House of Commons

Justice Committee

Operation of the Family Courts

Sixth Report of Session 2010–12

Volume I

Volume I: Report, together with formal minutes

Volume II: Oral and written evidence

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Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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Summary

The Family Justice Panel's Interim Report proposes a fundamental restructuring of the family court system through the creation of a Family Justice Service. We broadly welcome the Panel's approach, but disagree with its proposal to introduce a statement into legislation to "reinforce" the importance of a child having a meaningful relationship with both parents. The Panel itself admits that such a statement is not intended to change the law but believes it could "guide" parents who are splitting up. In our view it is obvious to the court that a child deserves a loving, caring relationship with both his or her mother and father. A statement which might be taken to qualify the principle that the best interests of the child must prevail could give the impression of a change in the law and could cause confusion. We heard evidence from Australia that the effect of the "shared parenting" approach had not only confused parties about how the "best interests of the child" test should operate, but can encourage a more litigious approach by parents in private law cases. This is in direct opposition to the greater emphasis on mediation and out-of-court agreement between parents which both the Government and the Family Justice Panel are pursuing. For all these reasons, we have concluded that the best interests of the child must remain the primary principle on which the family courts make decisions.

Throughout our inquiry we struggled to find objective, comparable data for the cost of the different parts of the family justice system. The Panel had a similar problem, which meant it was unable to cost its proposals. While we welcome the likely savings from the creation of a Family Justice Service, we are concerned that there was insufficient data to cost the proposals. The Ministry of Justice and the Department for Education must improve data collation.

While we note that Cafcass has made some recent improvements, we remain unconvinced that the organisation is robust enough to deal with future challenges. We have concluded, therefore, that subsuming Cafcass within the Family Justice Service must be the beginning of a series of reforms, not an end in itself. Only in this way will children be guaranteed the protection they deserve.

The family courts will see an increase in litigants in person following reforms to the legal aid system. We are not convinced the Ministry of Justice has fully appreciated the impact on court resources of many more unrepresented parties, but we welcome the Department's undertaking to monitor the outcome of the reforms.

We recognise the need for transparency in the administration of family justice, and the equally important need to protect the interests of children and their privacy. However, having heard the proposed scheme relating to media access to the family courts contained in the Children, Schools and Families Act 2010 condemned by all parties, we recommend the Government scrap the provisions and begin again. In formulating its new proposals we recommend that the views of children on media reporting of the family courts take centre stage. Children themselves must be properly consulted about any such new proposals. To do otherwise would run counter to the ethos that should underpin all proposals relating to the family justice system.

1 Introduction

1. On 20 July 2010 we announced our inquiry into the *Operation of the Family Courts* prompted by the new Government's proposals in four areas which would impact on the courts. Proposals for the reform of legal aid; changes to the current joint-sponsorship arrangements for the Children and Family Court Advisory and Support Service (Cafcass); encouraging the use of mediation in resolving matters before they reach court; and the statutory scheme for increasing media access to the family courts all merited scrutiny in the particular context of family law. We also wanted to provide democratic oversight of the Family Justice Review's interim proposals; and so scrutinise and influence the reform of the family courts at the earliest possible stage in the policy-making and legislative process.

2. Our terms of reference focused on four specific areas:

- The role and operation of Cafcass in court proceedings, including the sponsorship of Cafcass by the Department for Education;
- The impact on court proceedings and access to justice of recent and proposed changes to legal aid;
- The role, operation and resourcing of mediation in resolving matters before they reach court;
- Confidentiality and openness in family courts, including the impact of the proposed scheme in the 2010 Children, Schools and Families Act.

3. Relationship breakdown and the removal of children from their birth family are highly emotive areas. Inevitably, some of the evidence we have heard has been hotly disputed by other witnesses. Throughout our inquiry we have kept in mind that the primary purpose of all interventions in family relationships must be to protect the safety and wellbeing of the child.

4. It should be emphasised at the outset that the private law cases which appear in the family court system are a minority, as the evidence suggests that only 10% of all relationship breakdowns result in a court hearing.[1] Inevitably, therefore, they are the cases that present particular challenges where the parties find it impossible to compromise without assistance.

5. In May 2011 Professor Eileen Munro published her report into child protection.[2] The work of local authorities is outside the scope of this inquiry but we welcome Professor Munro's recommendations on reducing delays in care proceedings and look forward to the Government's response.

6. We received over 160 submissions from witnesses and took oral evidence from the witnesses listed at the end of this Report. We are grateful to all those who took the time to contribute to our inquiry. We also wish to thank our specialist adviser, Professor Judith Masson, Professor of Socio-legal Studies, University of Bristol, for her expert advice and assistance throughout this inquiry.

1 *Family Justice Review, Interim Report*, March 2011, Ministry of Justice. (from here on referred to as Interim Report)

2 *The Munro Review of Child Protection: Final Report: A child-centred system,* Cm 8062, Department for Education, May 2011

2 The current system and the case for change

The family law context

7. The family justice system sees cases ranging from the relatively amicable separation of a couple to physical, sexual and emotional child abuse. In the most serious cases, a child's life may be at risk. In 2009–10, 36 children were killed by their parents. Research carried out for the Home Office in 2003 found that, between 1995 and 1999, in 80% of all homicides where the victim was an infant under the age of one, the killer was a parent, and in "virtually all" the remaining 20% the killer was a family member, friend or someone who had care of the infant.[3]

8. While the assumption may be that a child's life is at risk primarily in cases of severe neglect and abuse, tragically children have been killed by a parent in the aftermath of relationship breakdown. In February 2010, five year old Gabrielle Grady was murdered by her father as he drove his car with her and her six year old brother inside into the River Avon, following a row with their mother over contact with the children. In August 2010, in Scotland, Theresa Riggi killed her three children who had been the subject of an on-going residence dispute with her estranged husband. She was found guilty of culpable homicide[4] on the grounds of diminished responsibility.

9. Abuse within a family, including severe neglect and physical, sexual and emotional violence, remains the reality for many children. In March 2010, there were 46,709 children on the child protection register at risk of abuse or neglect.[5] In 2009–10, the British Crime Survey found that 16,864 sexual offences against children under 16 were recorded in England and Wales, 31% of all sexual crimes and 38% of all rapes.[6] Studies indicate that around 80% of such offences take place in the home of the offender or child, and the vast majority are committed by someone known to the victim, often a family member.[7] In 2009, a study by the NSPCC found that all types of abuse and neglect of children were under-reported.[8]

10. Violence between adults has been found to have a long-term negative effect on the emotional well-being of children, particularly their ability to form healthy relationships in adult life.[9] Quantifying the incidence of domestic violence is notoriously difficult. In 2008–09 the British Crime Survey found that 42% of victims of all violent offences reported

3 Brookman and Maguire (2003), *Reducing homicide: a review of the possibilities,* Home Office, p.16–17

4 The equivalent offence in England and Wales is manslaughter.

5 DfE: Referrals, assessments and children who were the subject of a child protection plan (2009–10 Children in Need census, Provisional).

6 British Crime Survey (2010), Home Office

7 Grubin, Don (1998) *Sex offending against children: understanding the risk*. Home Office, pp. v-vi and p.26. http://library.npia.police.uk/docs/hopolicers/fprs99.pdf

8 *Child maltreatment in the United Kingdom: A study of the prevalence of child abuse and neglect,* Cawson, Wattam, Brooker and Kelly, November 2000 https://www.nspcc.org.uk/Inform/publications/Downloads/childmaltreatmentintheUKexecsummary_wdf48006.pdf

9 Ev 115

the incident to police, compared with only 16% of domestic violence victims. However, the most reliable figures, from the British Crime Survey, found that 1.2 million adults (780,000 women and 463,000 men) had been the victim of domestic violence in 2008–09, around 4.4% of women and 2.7% of men in the UK.[10] A 2004 survey found 45% of women and 26% of men had reported experiencing at least one incident of domestic violence in their lifetimes.[11] In 2009, some 24,865 non-molestation or occupation orders were made in the county court to protect victims of domestic violence.[12] Studies show that intra-familial violence occurs throughout society, in all social classes and across racial, religious and ethnic groups.[13] Many victims experience repeated attacks, including sexual, physical and emotional abuse: a 2004 survey found that no other crime has such a high repeat victimisation rate.[14] In 2001, the British Crime Survey found that 45% of rape victims were assaulted by current husbands or partners and 9% by former partners.[15] Of the 3,249 women and 6,808 men murdered between 1995 and 2009, 47% and 12% respectively were killed by a partner or ex-partner.[16]

Overview of the current system

11. Our primary difficulty throughout this inquiry has been to form a clear picture of trends and changes in the family justice system. The family justice system consists of private law cases, which deal with the consequences of relationship breakdown, and public law cases, which involve child protection. The Ministry of Justice's (MoJ) Judicial and Court Statistics for 2009[17] tell us that there were 163,290 court cases involving children in England and Wales, 137,480 in private law and 25,810 in public law.[18] We have heard from many witnesses that the numbers of cases in both public and private law is rising, and this is corroborated by the Ministry of Justice's figures. However, it is impossible for us to gauge the level of that increase given the flaws in compiling the data. The Ministry of Justice's Judicial and Court Statistics bulletin for 2007 gives a succinct summary of the weaknesses in the figures:

> Children Act data for the Family Proceedings Courts was provided on electronic summary returns submitted to HMCS Business Information Division on a monthly basis. The figures shown for Family Proceedings Courts pre 2007 are weighted estimates based on data from a subset of courts. There are known data quality problems with these, which are likely to be an undercount. Research undertaken on behalf of Ministry of Justice has identified that some cases that have transferred from the Family Proceedings Court to the county court have been incorrectly recorded as

10 British Crime Survey (2009) (Home Office)

11 Home Office Research Study 276, *Domestic violence, sexual assault and stalking: Findings from the British Crime Survey,* Walby and Allen, 2004, http://broken-rainbow.org.uk/research/Dv%20crime%20survey.pdf

12 Judicial and Court Statistics 2009, Table 2.9, Ministry of Justice. http://www.justice.gov.uk/publications/docs/jcs-stats-2009-211010.pdf

13 Walby and Allen

14 Dodd, Nicholas Povey, and Walker (2004). *Crime in England and Wales 2003/2004,* Home Office

15 Walby and Allen

16 Standard Note, House of Commons Library , *Domestic Violence*, SN/HA/3989, March 2010

17 The latest year for which we have statistics.

18 Judicial and Court Statistics 2009, Ministry of Justice, September 2010.

new applications in the county court, thus inflating the number of new applications at the county court (see Masson *et al* 2008). Work is in train to improve the accuracy of county court records.[19]

12. The Judicial and Court Statistics bulletin for 2007 also noted that the overall figures for applications in public law and private law, the numbers of divorces, and related proceedings, and the figures for applications made for non-molestation and occupation orders for the last five years differed from those published in previous years as "they are sourced from FamilyMan, a live case management system that is continually updated with new information."[20] Other problems with the statistics include the fact that disposals made one year may relate to applications in previous years, the court has the power to make an order of a type different to that applied for if it is in the best interests of the child, courts record the number of children who are the subject of applications in the family courts, rather than the number of applications themselves so the actual workload is unclear[21] and the figures for disposals do not include any interim orders made by the court.[22]

13. **Comparing the number of cases between years should be a simple exercise that would allow the Ministry of Justice to at least begin to assess the impact of policy and legislative changes on the family court system. We are therefore surprised that neither the current nor the previous administration has acted to provide a robust evidence base for the formation of policy.** We will return to this subject after considering what the data may, despite its flaws, show about trends in the family court system.

Private law

14. The number of children involved in applications in private family law has increased year on year since 2005, the greatest increase being 14% between 2008 and 2009. While the numbers in the High Court have remained reasonably steady since 2005, at an average of around 1,100 a year, the MoJ's figures for the county court, which hears the majority of private law cases, saw an increase of over 7% in both 2008 and 2009. In addition, the Family Proceedings Court (a specialist magistrates' court) saw an increase of 53% in the number of children involved in applications made between 2008 and 2009 (excluding adoptions). While the Ministry of Justice's Judicial and Court statistics must be approached with caution, some of our witnesses were also of the view that the number of children involved in applications in private family law was increasing.

Public law

15. The problems we had with ascertaining trends in the family courts is exemplified by the quality of the data available in public law proceedings. We were told by Cafcass, among others, that the publicity given to the tragic death of 17 month old Baby P at the hands of his mother, her boyfriend and the boyfriend's brother led to a surge[23] in the number of

19 Judicial and Court Statistics 2007, Annex A, http://www.official-documents.gov.uk/document/cm74/7467/7467.pdf

20 Judicial and Court Statistics 2007, Annex A, http://www.official-documents.gov.uk/document/cm74/7467/7467.pdf

21 *Ibid.*

22 *Ibid.*

23 The Judicial and Court Statistics 2009 showed an increase of 31%; http://www.justice.gov.uk/publications/docs/jcs-stats-2009-2010.pdf

children involved in public law proceedings.[24] In late 2008, the case became the subject of national headlines and caused a public outcry.[25] Peter Connelly had been on Haringey Council's Child Protection Register when he died. He had previously been placed temporarily in the care of a family friend during child protection enquiries. However, as his mother was viewed as co-operating with social workers, child protection services in Haringey were advised by the council's lawyers that the legal threshold for taking Peter permanently into care had not been met, and later injuries, which occurred after he had returned to his mother's care, were either not picked up or not properly investigated when they were identified.[26]

16. Bruce Clark, Cafcass's Director of Policy, told us:

> Serious commentators and researchers have explained that maybe in the mid-2000s the threshold at which local authorities were bringing care applications had risen too high…our immediate...post Baby Peter research showed that no footling irrelevant cases were being brought before the court in a panic. The cases that were being brought in the immediate wake of the Baby Peter publicity were long-term chronic neglect cases, and there were strong arguments that these cases should have been being brought before the court sooner [...]These are really serious cases that are still coming before the courts...reflecting serious problems of drug and alcohol misuse, parental mental ill-health and domestic violence.[27]

17. The impact of the increase in public law cases was such that it led the then President of the Family Division, Sir Mark Potter, to introduce guidance on the approach to be taken by Cafcass to reduce the rising number of cases that had not been allocated to a guardian. The Guidance constituted emergency measures allowing Cafcass to supply what was deemed a "safe minimum service".[28] The Guidance was originally put in place for a year but was extended for a further six months in April 2010 as the level of public law cases did not decline.

18. The problem with the figure of 31% (the 'surge' in public law cases after the death of Baby P according to the Ministry of Justice's court statistics) is that public law cases before the publicity surrounding the death of Baby P were in decline. The introduction of the Public Law Outline in 2008 and the introduction of court fees for local authorities in April and May 2008 had led to a significant downturn in the first half of 2008. Overall, even after demand rose sharply from December onwards, Cafcass saw only 3.7% more care cases in 2008–09 than in the previous year.[29] The initial pressure on Cafcass and the courts came from the concentration of applications and was compounded when the higher number of applications continued.

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24 Q 250

25 Peter Connelly died in August 2007 but reporting restrictions meant the facts surrounding his death did not enter the public domain until November 2008.

