prompt in the following areas:

- What specific roles or contribution does each form of representation have in these hearings? [and how does this differ? Is there any duplication of effort? Tease out the different roles/responsibilities of each and where the overlap is].
- Are different forms of representation considered more important for different types or stage/hearing of cases and why?
- When is a barrister necessary to represent a child in a hearing and why?
- *[For the facilitator only: Is there consensus amongst professionals in relation to which form of representation is considered necessary for different types of cases and/or stages/hearing in proceedings?]*

[If not covered already] Conversely, are there any types of cases or stage/hearings where you consider that a legal representative is not necessary and why?

If not raised, prompt in the following areas:

- Probe on why – pulling out themes from Phase 1 data as appropriate.

- How does this work in practice?
 - Are there different types of representative roles/responsibilities that Cafcass could lead on in the absence of a legal representative? Why/why not? [Tease out differences between instructing solicitors and professional welfare assessment roles].
4. *[If not covered already]* Conversely, are there any types of cases or stage/hearings where you consider that a Guardian is not necessary and why?

If not raised, prompt in the following areas:

- Probe on why – drawing out themes from Phase 1 data as appropriate.
 - How does this work in practice?
 - Are there different types of representative roles/responsibilities that legal representatives could lead on in the absence of a Cafcass Guardian? Why/why not?
5. What is the process for deciding what form of representation is necessary for a hearing and who makes this assessment?

If not raised, prompt in the following areas:

- What factors are taken into account when considering what form of representation is necessary? Which of these factors are most important and why?
 - Who makes this assessment?
6. Can you identify any ways in which the current model of representation, including the respective responsibilities of legal representatives and guardians, could be improved?

If not raised/ covered already, prompt in the following areas:

- Is there any duplication of effort within the current model?
 - Are there any ways in which the process could be made more efficient?
 - How might this work in practice?
 - What do you anticipate are the main benefits of potential improvements?
 - Can you foresee any risks or challenges to implementing these, and how might they be addressed?
7. Do you have any other comments about the representation of children in public law proceedings that we haven't already covered?

Thank you very much for your time today. If you have any questions about the research after today please contact me via email.

Appendix C

Descriptive statistics of the Phase 1 sample

Table C.1 Responses by region

North-West	166
South-East	87
South-West	44
North-East	220
Wales	63
London	98
Midlands	67
Total	745

Table C.2 Responses by judicial tier

Magistrates	51
District	268
Recorder	38
Circuit	375
Tier 1	6
Blank	7
Total	745

Table C.3 Ages of children subject to proceedings

Under 1	262
Aged 1-2	195
Aged 3-5	270
Aged 6-9	243
Aged 10-12	131
Aged 13-15	119
Aged 16 or over	31
Total	1251¹⁵

Table C.4 Breakdown by application type

Supervision order (SO)	33
Special guardianship order (SGO)	36
Interim care order (ICO)	157
Care order (CO)	634
Emergency protection order (EPO)	11
Placement order (PO)	65
Adoption	46

¹⁵ Respondents answered for all children subject to the application within the hearing.

Discharge of a care order	20
Private law (Child Arrangements Orders)	6
Revocation of placement order	8
Total	1016¹⁶

Table C.5 Breakdown by hearing type

Case management hearing (CMH)	275
Issues resolution hearing (IRH)	154
Fact finding hearing	7
Directions hearing (DH)	64
Final hearing (FH)	137
Urgent or contested ICO	44
Other	48
Blank	16
Total	745

Table C.6 Breakdown by outcome of the hearing

Case management directions	379
Other directions	54
Interim order	97
Final order	141
Adjourned	49
Other	63
Blank	12
Total	795¹⁷

Table C.7 Breakdown by order made

No order made (N/A)	437
Interim supervision order	7
Supervision order	32
Special guardianship order	31
Interim care order	111
Care order	57
Emergency protection care order	3
Placement order	24
Adoption	29
Blank	26
Total	757¹⁸

¹⁶ Respondents could select more than one application type.

¹⁷ Respondents could select more than one outcome of the hearing.

¹⁸ Respondents could select more than one order.