26 Serious Case Review, February 2009

27 Q 272

28 Cafcass, *Annual Report and Accounts 2009–10*, Department for Education, http://www.cafcass.gov.uk/PDF/Cafcass%20Annual%20Report%20and%20Accounts%202009-10%20web%20pdf.pdf

29 Cafcass Annual Report & Accounts 2008–09, p 14

Delay

19. The avoidance of delay in family matters involving children is a statutory obligation for the courts under the Children Act 1989.[30] Throughout our inquiry we heard from witnesses that delay in the family justice system was, despite the courts' statutory obligation, endemic and rising. The Family Justice Panel found, from the data on an internal case management system, that an average case in the family courts took 53 weeks in 2010. When the Children Act was passed in 1989, 12 weeks was the optimistic target, although evidence suggests that even in the early 1990s cases took some weeks longer.[31] However, recent years have seen a steady and inexorable rise in the time taken for cases to be concluded.

20. One of the reasons for the recent increase in delay is the increase in applications outlined above. Mr Justice Ryder told us: "We have fixed resources, both of the judiciary and courts available for us to use, and indeed the sitting days to use those courts."[32] Sir Nicholas Wall, President of the Family Division, told us that the pressure on the courts was such that he had concerns for the health of the judiciary.[33] However, we heard that other factors also contributed to the length of time cases took to conclude. The evidence of Barbara Esam, Policy Lawyer, NSPCC, is illustrative: "Delay is a problem in both public and private law. There is not enough judge time. The Cafcass reports are slow. There aren't enough experts around of sufficient quality. That means that the ones that there are are overworked and not available, which also causes delay."[34] We also heard complaints about case management by the judiciary and a lack of trust between social workers, Cafcass, the judiciary and parties which led to repeated adjournments to seek further evidence.[35]

21. The evidence we heard was similar to that found by the Family Justice Panel, which commented in its Interim Report that, although the rising number of children in the family justice system contributed to delays: "increasing delays are not solely a matter of rising caseloads. The number of hearings is increasing, caseloads in Cafcass have increased to the point where it is hard for them to carry out work on all cases, and ever more expert assessments are being ordered."[36] This conclusion tallied with the evidence given to us, as well as studies carried out by the Ministry of Justice and the Department for Education.[37]

The impact of delay

22. Barnardo's, commenting on public law cases, told us that the impact of delay on children's ability to form relationships was harmful and long-term:

30 Children Act 1989, s1(2)

31 For example, The Children Act Advisory Committee Annual Report: 1992/93, Lord Chancellor's Department.

32 Q 164

33 Justice Committee, Third Report of Session 2010–11, *Government's proposed reform of legal aid*, HC 681–II, Q 165; Ev 35

34 Q 76

35 For example: Ev 136, [Consortium of Expert Witnesses to the Family Courts]; Ev w53 [Magistrates' Association]; and Ev w58 [Jane Dambe]

36 Interim Report, p 5

37 Masson *et al* (2008) Care Profiling Study

> The uncertainty and instability caused by delay can have long term and irreversible consequences for a child's development by damaging their ability to form positive attachments. This often results in multiple problems in adolescence and later life. Two months of delay in making decisions in the best interest of a child equates to one per cent of childhood that cannot be restored.[38]

On a practical level, the longer a child's future is under consideration by the courts the less likely he or she will remain in the care of a single person. Jonathan Ewen, Director, Barnardo's North East, told us that the level of understanding of the impact on child delay, particularly in very young children, was poor throughout the family justice system: "All the paediatricians are telling us that what [young children] need is stability of care, consistency of love and for that care to be consistent over a period of time. If children don't get that, they are being harmed, day by day, week by week."[39] Barnardo's also told us:

> Barnardo's emergency foster carers often highlight the negative impact on the children they look after. For example, Helen, an emergency foster carer for Barnardo's, says: 'I can't answer Tom's questions. He wants me to make him promises about what is going to happen but I can't, it's very difficult to know what to tell him. He has such little concept of time it's hard to explain that we have to wait and see because a week feels like a lifetime to him'.[40]

23. Witnesses told us that the prolonging of conflict between parents together with the uncertainty, particularly where there are safety concerns, caused by delays in the court system reduces the well-being of children in private law cases. Fiona Weir of Gingerbread, a charity supporting single parent families, told us "what can harm children is the conflict between their parents, whether they are in intact relationships or whether the parents have separated."[41] Similarly, Craig Pickering, of Families Need Fathers, told us that delays in the court system contributed to an increase in "animosity", making resolution of the issues by other, less adversarial, means such as mediation much less likely.[42] Moreover, substantial delay can preclude the development of potential relationships with children to such an extent that, by the time a decision on residence or contact is made, the interests of the child may lead to a different outcome than would have been the case if the decision had been made earlier.

24. While we appreciate the importance of the decisions the courts are making, the impact of delay on children is so harmful that reducing delay cannot wait for the outcome of the Family Justice Review. In this Report we therefore assess what immediate action is necessary, as well as the approach the Government should take to the recommendations of the Family Justice Review.

38 Ev 122

39 Q 83

40 Ev 122

41 Q 83

42 Q 18

Data

25. In its report the Family Justice Panel noted that a poor evidence base was a significant problem in producing a robust evaluation of the current system. It summarised the difficulties as follows:

> currently almost nothing is confidently known about performance, cost or [efficiencies in the family justice system]. Paper to and within the courts flows in a way that barely reflects even the invention of computers. Individual IT systems in different agencies have different definitions (what constitutes a case for example) and do not talk to each other. [...]Data from HMCS is particularly poor with, for example, no complete figures for family judicial sitting days or unit costs. Moreover the parts of the system tend to measure the same things in different ways. The IT of each area also does not communicate. Information flows around the system largely on paper, as though computers and the internet had not been invented. We have rarely attended a court hearing when all the relevant information was available. Lack of systems is not the only reason for this, but it certainly contributes.[43]

26. In this inquiry we were also faced with a lack of quantitative data. Much of the evidence around the cause of delays in the court process is anecdotal, or qualitative. We were particularly disappointed by the lack of robust quantitative evidence in the areas of: litigants in person; expert witnesses; and the effectiveness of early interventions in private law cases.

27. **This Committee and its predecessor committees have repeatedly highlighted the need for robust data gathering to allow the development of evidence-based policy. We were extremely disappointed by the serious gaps in data that we and the Family Justice Review found during our inquiries. It is a concern to us that major changes to the system are being contemplated when there are such gaps in the evidence base. The Ministry of Justice, in particular Her Majesty's Courts and Tribunals Service, and the Department for Education must begin to improve data collation now; without such evidence, reform of the family justice system could be fatally undermined before it has even begun. We think the Ministry of Justice should take the lead on data collation, and we wish to see a report on progress by the end of 2011.**

43 The Family Justice Panel Interim Report, p11
http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-interim-rep.pdf

3 The Family Justice Review Interim Report

Background

28. The Family Justice Review started work in March 2010. It was jointly sponsored by the Ministry of Justice, the then Department for Children, Schools and Families, and the Welsh Assembly. The terms of reference for the review included a list of "guiding principles" (including the paramountcy of the interests of the child, protecting the vulnerable, minimising conflict, and promoting the positive involvement of both parents). The Panel was asked to assess how the current system performed against these principles, and to make recommendations for reform in two key areas: "the promotion of informed settlement and agreement" and "the management of the family justice system". The terms of reference said that "recommendations should be costed and have regard to affordability".[44] The review was conducted by a Panel chaired by Sir David Norgrove (former chair of the Pensions Regulator), consisting of independent members and representatives from the three sponsoring bodies. The Panel published its Interim Report on 31 March 2011.

The Review's approach and its interim conclusions

29. The majority of the written and oral evidence we received was submitted before the Interim Report was published, and much of that evidence addressed issues which are the subject of recommendations in the Interim Report. We shall consider relevant recommendations in the Interim Report in each chapter alongside our own findings. However, it would be helpful to discuss some of its principal conclusions here.

30. The Interim Report concluded that the current family justice "system is not working".[45] It said that it had identified "much the same problems" as the previous seven reviews of family justice carried out since 1989 and concluded that "the chief explanation in our view is that family justice does not operate as a coherent managed system, in fact, in many ways it is not a system at all".[46] The Interim Report concluded that the family justice system required radical structural change. It recommended setting up a Family Justice Service "subsuming" the work of the Family Justice Council, Local Family Justice Councils, Family Court Business Committees, the National Performance Partnership, Local Performance Improvement Groups and the President's Combined Development Board. It would also include Cafcass but not Cafcass Cymru, which is and will remain a matter for the devolved administration.[47]

31. Many of the issues which led to the Panel's proposal for structural change have also been brought to our attention during our inquiry. The failure of the system to ensure that the voice of the child is heard, the lack of trust between agencies, the low morale of many staff and the complexity of the system for all concerned have all been the subject of concern

[44] Interim Report, Annex A, p 190

[45] *Ibid*, p 5

[46] *Ibid*, p 6

[47] *Ibid*, p 25

and criticism by many of our witnesses. There are also questions about the current system's ability to cope with future challenges. Change to the legal aid system will produce more litigants in person, and the number of public law cases seems unlikely to fall. It is clear that reform is needed. However, during our inquiry we have focused on discrete areas of the family justice system rather than the intricacies of the current structure.

The focus of the Interim Report

32. The Interim Report has a clear focus on the welfare of the child, which we welcome. We also welcome its concentration on the damaging effects of delay on children. We have sought to use the same approach in this Report.

33. However, we regret the lack of analysis of the challenges that will be presented now that the Government has decided to proceed with its proposed changes to legal aid. *The Government's Proposals for the Reform of Legal Aid in England and Wales* were published in November 2010 and its response to the subsequent consultation on 21 June 2011. The Government intends to remove aid for help and representation in private law cases where there are no domestic violence or safeguarding concerns. Most people who previously would have been eligible for legal aid will, in future, be expected to rely on mediation. We discuss the likely impact of this in Chapters 5 and 7. Referring to the likely increase in the number of litigants in person expected to result from the removal of legal aid in many circumstances, the Interim Report noted that:

> We share [the concerns of respondents], both as to the ability of litigants in person to conduct their case effectively and as to the inevitable increased burden in terms of time and resources this will place on the court. We are also concerned that some parents will simply not pursue their dispute leading to some children losing contact with a parent.[48]

34. The Interim Report does not comment explicitly on whether the current family justice system would be able to cope with the "increased burden", or what measures would be necessary to mitigate such a burden. The Interim Report concludes that: "our recommendation that the legal aid budget be managed as part of the overall family justice budget, would enable the Family Justice Service to take a more holistic approach to ensuring there are available services to support these families".[49] We did not take evidence on this recommendation, but it would be a longer term solution which could only take effect once the Family Justice Service was up and running. Any changes to the eligibility or scope of legal aid would require legislation, so we are not clear to what extent the proposed Family Justice Service could "shift money between activities" as the Interim Report suggests.[50]

35. **We welcome the work of Sir David Norgrove and the Family Justice Panel. While the need for reform of the family justice system is clear, the evidence that we have heard on the most appropriate structure for the family justice system is limited. We therefore**

48 Interim Report, p 155

49 *Ibid*.

50 Interim Report, p 68

remain neutral as to the Panel's detailed proposals on the creation of a Family Justice Service, while taking a close interest in responses to the consultation.

36. **We welcome the focus of the Interim Report on the needs of the child. However, we are disappointed that the Interim Report did not look in more detail at how the family courts might cope with an increase in the number of litigants in person resulting from the Government's proposed changes to legal aid. We hope that the Panel can address this issue in more detail in its final report.**

Costs

37. We have noted above the paucity of data available regarding the family courts. The Panel found this was particularly true with regard to cost: the Interim Report contains virtually no information on the likely costs of its recommendations, noting that it was not possible to cost its proposals in the absence of information about the current system. It concludes that: "we believe that by removing duplication, refocusing the court's attention and encouraging other methods of dispute resolution costs will be reduced."[51]

38. The Minister, Jonathan Djanogly MP, Parliamentary Under-Secretary of State, Ministry of Justice, told us that the Government was seeking to address this:

> The Review team themselves have identified a whole series of gaps in the statistics that they need to find out before they can put in costs. The costs that appear in the Initial Report are actually very high level [...] MoJ and DfE will do our best to help them in identifying those costs so that we can benefit from that information at the time of the Final Report.[52]

Would the proposals be cost neutral?

39. Tim Loughton MP, Parliamentary Under-Secretary of State, Department for Education, argued that many of the changes proposed in the Interim Report would be cost neutral, and that there were potential savings to be made:

> Sir Nicholas Wall and the senior judges that you had in front of you said that a lot more could be done with the existing funding that is there, recognising that there is not going to be, on the face of it, a lot of extra funding coming in. The duplication to which the Report refers is a major source of cost. The bureaucracy around a lot of the proceedings and the lack of trust between various different agencies involved in the court procedures, such as the duplication of expert reports and everything else, is bringing about costs now which need not be there.[53]

40. The Interim Report identified the following areas where it says there is duplication of work: both the courts and local authorities examining applications for adoption (where it

51 Interim Report, p 25. http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-interim-rep.pdf

52 Q 295

53 *Ibid*.

recommends that local authorities stop carrying out this work); the work of guardians[54] duplicating that of local authorities (where it recommends both continue, so there would be no saving); and duplication where both Independent Reviewing Officers (IROs) and guardians examine care plans (where it recommends IROs should have sole responsibility). Thus the Report identifies only three areas, and in none of them would ending that duplication lead to savings for the MoJ (guardians are supplied by Cafcass, part of the Department for Education, discussed further in Chapter 6).

41. The Interim Report also noted that judges had been using expert witnesses to repeat the work of local authorities and guardians, which had resulted in a "disincentive to the authority to do the work fully in the first place". It also concluded that courts instruct too many expert witnesses. However, it is worth noting that the entire expert witness legal aid budget was estimated at about £53 million in 2008–09[55] so any reduction in the use of expert witnesses would result in a relatively small potential saving in a system the Interim Report estimates costs £1.5 billion a year.

42. One of the Interim Report's recommendations is that the Family Justice Service should be responsible for an integrated IT system able to support case management with "much better IT capability". Like the other recommendations, this was uncosted. However, both Ministers agreed they were apprehensive about the potential cost of such an IT system.[56] Mr Loughton said that:

> The history of central Government-initiated IT projects is not one that makes one jump up and down with joy, of course [...].We will need to look at that very carefully. It does strike us that the admin procedures of Cafcass are slightly behind time and we need to get up to speed with it. IT is going to be part of that solution, I am sure.[57]

43. Governments, both in the UK and internationally, have an extremely poor record for procuring effective IT systems on time and on budget.[58] Experience suggests that the Panel's recommendation for the development of an integrated IT system with the ability to support the management of cases may prove to be particularly challenging to implement without extensive further resources.[59] The Ministry of Justice's track record on IT is also poor. After the merger of the Prison and Probation Service to form the National Offender Management Service a new database, C-NOMIS, was planned. After costs tripled to £690 million it was reconfigured to just include prisons.[60] Cafcass alone currently spends £7.78

54 The term guardian technically only applies to cases where the child is a party to proceedings, in all public law cases, and some private law cases. However, many of our witnesses used the term generically to refer to Cafcass workers in all cases. In this report we have used the term 'Cafcass worker' unless we mean guardian in the more narrow technical sense, or where we are paraphrasing or commenting on evidence which used the term guardian.

55 The *Impact Assessment* for the *Government's proposals for the reform of legal aid in England and Wales* states that the exact figure spent on expert witnesses is not known, but it is estimated to be 2/3 of the £80 million spend on disbursements. Disbursements are costs arising from proceedings in addition to legal costs, they include photocopying, travel costs, out of pocket expenses and expert witness fees.

56 Q 296

57 Q 297

58 Stanforth, *Analysing e-Government Project Failure: Comparing Factoral, Systems and Interpretive Approaches*, University of Manchester (2010)

59 Interim Report, p 79

60 *The National Offender Management Information System*, National Audit Office, March 2009, http://www.nao.org.uk/publications/0809/national_offender_management.aspx

million a year on outsourced IT. While we welcome the Panel's indication that reform will result in a cheaper family justice system overall, experience suggests that radical structural reform rarely supplies savings, or even cost-neutrality in the short-term. In this context, we note that the Australian Government made around £260 million available for the far-reaching structural and legislative reforms it carried out to its family justice system in 2006.[61]

44. **We agree with Ministers that there are potential savings from implementing the proposals in the Interim Report. We are concerned that the Family Justice Review has been unable to cost its proposals and we look to Ministers to ensure the Review has all the information it needs fully to inform its final report.**

Government's response to the Interim Report

45. The consultation on the Interim Report closed on 23 June. The Family Justice Review hopes to publish a final report in the Autumn, to which the Government intends to respond before the end of 2011.[62] The Minister stressed that the Government was not just waiting for the final report: "given the state of the system as it exists and the urgent needs of children waiting for court cases, we felt that we had to act".[63] He set out the measures that the Government had already taken including: 4,000 extra county court hearing days; quarterly meetings between the MoJ, the Department for Education, and the judiciary; and setting up 42 local performance improvement groups bringing together local authority representatives, local judges, HMCTS, Cafcass, and the Legal Services Commission.[64] On 21 June 2011, the Government presented its *Legal Aid, Sentencing and Punishment of Offenders Bill*, which incorporates those aspects of its legal aid reforms which require legislative changes.

46. **Undertaking changes to legal aid and implementing the recommendations of the Family Justice Review at the same time will be difficult. The Department must look carefully at the interactions between the two sets of proposals, and the cumulative impact on the different elements of the family justice system. The Department must monitor the situation carefully and intervene quickly if problems emerge. The Committee will return to this matter in the light of early experience of the legal aid changes.**

61 Australian Government, 2005, A New Family Law System: Government Response to Every Picture Tells a Story, pp 1–2

62 Q 292

63 Q 294

64 *Ibid*.

4 Underpinning principles

The "best interests of the child" principle

47. The Children Act 1989 was introduced both to reform and to consolidate family law relating to children. It is widely acknowledged to be a highly successful piece of legislation and, as the Centre for Social Justice concluded in its report *Every Family Matters*, has been "much copied around the globe, with radical new concepts and much flexibility of approach and outcome, which...is still working very well."[65]

48. The 1989 Act brought private and public family law into one framework, replacing around 32 Acts in total, and set out three principles. The first principle was that the child's interests are of paramount importance in all decisions made about his or her welfare, and the Act introduced a 'welfare checklist' of the elements to be considered in determining the child's best interests.[66] Secondly, the Act replaced the concept of parental rights with that of parental responsibility, reflecting Parliament's view that parenthood was a matter of responsibility not rights.[67] Thirdly, the Act provided that: "In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."[68]

The Australian experience

49. In 2006, the Australian government introduced legislative and structural changes to the private law family justice system in Australia. The changes followed recommendations by the House of Representatives Standing Committee on Family and Constitutional Affairs following its 2003 inquiry.[69] In December 2009 the Australian Institute for Family Studies published its three year-long, government-commissioned evaluation of the success of the changes against the policy aims. The evaluation has involved the collection of data from some 28,000 people involved or potentially involved in the family law system—including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers—and the analysis of administrative data and court files.[70] It is noteworthy that the Australian Government had the benefit of a greater knowledge base for many of its reforms, having had the foresight to invest in research in this area.

50. The Australian experience is highly relevant to family justice reform in England and Wales. Before the 2006 reforms, the legal position in family law in Australia was similar to

65 *Every Family Matters*, Centre for Social Justice, July 2009, p 40, www.centreforsocialjustice.org.uk/client/downloads/WEB%20CSJ%20Every%20Family%20Matters_smallres.pdf

66 Children Act 1989, s1 (1)

67 Children Act 1989, s2 and 3

68 Children Act 1989, s1(2)

69 House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story* (2003)

70 *Evaluation of the 2006 family law reforms*, Kaspiew *et al*, Australian Institute for Family Studies, 2009, p 361, www.aifs.gov.au/institute/pubs/fle/ (from now on referred to as Kaspiew *et al*)

that here. The welfare of the child was the paramount consideration in all court decisions,[71] and the courts used a checklist of factors to guide judicial discretion.[72]

51. One of the most significant changes made in the 2006 reforms was the introduction of a legal presumption in favour of "equal shared parenting". While the welfare of the child remained the paramount consideration, the Australian family courts now "must" consider making orders for children to spend "equal" or "substantial and significant time" with each parent, unless this is not in a child's best interests or reasonably practicable.[73] As with all legal presumptions, the shared parenting presumption can be rebutted when the court is convinced, on reasonable grounds, that it is not in the best interests of the child.[74] It has led to an increase in shared-care orders after fully contested hearings from 3–4% to 33–34%.[75]

52. The shared parenting presumption does not require that equal time be spent with each parent. Dr Rae Kaspiew, Senior Research Fellow at the Australian Institute of Family Studies and lead author on the evaluation, explained that shared care in fact had a reasonably broad definition equating to anything between 35% to 65% of nights spent with each parent.[76]

53. Dr Kaspiew told us that the evaluation found two particular difficulties with the working of the shared parenting presumption. The first was that, although the shared parenting presumption can be rebutted if a court is convinced that shared parenting is not in the best interests of the child, the evidence showed that cases where the child's or parent's safety was at risk were not being effectively filtered out by the courts.

> We had a study of 10,000 separated parents. About one fifth of those—21% of mothers and 16% of fathers—said that they had concerns for their safety or the safety of their child as a result of ongoing contact with the other parent. One of the findings that really highlights the issues to do with family violence was that, despite the presence of safety concerns, that group of parents was no less likely, and possibly more likely, to have shared care arrangements than parents without safety concerns. This is in a context where 16% of families have shared care arrangements.[77]

54. The findings of the Australian evaluation mirror evidence given by Women's Aid that the family courts in England and Wales do not always have all the relevant evidence before them, even of proceedings in another court, or may not give appropriate weight to that evidence even when it is submitted:

> There is a dangerous separation between the proceedings of three separate court systems: child protection cases under public law where the focus is on the child, and the mother is encouraged—or even forced—to leave her partner to protect her children from the consequences of living with domestic violence; the criminal court,

71 Children Act 1989 UK s1(1)); Family Law Act 1975 s60

72 Children Act 1989 UK s3; Family Law Act 1975 s60

73 Family Law Amendment (Shared Parental Responsibility) Act 2006 s61

74 Kaspiew *et al,* p 9

75 *Ibid*, p 132

76 Q 350

77 *Ibid*.

> where the perpetrator is charged and may be convicted of assault, harassment or other abuse; and the family court system where the same abuser is seen as a "good enough father" to be given contact.[78]

Women's Aid went on to note that an academic study had likened the relationship of the courts to "three separate and non-communicating planets".[79] As noted above, the Family Justice Panel similarly found that all relevant evidence was often not before the court.

55. The Australian evaluation also found that the presumption was perceived as creating parental rights to shared care of the child:

> There has also been a lot of confusion and misunderstanding about the presumption in favour of equal shared parental responsibility...it has been widely understood as somehow mandating or entitling parents to shared care. This is one of the features of the environment that has contributed to concern about children's interests not being considered to the extent that they should be because the framing of the legislation is viewed to encourage a focus on parents' interests and rights, although the legislation doesn't record any such right.[80]

The evaluation received evidence from legal practitioners that the presumption in favour of shared care led to some parents being less willing to negotiate and resolve arguments over child contact outside court.[81]

56. Considering the impact of shared-care time on children's well-being the evaluation found:

> While a history of family violence and highly conflictual inter-parental relationships appear to be quite damaging for children, there was no evidence to suggest that this negative effect is any greater for children with shared care time than for children with other care-time arrangements. It remains possible, however, that the measures adopted in this analysis were insufficiently sensitive to detect existing effects in these areas. Longitudinal research based on a relatively small clinical sample of high-conflict separating families (McIntosh, 2009) found that, compared to other parenting arrangements, a pattern of shared care sustained over more than 12 months was associated with a greater increase in the already negative impact on children of highly conflictual inter-parental relationships and the negative impact of circumstances in which one parent holds concerns about the child's safety...The presence of safety concerns was associated with lower child wellbeing in all care-time arrangements. These findings are consistent with the findings of other researchers.[82]

Professor Jenny McIntosh found "children's experience of living in shared care over 3-4 years was associated with greater difficulties in attention, concentration and task

78 Ev 92

79 Ev 92; Radford, Lorraine and Hester, Marianne (2007) *Mothering through domestic violence* (London: Jessica Kingsley Publishers).

80 Q 356

81 Kaspiew *et al*, p 214

82 Kaspiew *et al*

completion by the fourth year of the study. Boys in rigidly sustained shared care were the most likely to have Hyperactivity/Inattention scores in the clinical/borderline range."[83]

57. Professor McIntosh also found evidence, across a range of national samples, that very small children found shared care difficult:

> regardless of socio-economic background, parenting or inter-parental cooperation, shared overnight care for children under 4 years of age had an independent and deleterious impact on children under 4 years of age, manifested in behaviours consistent with high levels of attachment distress.[84]

This has led to a debate over whether having more than one place as 'home' is simply too difficult for very small children.

58. The Interim Family Justice Panel Report recommended that: "A statement should be inserted into legislation to reinforce the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm." It rejected the introduction of a legal presumption: "Based on the experiences of Sweden and Australia, the Panel has concluded that no legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents."[85]

Our evidence

59. Families Need Fathers (FNF) told us that the legal framework in the UK jurisdictions needed rebalancing with explicit recognition of the rights of parents, as well as the rights of the child:

> What is needed is a law that encourages 'shared parenting', so that both parents are, wherever appropriate, encouraged to play a full role in their child's life following divorce and separation....In FNF's view the state should provide a family law system that handles disputes after separation and divorce fairly, efficiently, as speedily as possible and in the best interest of children. The state's intervention should be the minimum required to protect a child's health and their and the parents' right to family life in accordance with the Human Rights Act and the UN Convention on the Rights of the Child.[86]

60. In oral evidence, Craig Pickering, the CEO of Families Need Fathers, said "the Children Act 1989 says that family court decisions should be in the best interests of the child, but actually nobody has ever set out what that means. So when you enter the court system you

83 McIntosh, J.E. & Chisholm, R. (2008), Cautionary notes on the shared care of children in conflicted parental separations, *Journal of Family Studies*.

84 McIntosh, J.E. & Chisholm, R. (2008), Cautionary notes on the shared care of children in conflicted parental separations, *Journal of Family Studies*, p 9

85 Interim Report, p 159

86 Ev 90

are, frankly, in a bit of a lottery."[87] The Grandparents Association also suggested minimum rights to contact for grandparents should be introduced.[88]

61. We asked a number of witnesses, who did not otherwise support a rebalancing of rights between the child and the parents or a shared parenting presumption, whether a presumption that a child have contact with his or her parents, as opposed to the parent with the child, would unfavourably interact with the paramountcy principle. Fiona Weir, CEO of Gingerbread, rejected any changes to the best-interests-of-the-child test:

> There is a huge body of evidence that contact is generally in the interests of the child and that children do very well if they have time with both parents strongly engaged in their lives. That is generally hugely to be encouraged. There is also evidence, however, that what can harm children is the conflict between their parents, whether they are in intact relationships or whether the parents have separated. That and safety concerns do need to be addressed. That is why you need to start not with a presumption of a particular outcome but with a process that looks at what is best for the child.[89]

62. Stephen Cobb, of the Family Law Bar Association, said it was difficult to see how the paramountcy principle could be bettered or enhanced by the addition of a presumption of contact. He also told us: "The starting point of every court, in my experience, is that it is generally in the best interests of a child to have an ongoing relationship with both of his or her parents. I am not sure that a statutory or other presumption in favour of contact is going to add very much to that universal starting point."[90] Linda Lee, President of the Law Society, agreed.[91] Mr Cobb also noted the complexity a presumption of contact could introduce into the court system:

> If we introduce a presumption, we would then have to incorporate a range of situations in which one would say that the presumption wouldn't apply: for example, where domestic violence had perhaps been a feature of the family life or where there were ongoing investigations into allegations of harm to the child. The moment one starts to introduce exceptions to the presumption, I think one moves away, ultimately, from the best interests test...[92]

63. In 2009, some 95,240 applications for contact were made, of which 91,890 were granted, around 96.47% of the total.[93] A 2008 snapshot study of 308 cases for the Ministry of Justice found that 14% of initial applications ended in no contact between the non-resident parent and child. The majority of applications which ended with no contact at all were formally withdrawn or effectively abandoned, for example, when the applicant's representatives could no longer obtain instructions. Of the 308 cases reviewed, four (1.3%)

87 Q 1

88 Ev 109

89 Q 83

90 Q 127

91 Q 127

92 Q 83

93 Judicial and Courts Statistics 2009, Table 2.4, Ministry of Justice

resulted in no contact after a contested hearing.[94] The abandonment of applications for contact seems to be a relatively common experience. Jane Wilson of Resolution, a society of family law practitioners who seek to resolve cases non-adversarially, gave us two examples of cases she had seen dropped:

> the experts' reports said that the child was suffering from post-traumatic stress having been assaulted by the father. The father read the report and withdrew his application...I can think of other cases I have dealt with where, in fact, the absent parent has withdrawn the application because they didn't like what the Cafcass officer had said in their report, because it tied in with what the mother had said from the start.[95]

Ms Wilson said her experience of such cases meant that she thought "it would be dangerous to have a presumption for contact if you are not going to get to the level where that sort of issue is being looked at."[96]

64. The numbers of cases in which contact is refused must be seen within the context of the proportion of cases that end up in court. There will always be cases where safety concerns mean that it is appropriate to deny a parent contact with his or her child, because of safety concerns over the child or one of the parents. Nicola Harwin of Women's Aid told us that only 10% of all divorces and separations ever reach court, with 90% of separating couples finding other ways in which to resolve their differences.[97] This might also explain the high incidence of domestic violence among cases that do come to court; in a 2005 study[98] 53% of women reported physical or emotional abuse as a cause of the separation, with actual or fear of violence continuing post-separation for 40% of women. Actual violence or fear of violence prior to the application was reported by 24% of women who had not reported violence during the relationship.

65. **The evidence shows that courts rarely deny contact between child and parent. Most applications that result in no contact are abandoned by the applicant parent. In our view this reflects the reality of the cases that come before the court. In the majority of cases it will be in a child's best interests to have meaningful contact with both parents. In cases where a parent constitutes a danger to his or her child, either directly or through failing to protect them from others, the courts must remain free to refuse, or specify the arrangements for, contact in order to protect the child.**

66. **The Australian experience of introducing a shared parenting presumption shows that it does not contribute to children's well-being, which, in our view, must be the paramount aim and objective of the family courts. We believe therefore that the best interests of the child should remain the sole test applied by the courts to any decision on the welfare of children in the family justice system.**

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94 *Outcomes of applications to court for contact orders after parental separation or divorce*, Hunt and Macleod, Oxford Centre for Family Law and Policy, Department of Social Policy and Social Work, University of Oxford (2008)

95 Q 126

96 Q 126

97 Q 2

98 Trinder, L., Connolly, J., Kellett, J., Notley, *A Profile of Applicants and Respondents in Contact Cases in Essex.*(2005)

The Family Justice Panel recommendations

67. Having considered the international evidence, from Australia and Sweden, the Family Justice Panel rejected the introduction of a shared parenting presumption in its Interim Report. The Panel concluded:

> In our view, achieving 'shared parenting' in those cases where it is safe to do so is a matter of raising parental awareness at the earliest opportunity. This is intended to manage expectations and move towards recognition of parental responsibilities rather than parental rights, as opposed to making any significant changes to the welfare principle of section 1 of the Children Act 1989, or to the approach of the courts.[99]

68. The Panel went on, however, to recommend the introduction of a legislative statement "similar to the delay principle, into the Children Act 1989." Such a statement, the Panel concluded, "would reflect the case law on contact, reinforcing the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm." The Panel thought that this statement would:

> guide parents when coming to their own arrangements, whether or not they seek assistance via mediation or alternative dispute resolution. It would also reinforce the starting point of the courts, which has been recognised in case law, for the minority of cases that do require judicial determination. This amendment would require courts to take into account:

- the benefit to a child of having a meaningful relationship with both of his or her parents; and
- the need to protect the child from physical or psychological harm.[100]

69. The Panel's rationale for the insertion of this statement appears muddled. Separating parents who are capable of resolving their own childcare arrangements are highly unlikely to need a statement telling them their child benefits from a meaningful relationship with both parents but must be protected from harm. This should be patently obvious to all parents. If the statement reflects the case law on contact and the courts' current starting point, which the Panel has concluded it does, then legally it is redundant. If such a statement is intended to change the law on contact then this seems a remarkably ineffectual approach, the analogy with the delay principle in the Children Act 1989 showing the limited impact such an approach is likely to have.

70. Evidence from Australia, noted above, has shown that, despite the retention in Australian law of the paramountcy principle, legal professionals have found some parents less willing to compromise outside court because they believe they have a right to custody or care of their child. The potential for a legislative statement in the terms proposed by the Panel similarly encouraging a litigious rights-based approach is unquantifiable.

99 Interim Report, p 159

100 Interim Report, p 160

71. **We do not see any value in inserting a legislative statement reinforcing the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm, into the Children Act 1989. Such a statement is not intended to change the current position as the law already acknowledges that a meaningful, engaged relationship with both parents is generally in a child's best interests. The Panel has concluded that the family court system is allowing contact in the right cases; in our view nothing should be done that could undermine the paramount importance of the welfare of the child.**

72. The Family Justice Panel recommended that a statutory time limit be introduced for care and supervision proceedings, requiring them to be completed within six months. The Panel is seeking opinions on possible exceptions to the six-month limit, acknowledging that it is difficult to draw a definition that will be sufficiently tight while allowing appropriate cases the time required.[101] The Panel also acknowledged that the feasibility of such a time limit may be questionable, and would require significant system change, as it proposes in the creation of a Family Justice Service.

73. **We welcome the intention behind the Family Justice's Panel's recommendation that there be a statutory six-month time limit on care and supervision proceedings, but question, on the evidence we have heard about delay, whether such a time limit would be feasible, even with the creation of a Family Justice Service. The average public law case currently takes over a year, despite the court's obligation to make decisions with as little delay as possible. It is not envisaged that the Family Justice Service will have greater resources than the current system: the aim is that it will use rather less. In these circumstances it may be that a statutory six-month time limit is unenforceable.**

101 Interim Report, p 122

5 Mediation and other means of preventing cases reaching court

Background

74. In this Chapter we note the number of private and public law cases reaching the courts and consider whether early intervention provides a means of reducing the number of such cases. We then consider the use of mediation as a potential source of (relatively) quick and cheap resolution of private law cases.

Public law

Number of cases reaching court

75. In 2009 (the latest year for which figures are available) 25,810 children were subject to public law applications, and some 17,090 of these were care applications.[102] This represents a 45% increase in care applications and a 31% rise in public law applications overall. Cafcass publishes monthly figures (discussed in more detail in Chapter 6) on care cases (a subset of public law cases) which show that the number of care cases has continued to rise, increasing from 8,826 in 2009–10 to 9,152 in 2010–11 (a case can involve more than one child).

76. Despite the increasing numbers, we were told that unnecessary cases were not being brought before the courts. Bruce Clark, Director of Policy, Cafcass, told us that:

> Certainly, our immediate own post Baby Peter research showed that no footling irrelevant cases were being brought before the court in a panic. The cases that were being brought in the immediate wake of the Baby Peter publicity were long-term chronic neglect cases, and there were strong arguments that these cases should have been being brought before the court sooner and they should not have been kept away from the court.[103]

77. The research Cafcass carried out was in the form of a survey in June/July 2009 which asked guardians about care applications made in the 3 weeks after the publicity over Baby Peter's death. It found that the profile of cases was similar to those found by earlier studies conducted before the Baby Peter case. It concluded that "overwhelmingly, children's guardians felt that in the cases referred to in the survey, the [care] application was either timed appropriately (53.7%) or had been delayed (43.9%). In just 2.4% (2 cases) the guardian indicated that they believed the application was premature." Most workers felt that local authorities had not changed the threshold at which they launched care proceedings. Instead they were launching care proceedings closer to the time the legal threshold was reached, while in the past they might have waited. Because of the time it

102 Judicial and Courts Statistics 2009

103 Q 272

takes for cases to reach a conclusion, the report was not able to look at whether judges agreed with the Cafcass worker's view.[104]

78. The Minister, Tim Loughton MP, Parliamentary Under-Secretary of State, Department for Education, was more cautious than Cafcass, but said that:

> certainly the number of children in care about whom the courts have then upheld that was the right decision would suggest that perhaps more children should have come into the care system pre-Baby Peter than actually did.[105]

79. The MoJ told us that "Prior to Baby P, in roughly 9 out of 10 cases, the courts made an order (i.e. to take the child into care, adoption, or place with a relative etc). The Ministry of Justice has no evidence to suggest that the proportion of orders made has decreased in the post Baby P cases", but it did not supply us with figures.[106]

80. There are problems with using the published statistics to calculate whether the number of cases the courts are upholding has changed. The latest published figures are from 2009, and these show that the number of care orders made increased from 6,240 to 7,640, while the number of cases withdrawn increased by 28 to 298 and the number of refused orders remained the same at 20. However this only covers cases which were concluded in 2009, and the average case length means that most of the cases resolved in 2009 would have been brought prior to the increase in cases associated with Baby Peter (which started in November 2008). In addition, because it is not possible to link outcomes with applications, these figures do not indicate whether a lower percentage of cases resulted in orders. They do indicate that the proportion of disposals has not increased in line with the increase in applications, reflecting increases in the duration of cases. This problem with matching up cases has meant that it has been necessary in the past to commission research to calculate the proportion of applications resulting in various types of orders. The *Care Profiling Study* (Masson et al 2008) was commissioned to provide such data.

81. **Cafcass, the Education Minister, and the MoJ all told us that it is not the case that too many care cases are coming before the courts. However, because of problems with the statistics it is not possible to tell if the proportion of cases in which the courts agree with the local authorities' assessment has changed. We note that in the past it has been necessary to commission research to calculate the proportion of applications resulting in various types of orders. There may be a need for further such research in future if there appears to be a significant shift in the proportion of cases in which the courts reject the assessments of local authorities.**

Family Group Conferences

82. One suggested means put to us for preventing cases reaching court was the use of Family Group Conferences (FGCs). They originate from New Zealand and aim to support families (including extended family members and friends) to draw up a plan to enable the child to remain with the immediate or extended family. FGCs are voluntary, but the

104 *The 'Baby Peter effect' and the increase in s31 care order applications,* Executive Summary, Cafcass, 2009

105 Q 323

106 Ev 200

families are aware that if nothing is agreed the child may be taken into care. The family, and often the child, meet with a social worker and a co-ordinator who may be from a charity or a separate part of social services. The plan is constructed by the family (in private) but must address the local authority's concerns. The local authority can set conditions, for example stipulating that the child cannot live with a particular person. The family can ask for support as part of the plan. The local authority then chooses whether or not to accept the plan. Depending on the details of the case and the plan it may avoid the need for proceedings, or the plan may need to be confirmed by court orders. The Interim Report noted that there were a variety of commissioning models and that the use of the technique varies between local authorities. It said that FGCs were "usually seen as a means to avoid proceedings" rather than as a form of mediation whose conclusions could be confirmed by the court.

83. The Family Rights Group explained the potential benefits of FGCs in its submission:

> FGCs are proven to:
>
> - Result in extended family members stepping in to support struggling parents and when necessary to take on the care of the child if s/he cannot remain with their parents;
> - Engage fathers and paternal relatives;
> - Give children a voice;
> - Improve outcomes for children at risk.[107]

The British Association of Social Workers was also very supportive of this approach.[108]

84. The Family Rights Group told us that a 2009 survey found that 69% of local authorities in England and 18 out of 22 authorities in Wales have or are setting up an FGC service.[109] The Interim Report found that "most (possibly all) local authorities now offer some form of FGC service". Barnardo's said in written evidence that it would like to see an entitlement to FGCs in care proceedings. Jonathan Ewen, Director, Barnardo's North East, told us that FGCs cost between £1,000–2,000 per family. A typical court case would cost the local authority £4,825 in court fees alone. He also assured us that FGC would not add to delays because:

> if we were able to be sure that at no stage in the care proceedings another relative was able to come forward to be assessed, it means all that work would be done before you got into actual proceedings. That means the proceedings could flow forward much more speedily.[110]

107 Ev w103

108 Ev w112

109 Ev w103

110 Q 90

85. A survey by Cafcass[111] found that "late emergence of family members wishing to be assessed as potential carers" was the second most common reason given for cases not proceeding as timetabled. However, this was the finding of a survey of Cafcass workers, rather than a review of case files, and so does not give an indication of how many cases may be affected by this problem. The Family Rights Group claimed that 90% of FGCs reached an agreement that the local authority accepted, and that this prevented children being taken into care in 32% of cases and prevented proceedings in 47% of cases.[112] Mr Ewen told us about the work of Barnardo's Liverpool Family Group Conferencing Service which claimed an even better success rate: it had worked with 27 families, and not one proceeded to care. However it should be noted that not all cases in an area are referred to FGC, and that the families are carefully selected. If FGCs were rolled out to all cases, the success rate could well fall.

86. Barnardo's told us that note should be taken of the cost savings of FCGs:

> [The Liverpool FGC] cost £88,000 to run but saved the local authority approximately ten times that amount in care fees. Despite being regarded as a successful and cost effective service by the local authority, last year [2010] Liverpool announced it would no longer be able to continue funding non statutory work. The service has been forced to make significant cut-backs.[113]

87. The Family Rights Group also reported considerable savings from FGCs, with a recent sample of four local FGC projects finding that they have prevented 159 children becoming looked after in the last year, including avoidance of proceedings for 87 children, at a saving of approximately £6.76 million.[114]

88. **Family Group Conferences are a way to enable parents to makes necessary changes in order to retain care of their children, or to enable children to remain with the extended family. In cases where it is not possible for the child to remain with the family, they can help reduce delays once the case reaches court. Given the high costs of court cases, legal aid and the high costs of keeping children in care, the potential saving from even a small reduction in the number of care cases is considerable. We were very impressed by the account of Family Group Conferences in Liverpool. It is a matter of regret that a service with an apparent 100% success rate is being cut back.**

Other means of diverting public law cases from court

89. We also took evidence on the use of "letters before proceedings". These are letters that Government guidance recommends local authorities should send to parents when they are considering care proceedings. The letter should set out what the local authority's concerns are, how these can be addressed, and what help and support is available. The letter should

111 Ev 180

112 *Using Family Group Conferences for children who are, or may become, subject to public law care proceedings; A guide for Courts, Lawyers, Cafcass and Cafcass Cymru officers and Child Care Practitioners*. Developed by the Family Rights Group in consultation with the Family Group Conference Network. Endorsed by Cafcass and the Family Justice Council, October 2008.

113 Ev 126

114 Ev w103

be written in jargon-free language the parents can understand, and if necessary it should be translated. None of the information in the letter is supposed to be new, and it should all have been raised in previous meetings. The letter invites the parents to a Pre-Proceeding Meeting where the local authority and the parents try to agree a plan drawn up by the local authority. Receipt of such letters also confers eligibility for legal aid on the parents concerned. The Family Rights Group told us that the use of letters before proceedings was "patchy" and that:

> it is often sent so late in the day that there is no time for parents/wider family members to make the changes necessary to overcome the concerns before care proceedings commence. We would recommend that the guidance be revised so that local authorities are encouraged to send the letter at least 3 months before proceedings are likely to be initiated unless there is an emergency.[115]

90. A study by Cafcass looking at the impact of the Baby Peter case found that Cafcass was sure that a letter before proceedings had been sent by the Local Authority in 39% of cases, and was also sure that a letter had not been sent in 39% of cases, (although half of these were emergency protection orders where the urgency of the application meant that a letter could not be sent).[116] The MoJ told us that it did not hold any information on numbers of letter before proceedings issued.[117] The Interim Report said that:

> it makes sense to give parents due notice, with a clear statement of the changes they need to make, rather than going straight to court. But there is a need for research on what works and why some areas of the country are not using it.[118]

91. **We agree with the Interim Report that further research is required on a range of measures which could potentially help parents to make changes which could resolve pubic law cases without taking children into care, or without proceedings. We are particularly interested in the wider use of "letters before proceedings". However, the Department has no data on how often they are used, what the barriers are to their wider use, or how effective they are. Given that receiving a letter before proceedings confers entitlement to non-means-tested legal aid we find this lack of any evidence base particularly surprising. We recommend that the Government should commission such research.**

Private law

Number of cases reaching court

92. The number of private law cases have been rising since 2005, and the 2009 figures represented a 14% increase on the previous year. In 2009, some 137,480 children were the subject of private law family cases. Currently 90% of separating parents do not use the courts. The MoJ told us that it believed this figure had remained stable between 2002 and

115 *Ibid*.

116 *The 'Baby Peter effect' and the increase in s31 care order applications*

117 Ev 200

118 Interim Report, p 130

2007.[119] However, some of those 90% will be unhappy with their contact arrangements, and in up to 30% of cases one parent does not see the child but does not challenge that in court. [120]

93. We heard that the families that did reach court were those with multiple problems:

> Many are victims of violence, or are perpetrators whose need for representation and advice is no less great. Many have lives blighted by alcoholism or drug abuse. Many of our clients do not have English as a first language; many speak no English at all—vital instructions are communicated through interpreters.[121]

94. Research has found very high levels of domestic violence in private law cases which reach court. In a 2005 study, 53% of women reported physical or emotional abuse as a cause of the separation, with actual or fear of violence continuing post-separation for 40% of women. Actual violence or fear of violence prior to the application was reported by 24% of women who had not reported violence during the relationship. The study noted that despite the high levels of domestic violence only about 15% of cases had an injunction or protective order.[122]

95. Research for the Ministry of Justice by Joan Hunt and Alison Macleod of the University of Oxford found high levels of safeguarding concerns, only about a third of which related to domestic violence.[123]

> In 54% of cases (167 of 308) the resident parent raised concerns over serious welfare issues: domestic violence (34%); child abuse or neglect (23%); parenting capacity affected by drug abuse (20%), alcohol abuse (21%), mental illness (13%) or learning difficulties(1%); fear of abduction (15%). The proportion rose to 82% of cases (89 of 108) where the resident parent initially opposed any direct contact.

96. The study also found that domestic violence was alleged in 50% of cases (this figure is higher because it includes historic domestic violence or where it was not raised as a welfare concern). Some cases in which there are safety concerns are not reaching court under the current arrangements. Fiona Weir, CEO, Gingerbread, told us that in cases which did not reach court: "we find even where contact is continuing, in about 10% of cases, there is an ongoing safety issue that is concerning at least one of the parents."[124]

97. **We received evidence that a large number of private law cases that currently reach court involve families with multiple problems. A high percentage of cases involve domestic violence or other child protection concerns. Care must be taken that any**

119 Ev 200

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

121 Ev w92

122 Trinder, L., Connolly, J., Kellett, J., Notley, *A Profile of Applicants and Respondents in Contact Cases in Essex*. (2005)

123 *Outcomes of applications to court for contact orders after parental separation or divorce,* Briefing Note, Joan Hunt and Alison Macleod.

124 Q 93

measures to divert cases from court only seek to do so where that is in the best interests of the child. This will be more complex than simply screening for domestic violence.

Early Intervention

98. In our terms of reference we asked about "the role, operation and resourcing of mediation and other methods in resolving matters before they reach court". The vast majority of the submissions we received focused on mediation. However, we did receive some evidence about even earlier intervention to prevent private law cases reaching court. Early intervention can include:

- Peer support groups;
- Leaflets;
- Helplines;
- Educational DVDs;
- Parenting Classes;
- Information sessions;
- Advice from schools or Sure Start Centres;
- Websites (including DirectGov);
- Counselling; and
- Therapeutic interventions.

99. However, we received no evidence of evaluations which established the effectiveness or otherwise of the interventions listed above. Gingerbread called on the Government to undertake such research:

> [We call on the Government to] Conduct a robust cost/benefit analysis of different interventions intended to improve child outcomes, reduce parental conflict and reduce the use of the courts, drawing on evidence from the UK and elsewhere. This should include a broader analysis in terms of long-term cost savings of better outcomes for children.[125]

100. Providing an early intervention service to all parents, in an attempt to target the 10% of parents who go to court, would not seem to be a cost-effective use of resources. However, if the intervention is seen in terms of child and family wellbeing, rather than solely in terms of the number of cases reaching court, then early intervention may have real benefit. We also heard that in some cases intervening later is not effective as positions have become entrenched.[126] The small proportion of cases reaching court means that any study of the effectiveness of early intervention would have to be carefully designed to deliver reliable results.

125 Ev 129

126 *Ibid*.

101. It is also worth noting that there are currently up to 30% of cases where one parent has no contact but does not apply to court. There are also cases where one parent is unhappy with the current level of contact but does not make a court application. Any early intervention or additional information could help these parents make better informal arrangements about child contact. However, it could also encourage more parents who were unhappy or denied contact to go to court. In some cases it could be in the best interests of the child for this to happen, for example if one parent was denying the other parent contact without good cause. The chance of an increase in the number of court cases could be minimised by high quality interventions, but, given the high number of cases with no contact, an increase in the number of parents making court applications for contact is a real risk.

Signposting

102. With the wide range of interventions available parents need to know what to choose and how to access it. We heard that there was a problem with parents not knowing how to access the help that was available. Fiona Weir from Gingerbread told us that:

> What parents tell us again and again is that they don't know what's out there. There is a real issue about navigating. They are not being signposted effectively to what the mix of interventions is from information to advice to counselling to mediation that could help them.[127]

103. The Government is seeking to address this problem. On 13 January 2011 the Department for Work and Pensions published *Strengthening families, promoting parental responsibility: the future of child maintenance.*[128] The consultation primarily focused on the reform of CMEC (the former Child Support Agency). However, the document also included proposals relevant to the family courts. The consultation asked "whether a single website and a single helpline linking up the range of support available online and in local communities for separating families might be appropriate." These could be run by voluntary or community groups, and could also "build on and complement the existing government and voluntary and community sector services..."[129]

104. In parts of the consultation the proposed new service appeared to be about joining-up information which was already available: "integrat[ing] the support currently provided to empower families" and "fully integrating the emotional support people may need". However, other parts of the consultation proposed more than just integrating existing services, stating that the proposed helpline "could offer an initial triage for problems, with greater emphasis on self-help tools, encouraging parents to make their own arrangements, but also fully trained advisers to help assess cases and refer families on to the most appropriate support." The proposal does not include any costings, on the basis that the cost would depend on which model was finally decided upon.

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127 Q 94

128 Department for Work and Pensions is the lead department but the proposals were developed jointly with the Ministry of Justice and the Department for Education.

129 *Strengthening families, promoting parental responsibility: the future of child maintenance,* Department for Work and Pensions, 2011

105. The Interim Report made its own set of proposals to tell parents about services. It recommended:

> the introduction of an online information hub for England and Wales to provide a single point of access for information, legal documents and applications for family related issues. The online system would be supplemented with a telephone helpline and paper based information for those without access to the internet or who need further information on a specific issue. This will include:
>
> - clear guidance about parents' responsibilities towards their children whether separated or not, including their roles and responsibilities as set out in legislation;
> - information and advice about services available to support families, whether separated or not;
> - information and advice to resolve family conflicts, including fact-sheets, case studies, peer experiences, DVD clips, modelling and interactive templates to help with Parenting Agreements;
> - advice about options for supported dispute resolution, which would highlight the benefits of alternative forms of dispute resolution, including mediation, and PIPs;
> - information about court resolution, should alternative dispute resolution not be suitable, and costs of applications;
> - support for couples to agree child maintenance arrangements;
> - guidance on the division of assets; and
> - what to do when there are serious child welfare concerns.
>
> The hub should include support and information for children and young people, to help them through this difficult time. It will provide information to divorcing couples about the divorce process, directing them to the online divorce portal where they will find the forms and tools they need. It should also be a source of information for wider family members, who can often be the first and main point of information and emotional support for separating couples.[130]

106. **More support for separating parents could reduce the number of cases reaching court and reduce the negative impact of separation on children. However, there is currently a lack of evidence as to which early interventions are most effective. There is also the risk that some of the numerous cases where one parent has no contact could be diverted into court. We are not clear to what extent the proposals in *Strengthening Families* are proposing a referral and signposting service or a service which itself provides additional help. We call on the Government to clarify this.**

107. **Currently only one in ten separating parents resolves their disputes in court. The evidence we received is that a large number of these parents have multiple problems. This means that they are unlikely to be diverted from court by anything other than**

130 Interim Report, p 169

intensive intervention. In addition, there are many cases involving safeguarding concerns which should not be diverted from court. Some parents could be diverted from court by low-level intervention, but the Government should be realistic about the impact of any proposals on the number of private law cases reaching court.

Resources

108. If more families are to be referred to various early intervention services, those services will need to be funded. In the current financial circumstances, such funding is in short supply. For example, *Strengthening Families* suggested more training for Sure Start staff to enable them to "respond to relationship distress" and "provide access to relationship counselling". It suggests that local authorities should intervene with families early to provide parenting programmes and conflict resolution programmes (these would not be provided in cases of domestic violence). However, the proposals do not comment on whether extra funding will be provided to help local authorities fund these interventions, or to fund additional training for Sure Start staff. Some Sure Start Centres are facing closure or reduced services as a result of spending cuts.[131]

109. We also heard that some current early intervention services are under threat. Fiona Weir told us that:

> The obvious worry is what is out there. When you look at the services for families that work and support families, most of them are desperately under pressure for funding and we may see quite a significant reduction in what is out there over the next year rather than an increase. To make that vision real it is going to require some investment.[132]

110. The National Association of Child Contact Centres was concerned about the increasing reliance on the voluntary sector:

> straightforward contact disputes never now come to court yet the numbers themselves continue to increase and much of the external provision is provided by the voluntary sector and by volunteers heavily reliant on a reducing number of funders.[133]

111. **The wider funding to accompany any signposting service will be crucial. There is no point in referring parents to services which have no capacity to cope with additional demand. However, we know that resources are scarce and that it is unrealistic to make demands for widespread increased Government spending in the current climate. We heard during our previous inquiry into legal aid that the Big Society Bank will be a potential source of capital for charities and social enterprises, by means of social impact bonds and other financial products. We call on the Government to confirm that such bodies which provide early intervention for families which need assistance would potentially be eligible for such capital and to ensure that those bodies understand how they can become involved. We also think that the Government should consider**

131 http://blogs.channel4.com/factcheck/update-how-safe-is-sure-start/5578

132 Q 87

133 Ev w72

whether the payment-by-results principle which it is championing elsewhere might be applicable here, with financial incentives available for organisations which have a successful impact providing effective support for families. Our predecessor Committee's report on Justice Reinvestment made the case for more funding to be spent on early intervention, with consequential reductions in the need for expensive prison spaces at a later date; we support that approach as a longer-term aspiration for criminal justice policy.

Mediation

112. The Government is keen to encourage the use of mediation. Two recent measures, the Practice Direction, and the *Government's Proposals for the Reform of Legal Aid in England and Wales* both seek to encourage the use of mediation, the first amongst privately-funded parties and the second amongst legally-aided parties. Increasing the use of mediation seeks to reduce the burden on the court system, on Cafcass, and on the legal aid budget. It also seeks to improve outcomes for families by avoiding a long adversarial court process. However, mediation will not work in all cases (as the Government accepts) and we now consider how it can best be used.

Current System

113. In 1997 it was made compulsory for people applying for legal aid for private family law cases to consider mediation. However, parties who funded their legal proceedings privately had no obligation to consider mediation. Evidence suggested that many were not aware of the option (discussed further below). This situation recently changed with the introduction of a new Practice Direction.

Practice Direction

114. On 6 April 2011 *Practice Direction 3a—Pre-Action Protocol for Mediation* came into effect. The Practice Direction requires that any couple "considering applying" for an order in the family courts must attend a "Mediation Information and Assessment Meeting" (MIAM) about "family mediation and other forms of alternative dispute resolution". If the parties are willing to attend together the meeting may be conducted jointly, but where necessary, separate meetings may be held. The meeting is designed to cover all aspects of the divorce or separation, not just arrangements for the child. The court will ask whether a litigant has attended a meeting and "can require that they do so before considering any application". The Practice Direction does not define a mediator, but gives information of where family mediators may be found. The Legal Services Commission (LSC) sets minimum standards for publicly-funded mediators, however, at present anyone can set themselves up as a privately-funded mediator with no qualifications or training.

115. The Practice Direction sets out the circumstances in which people do not have to consider mediation. These include cases where the parties already have an agreement and are only seeking a consent order, where the order is urgent due to a physical threat to the child or where an allegation of domestic violence has been made and this has resulted in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months. This is a narrow definition of domestic violence very similar to

that originally proposed in the *Government's Proposals for the Reform of Legal Aid in England and Wales*. The Government subsequently broadened the definition and included cases where there are safeguarding concerns. The same broader definition should apply in this instance.

116. Parties are only required to attend a meeting about mediation. Once they have been to the meeting, even if the mediator believes they are excellent candidates for mediation, they are free to go straight back to the court. Mediators can set their own fee for the MIAM, the LSC rate being £130 for a couple.

117. We heard evidence that in Australia the increased use of mediation had led to delays for some families.[134] However, the Minister told us that he did not believe that the Practice Direction would lead to delay, because:

> Even if someone goes for a mediation assessment, if they want to be difficult, they can say, "I am not interested in mediation." If that is the case, then the case goes immediately to court. That is the reason for the assessment coming to an end, if you like. I do not see this as being a cause of delay. I only see this as a cause of cases being speeded up.[135]

118. **We broadly welcome the Practice Direction. The previous system, where people on legal aid had to consider mediation but those who could afford to pay their own fees did not, was patently unfair. The Practice Direction will ensure that all parties have considered mediation, which will reduce the burden on the courts. We also welcome the fact that the Practice Direction is not limited to mediation but includes other forms of dispute resolution.**

119. **We note that the Practice Direction uses a definition of domestic violence similar to that in the legal aid Green Paper. In its response to the consultation on the Green Paper the Government adopted a broader definition and encompassed safeguarding concerns. We recommend that the Practice Direction is changed accordingly.**

Training

120. Publicly-funded mediators must be registered with the Legal Services Commission which requires them to have:

- successfully completed the competence assessment process managed by member organisations of the Family Mediation Council; or
- be a practitioner member of the Law Society Family Mediation Panel.

121. Non-publicly funded mediators do not need any qualifications and are not registered. The Children's Commissioner told us that:

134 Q 362

135 Q 304

> [Mediators] do need to be registered and regulated. They need to be held to account for what they do. You can't just put your name on a card you've had printed at a motorway service station and call yourself a mediator.[136]

However, that is exactly what the current rules allow at the moment. The Minister told us that he had mixed views on the current situation. He said that:

> [People] may not want to go through the court system or the public system at all. They may want to use their neighbour as a mediator. This sort of thing happens in real life.[137]

122. However, he also said that:

> What we are saying, though, is that there should be higher levels for those who do go to mediators. There should be an expectation of a certain quality. We are working on that at the moment with the FMC [...] This is going to take time, but it is something that is very much being concentrated on. I know also that the professional bodies such as the Law Society are very keen that this should happen as well. So I think we are all heading in the same direction.[138]

123. Poorly trained mediators raise several areas of concern:

- Failure to recognise child protection concerns, leading to agreements which put children at risk;
- One-sided or parent-focused agreements which do not recognise the needs of the child (both discussed below);
- Mediators failing to realise quickly that a case, for whatever reason, will not be resolved by mediation, leading to higher costs for parents and delays for children ;
- Poorly mediated or unworkable agreements which then break down. This wastes parents' money, causes delay, and adds to the number of court cases;
- Poor quality mediation leading to a failure to reach agreements where agreements would have been possible with a better mediator. This leads to delays and unnecessary expense.

124. The 2007 NAO report (which looked at publicly-funded mediators) found that 25% of clients were unhappy and complained of mediators who "had not been good at his or her job, had been rude, unsympathetic or inexperienced, had not been impartial, made the client feel pressured and was unfair".[139]

125. The Interim Report said that:

136 Q 393

137 Q 309

138 Qq 309–11

139 National Audit Office, *Legal Services Commission: Legal aid and mediation for people involved in family breakdown,* Report by the Comptroller and Auditor General 256, Session 2006–2007, 2 March 2007

> Mediators [including privately-funded ones] should at least meet the current requirements set by the Legal Services Commission. These standards should themselves be reviewed in the light of the new responsibilities being laid on mediators. Mediators who do not currently meet the LSC standards should be given a specified period in which to achieve them.[140]

126. **Poor privately-funded mediation is bad for parents (who have to pay for it), children (who are impacted by the delays it causes and by agreements which do not consider their needs) and also for the tax payer. While the tax payer does not have to pay for the mediation, the public purse bears the cost when mediation fails and cases reach court that could have been resolved by better trained mediators. We are very concerned that there are currently no minimum qualifications for privately-funded mediators. We agree with the Interim Report and recommend that privately-funded mediators should have to meet the current requirements for legally aided mediators set by the Legal Services Commission.**

The effectiveness of mediation

127. We heard from many witnesses about the potential benefits of mediation. Families need Fathers told us that "court is often the worst place to decide who will care for children and when. There is general agreement that mediation is a better alternative and it can have more lasting results. Mediation can play a central role, by helping to switch the culture from an adversarial one to an approach that emphasises the need for agreement, for the children's sake primarily".[141] Nagalro (the Professional Association for Children's Guardians, Family Court Advisers and Independent Social Workers) noted that 70% of those using state funded mediation reach an agreement, and 59% thought they could negotiate further changes themselves.[142] The *In-Court Mediation for Family Disputes Research and Evaluation Report*[143] found that 73% of those who underwent an assessment for mediation went on to participate in mediation, with 71% who participated either reaching a full agreement or narrowing the issues in dispute. Gingerbread told us that:

> In Australia, around two fifths of participants in [family dispute resolution] or mediation said they had reached agreement as part of the process. Just under a further third of those said they later went on to sort out arrangements or were in the process of doing so.[144]

128. National Audit Office (NAO) research in 2007 found that on average mediation cost £753 and took 110 days, while court cost £1,682 and took 435 days.[145] In supplementary evidence, the MoJ supplied us with different figures, saying that "mediation is often cheaper than going to court—data from Legal Aid cases show the average cost per client of

140 Interim Report, p 23

141 Ev 90

142 Ev 144

143 *In-court mediation for family disputes: Research and evaluation report of in-court mediation trial,* 2010, Legal Services Commission

144 Ev 129

145 National Audit Office, *Legal Services Commission: Legal aid and mediation for people involved in family breakdown,* Report by the Comptroller and Auditor General 256, Session 2006–2007, 2 March 2007

mediation is £535 compared to £2,823 for cases going to court."[146] Mediation can save the costs of Cafcass, the judiciary and the court system, as well as the cost of legal aid. In addition to the cost savings, Families Need Fathers stressed the importance of the shortened time-frame for mediation saying that: "it can minimise the opportunities for warring parents to use the courts to ensure that a child sees little or nothing of their ex-partner for long periods of time, often damaging the child significantly."[147]

129. While the evidence we received was widely supportive of the greater use of mediation, witnesses also drew our attention to some of the less favourable evidence about the longer-term effectiveness of mediation. The evidence for mediation is complicated by the fact that mediation is voluntary. Parents with a better relationship are more likely to mediate, and more likely to reach an agreement. The trials that we examine below did not involve control groups, and it is difficult to find comparable data for non-mediated couples.

130. A 2006 Department of Constitutional Affairs report looked at three different types of in-court mediation and found that court mediation produced more agreements but parents were less satisfied with the agreement and process:

> Consistent with previous research, the overall agreement rate was very high, with 76% of parents reporting a full or partial agreement. [...] The model, and not the characteristics of the case, determined the agreement rate..[...] Overall, only 62% of parents were satisfied with the agreements they had reached.[148]

131. The study also followed up the families after six months. It found that:

> At follow up only a fifth of agreements had not worked at all, most agreements were intact or had been extended, most cases were closed with low relitigation rates, many more children were having increased contact, more parents were satisfied with the quantity and quality of contact and parents and children were doing better than at baseline. [...]Despite these successes there are some significant problems [...]Parental satisfaction and parent and child wellbeing did improve from baseline to follow up, but overall levels remain low. Only 59% of parents whose cases were closed were satisfied with arrangements.[149]

132. The 2006 cohort were followed up by a second 2007 study two years after mediation. It noted that things has deteriorated:

> A majority of parents had required further professional intervention and 40% had been involved in further litigation since baseline. About 60% of baseline agreements had been dropped, or had broken down, by the two year follow-up point. Changes in baseline agreements appeared to be due to one or more of the adults or children

146 Ev 198

147 Ev 90

148 *Making contact happen or making contact work? The process and outcomes of in-court conciliation,* Liz Trinder, Jo Connolly, Joanne Kellett, Caitlin Notley and Louise Swift, 2006

149 *Ibid*.

> not supporting the agreement, rather than an adaptive response to changed circumstances.[150]

133. The study found that the mediation process did little to resolve underlying conflicts between parents or improve their ability to communicate—with the consequence that, despite contact taking place, child well-being had not improved from initially poor levels. However, without having comparable data from court cases it is difficult to know if court would have produced better or worse outcomes for these families.

134. The 2007 NAO study noted that the agreement rate between publicly-funded mediators varied considerably. Among the ten firms of mediators doing most work for the Legal Services Commission (LSC), each of which had undertaken more than 300 cases between October 2004 and March 2006, the proportion of cases failing to reach agreement ranged from 22% to 52%.[151] Both high and low rates of agreement can be a concern: too high a rate could suggest that parents are being pressured into agreements, while too low could suggest that mediators are failing to help parents reach an agreement where one might be possible.

135. In Australia there were also concerns about the longer-term outcomes of mediation. In the short term court filings had dropped by 22%: something that was "largely attributable" to compulsory assessment for mediation. However, that now seemed to be changing:

> Those data were based on the years immediately after the introduction of the reforms. Informal discussions that I have had with the courts indicate that filings might be starting to creep up. There was an immediate effect after the reforms that perhaps is not going to be sustained to the same extent [...]: It takes time for people to discover that they are not agreeing and that they need to go to court. A period of 18 months to two years after the reforms doesn't allow things to unfold in families in the way that one might expect.[152]

Potential for greater use of mediation

136. National Family Mediation said that the total number of publicly-funded mediations for the period 2007–09 was approximately 13,000 p.a.[153] In 2009 there were 137,480 children involved in private law cases (some cases would have involved more than one child) as well as divorce cases not involving children. National Family Mediation said that there is little awareness of family mediation and "how it can help" among parties. LSC research in 2010 found that 42% of privately-funded clients had not considered mediation,[154] while NAO research in 2007 found that 14% of litigants were not offered

150 *The longer-term outcomes of in-court conciliation,* Liz Trinder & Joanne Kellett, University of East Anglia, Ministry of Justice Research Series, 15/07, November 2007

151 National Audit Office, *Legal Services Commission: Legal aid and mediation for people involved in family breakdown,* Report by the Comptroller and Auditor General 256, Session 2006–2007, 2 March 2007

152 Qq 558–9

153 Ev w131

154 *In-court mediation for family disputes: Research and evaluation report of in-court mediation trial*

mediation and would have tried it if they had.[155] Both these research projects suggested that the use of mediation could be increased simply by increasing awareness of it. National Family Mediation said that since the NAO report, growth in publicly-funded mediation has been slow. Case numbers have increased by approx 1,000 per year since the NAO report was published.[156]

137. A large number of the submissions we received were in favour of wider use of mediation. However, in almost all cases this opinion was qualified. It was widely stated that not all cases are suitable for mediation. This included the "obvious" cases of domestic violence, safeguarding concerns (discussed below), and forced marriage (where Foreign and Commonwealth Office guidance prohibits mediation), but also a range of other more subjective concerns for example:

- Where there was a power imbalance between the parents;
- Where one parent was intransigent;
- Where there was a complete lack of trust between the parties;
- Where one parent was denying all contact and was using mediation to delay the case going to court.

138. The National Children's Bureau told us that:

> many cases are not suitable for mediation, for example where there has been alleged domestic violence or sexual abuse, or even where relations have broken down to such an extent that collaboration is not possible. Similarly, where contact is frustrated it is often only the court's power to intervene that can ensure compliance.[157]

139. The Family Law Bar Association supported mediation but explained when it was appropriate and how it could go wrong:

> mediation will only be appropriate for partners in equal relationships which are sufficiently amicable for productive discussions to take place. Lengthy unproductive mediation can run contrary to a family's interests—prolonging the disputes, and raising tensions.[158]

Domestic violence, safeguarding and the voice of the child

Domestic violence and safeguarding

140. Many of the cases which reach mediation involve instances of domestic violence and/or safeguarding concerns. Dr Lynne Harne has carried out extensive research into the impact of domestic violence on the children of separating parents. She noted in her written submission "much [...] abuse will not have been disclosed either by the children themselves

155 National Audit Office, *Legal Services Commission: Legal aid and mediation for people involved in family breakdown,* Report by the Comptroller and Auditor General, 256, Session 2006–2007, 2 March 2007

156 Ev w131

157 Ev w79

158 Ev w92

or by mothers to agencies prior to separation because of fear of the perpetrator-parent, or his family."[159] Domestic violence has also been found to have an impact on a child's desire for a relationship with the abusing parent, a finding that militates against the usual assumption that a relationship with both parents is in the best interests of the child. Dr Harne observed that:

> Children who have lived with ongoing violence for most of their lives are unlikely to feel any emotional attachment to the violent parent and feel only relief that they have separated and wish to be able to live their lives without fear. Other children may have conflicted feelings, but only desire contact when they can be certain that their fathers have changed sufficiently so that they and their mothers can be safe from the violence.[160]

141. The Private Law Programme provides for a first hearing dispute resolution appointment, at which the judge, and/or a Cafcass worker, will discuss with parties both the nature of their dispute and whether it could be resolved by mediation. At this meeting the court should also have information obtained through safeguarding checks carried out by Cafcass, to ensure that any agreement between the parties, or any dispute resolution process selected, is in the interests of the child and safe for all concerned. Cafcass checks are very thorough, as Dr Harne explained in written evidence:

> Cafcass officers are required to screen and make initial safeguarding checks for all parents making applications for contact or residence through seeking information from court forms (which now ask questions about domestic violence and other forms of harm) the police and children's social care services and their own records and from other agencies where necessary. [...] If risk/harm concerns are identified Cafcass officers must then advise the court for the need of risk assessment to be undertaken by Cafcass and possibly a S.7 welfare report.[161]

142. This can uncover concerns that the current partner was not aware of (for example, if one parent had convictions which predated the relationship). It could also uncover concerns that the other parent was too afraid to mention, or concerns that related to both parent which they had decided not to raise (for example, police call outs for domestic violence by one or both parents). The Practice Direction requires cases to go to a mediator before they come to court and those safeguarding checks take place. However, not all parents will share their safeguarding concerns with a mediator.

143. We asked Jenny Clifton, Principal Policy Adviser (Safeguarding), Office of the Children's Commissioner, why there were no Cafcass checks when cases were referred to mediation before they reached court:

> if there are going to be more and more cases which are kept out of court through other dispute resolutions, through mediation and so on [...] there are various points at which there is a high level of concern about violence and abuse in cases which come on contested contact arrangements. We have to be sure that people who are

159 Ev 145

160 Ev 113

161 Ev 115

> involved in earlier stages of the process are really attentive to the safety issues for children and are experienced, qualified and trained enough to recognise that and pick those up at a very much earlier stage. I can't be confident about that as yet.[162]

144. The Interim Report does not suggest that Cafcass should carry out safeguarding checks before mediation. However, it does suggest more training for mediators in identifying safeguarding concerns and domestic violence, and that the assessment for mediation should cover these issues. The Interim Report also said that:

> domestic violence should not automatically preclude the use of dispute resolution. Domestic violence varies greatly in its characteristics, and we have heard evidence that the mediation process can successfully handle some cases that involve it.[163]

We heard that in Australia they were trying mediation for families that have experienced domestic violence. Dr Rae Kaspiew told us:

> The Government have funded a pilot programme that is being applied where there has been family violence. It is called co-ordinated family dispute resolution. That is quite a novel pilot that the Institute is involved in evaluating. The pilot is only just starting, but that initiative is evidence of the fact that our policy makers are in search of different models for different types of families that will meet their needs in different circumstances.[164]

Voice of the child

145. Some witnesses told us that the voice of the child is not always heard adequately in mediation. Doing so is complicated by the fact that the children involved in many private law cases are very young. Research by Joan Hunt on the ages of children in private law proceedings found that 46% of children were under 5 years at the date of application. This does not mean that they are too young to have a view, or for that view to be taken into account, but it does make establishing and understanding their views, or involving them in mediation more problematic.[165]

146. Article 3 of the UN Convention on the Rights of the Child requires that in all actions concerning children, including in courts of law, administrative authorities and legislative bodies, the best interests of the child shall be a primary consideration. Article 12 of the Convention gives children the right to have their views taken into account before any decision is made that affects their welfare. Involving children in mediation (or ensuring that their views are taken into account) is important to ensure that the agreement is in the child's best interests and takes account of their views. This can also be a vital factor in the success of a mediated agreement. Academic research has identified children not

162 Q 396

163 Interim Report, p 175

164 Q 361

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

supporting agreements as one of the reasons why they break down.[166] Mr Justice Ryder told us about the difference that hearing the voice of the child could make:

> [Parents] often forget that football is on a Saturday afternoon. They often forget that the dancing lesson is on a Wednesday night or that there is homework to be done. Their own issues completely overwhelm the child, and to hear what the child says can sometimes be very cathartic indeed.[167]

147. The Children's Commissioner told us how she felt that mediation could be helpful for children if they were involved, something she did not feel happened enough currently:

> When children talk to us [...]they say, "I'm scared it is my fault." Really good mediation that could help them to work their way through, in the same way as mediation aims to help adults through the difficulties, would be another string to the bow of the family justice system. It isn't at the moment.[168]

148. Publicly-funded mediators who meet children have to have specialist training. However, not all publicly-funded mediators have this training, and therefore not all meet children. Research has shown that the extent of children's involvement in mediation varies.[169] We did not receive any definitive figures on how many mediators currently meet children. The Children's Commissioner told us that children were often not involved at present:

> at the moment mediation is a very adult process. The two sides of the adult war use mediation. I am not quite sure how many mediators ever find the time or have the training to listen to the children.[170]

149. The NSPCC felt that more could be done to involve children. It recommended that:

> In all "suitable" cases, mediators meet directly with children to ascertain their wishes and feelings.
>
> Mediators are specifically trained in how to determine the appropriate extent of a child's direct involvement in mediations, and how best to ascertain children's wishes and feelings.
>
> Further steps are taken to communicate to children that their wishes and feelings are being listened to, even if it is not appropriate for them to be directly involved in the mediation.[171]

150. The Minister told us that he thought that children might actually be better heard through mediation:

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166 *The longer-term outcomes of in-court conciliation*, Liz Trinder & Joanne Kellett, University of East Anglia, Ministry of Justice Research Series, 15/07, November 2007

167 Q 193

168 Q 393

169 Liz Trinder, Jo Connolly, Joanne Kellett, Caitlin Notley and Louise Swift, 2006

170 Q 393

171 Ev 126

> The current guidelines that mediators follow have very specific proposals for how a child should be dealt with within mediation. They very much highlight the importance of the child. Indeed, within a mediation, the mediator will engage the child in the mediation. I would go so far as to say that, from everything that I have seen, a child is more likely to be given a fair hearing in the less formal atmosphere of a mediation—which for a child is obviously very important—than is the case for a court process. Obviously, there are exceptions. If violence is involved and so forth, that might not be the case and court might be the way to go. In a normal situation, I would say that the voice of the child would be heard in just as fair a fashion, if not more so, through mediation rather than going through the courts.[172]

151. **Hearing the voice of the child during mediation is vital. It is also important to ensure that agreements do not break down. We welcome that fact that LSC mediators need qualifications to meet children. However, we are concerned by evidence that some mediators do not see children. Children should be able to meet mediators or otherwise be involved in mediation and have their views taken into account, where they so wish. In cases where children have not been involved in the mediation process, steps must be taken by the mediator to ensure that the agreement is in their best interests, and that they are kept informed about what is happening.**

152. **There is clear evidence that mediation can be effective, with a high proportion of parties reaching agreements or narrowing the issues in dispute. This avoids the use of the courts, with considerable savings for legal aid, Cafcass and the courts service. It can also be faster and less traumatic for families. We therefore share the Government's belief that there is scope for greater use of mediation. However, in developing its policies on the use of mediation, the Government needs to recognise that: some types of mediation appear more effective than others, and it is imperative that scarce public funds are used to best effect; and mediators need to be professionally trained and know how to recognise and handle sensitive cases where there are accusations of domestic violence or safeguarding concerns. We call on the MoJ, in its response to this Report, or sooner, to spell out how those principles will inform the greater use of mediation which is it seeking to encourage.**

Proposed changes to legal aid

153. The *Government's Proposals for the Reform of Legal Aid in England and Wales* said "we are proposing that legal aid be retained for family mediation in private law family cases, including private law children and family proceedings and ancillary relief proceedings. This will generally apply to cases where domestic violence is not present, but even in those cases where domestic violence is present, we intend to offer support through family mediation, as some couples may still be able to obtain value from the mediation process."[173] The Government estimated that 210,000 litigants in the family courts will no longer receive legal help and 53,800 will no longer receive representation. Some provision has been made for an increase in demands on mediation services: "initial analysis estimates

172 Q 308

173 *Government's Proposals for the Reform of Legal Aid in England and Wales,* Cm 7967, 2011, Ministry of Justice

that 3,300 more mediations might be provided, at a total additional cost of approximately £5 million."[174]

154. The Minister told us that:

> We have no maximum number of mediations that we will permit...The more mediation the better as far as we are concerned and we will fund it. If someone is currently eligible for legal aid, they will be eligible, if our proposals come into effect, for mediation.[175]

He went on to say that:

> I think the variation [in projected costs] is £5 million to £7 million. At £7 million, that would still be fine within our savings projections. Indeed, it is the right thing to do because this Government support mediation and support it as a form of early intervention. It is better to get to the cases earlier and deal with the problems, not least in terms of the interests of the families and children involved, with early non-conflict resolution rather than long drawn-out court cases.[176]

155. The MoJ said in supplementary evidence that the 3,300 predicted mediations and £5–7 million projected costs:

> were initial assessments, based on increases in both the proportion of cases entering mediation and the proportion of those cases that reach agreement. My officials are now updating these assessments in light of consultation responses. [...]
>
> We would expect the number of publicly-funded parties who would be willing to try mediation to be higher than the number of cases that reach agreement as some cases may not be suitable for mediation, in some cases the other party may not be willing to engage in mediation, and some clients that enter mediation may not reach agreement.[177]

Following the legal aid consultation, the Government subsequently revised upwards its estimate of the likely additional take-up of mediations to 10,000 and said this would cost £10 million, rather than the earlier estimate of £5–7 million.

156. **We are concerned that the Government may not have budgeted for enough additional mediations in its legal aid proposals. With more than 200,000 people losing eligibility for legal help and representation, the Department's prediction that only 10,000 extra mediations will be required seems low (albeit more realistic than their initial estimate of 3,300). We welcome the Government's assurance that it will pay for mediation for all eligible people. However, to help manage the Department's budget we call on it to re-examine the figures and bring forward more realistic estimates.**

174 *Ibid*

175 Q 302

176 Q 303

177 Ev 198

Interim Report

Towards compulsory mediation?

157. The Interim Report is in favour of greater use of mediation. Going further than the Practice Direction, the Interim Report argues that not only should the parties have to meet with a mediator for an assessment but they should then have to attend a Separated Parents Information Programme.[178] Those who do not wish to mediate will need to return to the mediation assessor to obtain a certificate to enable them to apply to court.

158. The Interim Report says that:

> Where a mediator considers that one parent is using the assessment and information process to extend and delay proceedings, to the detriment of the other parent and possibly the child, the mediator would issue a certificate for court under a general heading of the kind allowed in Australia.[179]

The exemptions certificate in Australia covers issues such as:

> a) a history of family violence (if any) among the parties;
>
> b) the likely safety of the parties;
>
> c) the equality of bargaining power among the parties;
>
> d) the risk that the child may suffer abuse;
>
> e) the emotional, psychological and physical health of the parties; and
>
> f) any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.

159. The Interim Report does not seem to be completely clear about whether parents can choose not to mediate. On one hand it says parents can ask for a certificate because they "do not wish to mediate" but then the reason given for a mediator granting that certificate seem quite specific. In part that would depend on the guidance given to mediators as to where one or both parties wanting to go to court would qualify as "any other matter" under section (f). The Interim Report states that:

> [We] would anticipate that only those cases where an exemption is raised by a professional based, for example, on welfare concerns, would proceed directly to the court process.[180]

However, it then goes on to acknowledge that "attendance at dispute resolution cannot be compulsory, unlike the assessment [...], but the aim must be that this becomes normality."

160. The Interim Report is walking a fine line between strongly encouraging the use of mediation, and making it compulsory for those who do not qualify for an exemption.

178 Interim Report, p 23

179 *Ibid*, p 174

180 Interim Report, p 23

Given the mixed evidence around the effectiveness of mediation, especially in difficult cases, we cannot support it being made compulsory. We call on the Family Justice Panel to clarify that while attendance at Information Meeting or Assessment for Mediation sessions and a Separated Parenting Programme should be compulsory (with some limited exemptions), all parents should be free to apply to the court after those have taken place.

6 Cafcass

Background

161. The Children and Family Court Advisory and Support Service (Cafcass) provides the people appointed to represent the wishes and feelings of children to the court. It also carries out safeguarding checks (to ensure parents seeking contact are not a danger to children), produces reports requested by the courts and employs or contracts with children's guardians who represent children in public law cases. Cafcass is currently the responsibility of the Department for Education, not the MoJ, and so it is not formally within the Justice Committee's remit. However, Cafcass is a crucial player in the family courts system. It has been the responsibility of the MoJ in the past, and it has been suggested that it might be again in future (as discussed below). As such we felt that it was vital that this inquiry looked at Cafcass. We would like to thank the Department for Education for supplying a Minister to give oral evidence.

History

162. Cafcass was created in 2001 and has had a number of problems since then. In 2003 the Chairman of the Board resigned after a very critical report by our predecessor Committee which called for a fundamental review of its operation. The then Lord Chancellor (who was responsible for the Board at the time) then invited the other Board members to resign.[181] Later, the death of Baby Peter in 2007 and the subsequent increase in the number of care proceedings put the organisation under considerable pressure and led to lengthy delays in allocating guardians to cases and in completing reports. We heard conflicting versions of the history of Cafcass and the extent to which Cafcass was responsible for its recent problems. We were told that the time prior to Cafcass was "a golden age"[182] while the Interim Report concluded that "there was no golden age before the creation of Cafcass". Baroness Howarth, Chair of Cafcass, described it as a time when "we had a Rolls-Royce service for some children, [...] and we had hundreds of other children who were never seen."[183] It has been suggested to us by Cafcass that its recent problems were caused by a "surge" in cases after the death of Baby Peter,[184] but we were also told by the Interdisciplinary Alliance for Children that this only increased the number of cases to the levels seen in 1998.[185] Finally we were told that "the current problems faced by Cafcass are both a cause and a symptom of the continuing long delays. The longer a case goes on the more assessments are ordered and the more work the appointed guardian is expected to devote to any one case."[186]

163. After the death of Baby Peter and the resulting increase in care applications, the number of cases Cafcass had not allocated to a guardian grew, with over 900 unallocated

181 Constitutional Affairs Committee, First Special Report of Session 2003–04, *Protection of a witness—privilege,* HC 210.

182 Ev 141

183 Q 282

184 Q 250

185 Q 238

186 Ev 122

cases by September 2009.[187] In order to tackle this, Cafcass and the President of the Family Division drew up the President's Interim Guidance. Introduced in October 2009 and originally designed to last for six months, this remained in place until October 2010 when it was replaced with a Joint Agreement which is expected to last to October 2011. The President's Interim Guidance was designed to allow Cafcass to provide a "safe minimum service", by focusing on safeguarding and task focused work, and providing reports on specific issues rather than on general welfare.

164. The Minister responsible for Cafcass, Tim Loughton MP, told us that he thought some of the criticism of Cafcass was unfair: "with all the problems there are with Cafcass, we are going through, hopefully, some quite abnormal times at the moment, given the very high increase in workload that Cafcass has been faced with post-Baby Peter from 2008 onwards. [...] It was slightly unfair to judge Cafcass at that precise time."[188]

Delays

Public law

165. Cafcass has recently been successful in tackling delays in allocating cases to guardians. The number of unallocated public law cases reached its most recent peak in April 2010 at 4.5% (551 cases) while the number of duty allocated public law cases peaked a month later at 9% (1,121 cases).[189] By February 2011 these figures had fallen to 1.7% duty allocated (215 cases) and 0.1% unallocated (9 cases). This was despite the number of open cases increasing by around a thousand to 12,794.[190]

166. Cafcass told us on 22 March that it currently had seven unallocated public law cases.[191] These figures were disputed by the Association of Lawyers for Children who sent us a list of 17 unallocated cases which they described as the "tip of the iceberg",[192] something Cafcass then itself disputed.[193] There were also 101 cases allocated to managers as of March 2011[194] and Cafcass were not able to assure us that in every one of those cases the manager was actually working on the case.[195] However, even discounting cases allocated to managers and noting the apparent discrepancy raised by the Association of Lawyers for Children, Cafcass has managed to achieve a substantial reduction in unallocated cases, at a time when the number of public law cases continue to rise.

187 http://www.cafcass.gov.uk/news/2009/cafcass_reduces_delays.aspx

188 Q 312

189 Duty basis is when Cafcass will both react to incoming information and also will take pro-active steps at appropriate points in time to review the status, needs and level of priority of the case, but unlike a fully allocated case there is not a named Cafcass worker, and a case plan may not be drawn up or worked on.

190 Ev 157

191 Q 258

192 Ev w130

193 Ev 179

194 Ev w13; there were also 120 private law cases allocated to managers.

195 Q 277

Private law

167. In February 2010 Cafass had 28,124 open private law cases, although it should be noted that the role of Cafcass in such cases is frequently limited to safeguarding checks. Nearly 20% of these cases were allocated on a duty basis, while just under 19% were unallocated. By February 2011 the number of open cases had fallen slightly to 27,453, and the number of unallocated cases had fallen to just 1%, though nearly 14% of cases were still allocated on a duty basis.[196]

168. Unlike with public law cases, we do not have monthly data on the number of new private law cases. The last figures from 2009 showed 137,480 children were involved in private law applications for the year, a 14% increase on 2008. However, the MoJ has also supplied us with provisional figures for 2010 which show a fall in the number of children to 122,330. The Interim Report quotes unpublished data that show that in the three years 2006-2008 the average case duration for private law children cases in the county courts was 33 weeks. This rose to 36 weeks in 2009, but then fell to 32 weeks in 2010.[197] The combination of a falling number of cases and shorter case duration should reduce the pressure on Cafcass.

169. In its October 2010[198] update (the most recent) on its progress in cutting delays, Cafcass noted: "the timeliness (and speed) of provision of private law reports is [...] improving [...] most late filed reports are only a few days late, which does not prevent the planned court hearing going ahead. 239 reports (out of 5,469) were filed 11 or more working days late in the period April to September 2010." However, a report by the Committee of Public Accounts in September 2010 noted that a third of section 7 reports were more than 10 days late.[199]

Resilience

170. The number of public law care cases Cafcass is receiving each month continues to increase, reaching 816 in May 2011. In 2010–11 there was a record number of cases in ten out of twelve months of the year.[200]

196 Ev 157

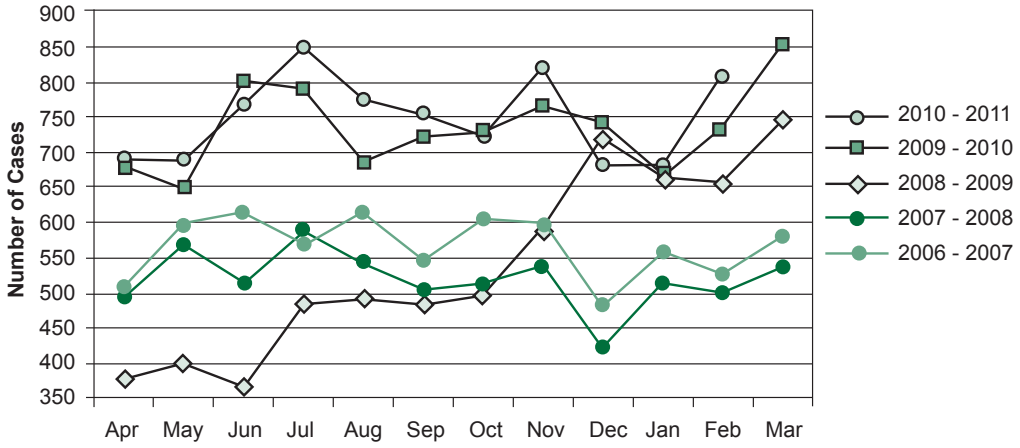
197 Interim report, p 153

198 PA Consulting Report (October 2009) – Cafcass Issues Analysis, October 2010 Update.

199 A court may ask the local authority for a welfare report (Section 7) when they are considering any private law application under the Children Act 1989. Public Accounts Committee, Sixth Report of Session 2010–11, *Cafcass's response to increased demand for its services,* HC 439.

200 *Cafcass care demand, latest figures for May 2011,* http://www.cafcass.gov.uk/news/2011/may_care_statistics.aspx The number of new public law cases varies seasonally.

Public law care requests



171. However, between February 2010 and February 2011 the number of new public law cases rose by only 3.3% to 8,239 while the number of open cases rose by 21% to 12,749 as cases were open longer. This has led to concerns that the number of unallocated cases could begin to rise again. A Committee of Public Accounts report concluded that "with duty allocation needing to reduce quickly and substantially, there is a risk that the reductions could result in the scale of unallocated cases returning to the unacceptable levels seen in summer 2009."[201] Cafcass's draft *Operating Manual*, dated March 2011, said that "resources are fully stretched".[202] We asked the Minister if he expected public law cases to remain at their current level. He told us that:

> I fear they will, and the 882 care applications in March represented the highest monthly figure on record. There has been an increase of 35% in care and supervision cases over the last couple of years, post-Baby Peter. That is a huge increase for any organisation to deal with, let alone one that was in a relatively fragile state, as Cafcass was at that stage.[203]

172. As we have seen, just the current rate of increase in public law cases will put a huge strain on Cafcass, especially if the number of open cases Cafcass has to deal with continues to rise even faster than the number of new cases. However, there are other factors which have the potential to exacerbate the situation. Any delay in the rest of the court system increases Cafcass's workload by increasing the number of open cases and the size of the files. In addition, cuts to local authority budgets have the potential to impact on Cafcass. We heard that 40% of care cases currently reaching court do so without the local authority having carried out a core assessment.[204] This can result in Cafcass being asked to do the work, or in the case staying open longer while the local authority or an expert witness does the work. Cafcass's draft *Operating Manual* involves a triage system looking at the quality

201 HC [2010–11] 439

202 *Operating Manual*, Cafcass, 2011, p 3

203 Q 322

204 Q 200

of the local authority's work. In cases with "significant gaps" the guardian will need to "do more social work".[205]

173. **While the exact figures are disputed, it is clear that Cafcass has made substantial progress in reducing the number of unallocated and duty allocated cases in public and private law. We welcome this progress and hope that it can be maintained. It continues to be a cause for concern, however, that Cafcass was unable to reassure us that, in the 221 cases allocated to managers, those managers were working actively on all those cases. We call on Cafcass to measure and monitor the amount of work carried out by managers in cases allocated to them in order to ensure that genuine progress is made and that these cases are not simply moved off the unallocated list to make those performance statistics look more acceptable. We expect Cafcass to report back to us on this point at the earliest reasonable opportunity.**

174. **We share the concerns of the Committee of Public Accounts about the ability of Cafcass to sustain its recent progress given that there is no sign of a future fall in the number of care applications. We are also concerned about the ability of Cafcass to cope with a range of potential future stresses, including any restructuring of itself or of the court system, any additional delays in the court system, and cuts to local authority budgets (which could lead to more poorly prepared cases reaching court).**

Management

Self-employed guardians

175. Cafcass uses a mixture of directly employed staff, self-employed staff, and agency staff. The Association of Lawyers for Children told us that: "even before its inception in 2001, Cafcass was opposed to the use of self-employed guardians, [...] In 2009, despite increasing waiting lists, Cafcass issued a directive that no further cases would be allocated to self-employed guardians. By March 2010, the number of self-employed guardians had reduced to 311."[206] Nagalro suggested that:

> there is significant spare capacity within the self-employed workforce to take on new cases, although this group continues to be substantially underused by Cafcass. [...] Instead, numbers of more expensive agency staff have been greatly increased. Many are inexperienced in the role but are likely to ask fewer questions about the way the role is being re-defined.[207]

The Interdisciplinary Alliance for Children agreed, saying that "there is a considerable degree of resistance and hostility to using self-employed guardians. In fact, agency staff are now preferred to self-employed guardians, at much greater expense.[208]

176. Mrs Justice Pauffley, a High Court judge specialising in family law, explained the benefits of self-employed guardians: "it is [...] a major anxiety that the self-employed

205 *Operating Manual,* Cafcass 2011, p 11

206 Ev w62

207 Ev 46

208 Q 229

guardians, generally the more mature and more experienced guardians, are viewed by some areas as being too expensive. In the judges' experience, those are precisely the individuals who are best able to help in private and public law cases."[209] In contrast, the British Association of Social Workers described the problems with some agency workers:

> agency staff have been taken on who may be very unsure of their role, require support and assistance from colleagues and subsequently more input from management which ends up costing more money than a flexible workforce.[210]

177. Cafcass provided us with the relative costs of different types of staff:

- Average FCA Agency Rate 2010/11 (hourly rate), £38.93;
- Average FCA salaried (hours exclude London Weighting (which would raise the figure), and Annual Leave & Bank Holidays to allow a better comparison), £30.34;
- Self-employed hourly rates, £30 (£33 London).[211]

178. In answer to a written parliamentary question on 17 May 2011, Cafcass disclosed its spend on different types of staff.[212] This showed that expenditure on self-employed contractors had fallen, while the amount spent on agency social workers had more than doubled in a year:

Financial Year	Total spend for self-employed contractors £	Total spend on agency social workers £	Total spend non social work agency staff £
2008–09	7,500,053	2,548,593	3,930,365
2009–10	6,974,733	6,100,693	3,957,246

179. The Minister responsible for Cafcass, Tim Loughton MP, told us that:

> [the use of self-employed guardians] is largely an operational matter for Cafcass, but I agree with the comments of the judge [Mrs Justice Pauffley]. There is a great deal of expertise in those self-employed workers. There used to be many more of them working within Cafcass before the reorganisation back in 2003, who did a rather good job. Part of the problems with Cafcass now is the haemorrhaging of some of those staff going back 10 years.[213]

180. Oversight of Cafcass is a matter for the Department for Education. However if Cafcass is not using its resources efficiently to maximise the number of experienced staff, this contributes to delays in allocating cases to Cafcass workers, and in completing reports, which in turn impacts on the entire family justice system. **We are puzzled and concerned**

209 Q 172

210 Ev w112

211 Ev 164

212 WPQ, *Official Report*, 17 May 2011, col 412–3W

213 Q 320

by Cafcass's continued aversion to the use of self-employed guardians, especially when the amount it spends on agency social workers has more than doubled in a year. Self-employed guardians are cheaper than agency staff and no more expensive than directly employed staff. At the same time they offer greater flexibility, and their expertise is valued by the judiciary. Cafcass should be making considerably greater use of self-employed staff, particularly in the geographical areas where it has difficulty recruiting.

Frontline and non-frontline staff

181. Cafcass has a ratio of non-frontline to frontline staff of 35:65, a figure that Cafcass described as the result of a "draconian cut",[214] pointing out that the figure had come down from 40:60.[215] Baroness Howarth told us that:

> When I joined it was 1:50. You could say that is a better ratio in terms of management. It is a very poor ratio in terms of supervision. Those supervisors need to be seen very much as the front line because without them we can't actually ensure quality, and it is the recommendation of anyone who looks at social work.

182. Cafcass supplied us with benchmarking figures from other agencies within the responsibility of the Department for Education. These did not look at the number of frontline staff, but did show that the amounts spent by Cafcass on HR, legal, knowledge and information management, and finance were comparable with other agencies Cafcass has the lowest spend on communications of any of the agencies. It also has the lowest percentage of staff working on communication by a factor of five.[216]

	DfE	NCLS	PFS	QDCA	TDA	Cafcass	CWDC	BETCA	Ofsted
Percentage Cost of the Finance Function	0.36	1.17	1.95	0.77	1.28	1.04	0.43	1.06	1.83
Percentage Cost of the HR Function	0.7	1.2	0.5	0.9	0.7	1.3	0.3	1.8	1.4
Percentage Cost of Information Technology	0.3	5.3	3.5	4.7	5.0	2.5	0,9	2.7	5.8
Percentage Cost of Communications	8.1	6.0	3.6	7.4	21.6	0.7	13.7	8.1	1.1
Percentage Cost of Legal Services	0.6	0.4	-	1.5	-	0.9	-	1.2	0.4
Percentage Cost of knowledge and information management	0.2	0.18	0.13	-	0.2	0.18	-	0.16	0.18

Source: DfE- Department for Education;NCLS- National College For Leadership of Schools and children's services; PfS- Partnerships for Schools; QDCA- Qualifications and Curriculum Development Agency; TDA- Training and Development Agency for Schools; CWDC- Children's Workforce Development Council; and BETCA- British Educational Communications and Technology Agency

214 Q 264

215 Cafcass told us that using the Secretary of State's definition of 'front line' 91.5% of its staff were frontline but that this included frontline business support staff and first line managers. The figures given here are for those staff who work with children.Q260-273

216 Ev 157; All figures are 2009–10 There are "some recognised anomalies within definitions for some functions". IT costs excludes the often 'one off' costs of transformation projects.

Draft Operating Manual

183. We also discussed Cafcass's draft *Operating Manual* for 2011–13. This will be the first time Cafcass has produced a document of this type. The draft *Operating Manual* has sections on Value for Money, Corporate Services, and Proportionate Service Management with "20 thematic areas" managers need to be good at.[217] We expressed concerns that the document was process driven, and not useful for staff. Baroness Howarth told us that: "we accept your criticism absolutely. In fact, I have been talking to Anthony [Douglas, Chief Executive, Cafcass] today about whether or not we should have put this out at this stage. The thing is that we want our staff to be able to add their perspective to it."[218] While we welcome the fact that Cafcass has accepted our criticisms that the draft Operating Manual is too process driven and not sufficiently user-friendly for staff, and has said that it will amend the document, we are concerned that the initial draft is indicative of the mindset of Cafcass's senior management.

184. We did not discuss these specific issues with the Minister, but he told us about his concerns with the management of Cafcass:

> Why is it that within the same organisation they can get things quite right in one part of the country and quite wrong in another part? I think there is poor dissemination of best practice, which, to an extent, is down to management. It is management at the top but also management at regional and local level. But then you could say that, ultimately, it is the responsibility of the national management to get it right. [...] Are they actually talking to those areas which are doing it better now? If they are not, why not, and why haven't management done something about it?[219]

185. **Proposed changes to the family justice system in the Interim Report will, if implemented, make demands on Cafcass in terms of change management. It will be crucial for management to deliver that change in ways which support the staff (and self employed and agency workers) to deliver the necessary services for children. The recent experience of Cafcass managing staff, communicating with stakeholders, and the production of the very imperfect draft Operating Manual all indicate that Cafcass management needs urgently to take steps to improve the way they communicate with staff and with others working in the family justice system.**

186. **Whilst we recognise the need for Cafcass to be a managed service and for its staff to be supported, the appointment of experienced social workers could justify a lighter touch in management, allowing professional staff more discretion about the way they carry out their role than the detailed and process driven Operating Manual would suggest. This is the future for social workers Professor Munro has set out in her report. Cafcass should look at the lessons that it can learn from her report and adopt Professor Munro's proposed approach.**

217 *Operating Manual*, Cafcass 2011, p 26

218 Q 290

219 Q 315

Service Cafcass provides to children

The current situation

187. Cafcass's website tells children what they can expect from their Cafcass worker:

> Because children don't usually go to court, it's important that someone explains your side of the story. Your Cafcass worker will meet with you a number of times and spend time getting to know you. They will help you understand what is happening in court and they will make sure the family court hears what you have to say.[220]

188. The website also says that the guardian is a good person for the child to talk to if they have questions or want more information.[221] As we have already noted, the President's Interim Guidance was designed to allow Cafcass to provide a "safe minimum service", by focussing on safeguarding and task-focused work and providing reports on specific issues rather than on general welfare. However, we received a great deal of evidence that while Cafcass has been successful in reducing delays and unallocated cases, the service offered to children had suffered.

189. A report in 2010 by the Children's Rights Director for England surveyed 58 children. It found that: "many of the children and young people in our groups did not know what Cafcass Guardians [...] did. Even though many children in the groups had experience of decisions being made about them by courts, few could remember having had a Guardian." The children spoke of wanting to have someone speak for them in court, and someone to explain what was happening to them, work Cafcass is supposed to undertake.[222]

190. Powerful evidence to highlight this problem came from Dr Freedman, a consultant psychiatrist with expertise in this area, who told us:

> five years ago when I spoke to a child, the child would tell me about concerns and tell me about the discussions that he or she had had with the guardian. That no longer happens. Now I will ask children, if they haven't mentioned it, "Have you discussed this with your guardian?" More often than not they will ask me, "Who is that?" If I name the guardian, if we are lucky enough to have a guardian by then in a case, they will say to me, "I think maybe I saw them once", or, "I haven't ever seen them.[223]

191. Dr Maggie Atkinson, the Children's Commissioner, agreed that children did not see enough of their guardians, saying that:

> we have got to a place in England where it seems to have helped to lessen delays in some places, but guardians themselves will tell you that they don't get to spend enough time—and enough quality time and consistent time—with the child concerned.[224]

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220 http://www.cafcass.gov.uk/cafcass_and_you/info_for_children.aspx

221 http://www.cafcass.gov.uk/about_cafcass/info_for_teenagers/going_into_care.aspx

222 *Children on family justice, A report of children's views for the Family Justice Review Panel*, 2010, Children's Rights Director for England

223 Q 213

224 Q 382

Cafcass's response

192. Anthony Douglas CBE, Chief Executive of Cafcass, accepted that Cafcass workers sometimes did not spend sufficient time with children, saying that: "practitioners under this degree of pressure do tell me that they are sometimes not able to see a particular child for too long in between contacts or visits. It is a genuine problem. One of the shifts we have to make is to find ways, despite all the other pressures and priorities we have, to do that."[225] Baroness Howarth said that "in a wonderful world where resources were ever-flowing and we had more qualified social workers, of course we would like young people to see more of their social worker. I personally would like young people to be able to see more of social workers—their local authority social workers and maybe our workers—but we have to stay within our remit."[226]

193. Despite this apparent recognition of the issue, elsewhere Cafcass's evidence was more equivocal. Its written evidence stated that "given the nature of Cafcass' responsibilities in private law applications and the specific and time-limited role of the Children's guardian in public law care cases, the key issue to consider is the rationale and focus of direct work with children, rather than its quantum."[227] Also, Anthony Douglas questioned how much support some children actually needed from their guardian:

> I would say that some of the young people I speak to need a guardian a lot more than others. Also, many do have a lot of people around them. Some children are still terrifyingly isolated, but one of the advantages of the services that have built up over the last 15 to 20 years, far more than when I was a practising social worker, is that there are other people supporting children.[228]

194. Because of the wide variety in the nature of cases it is not possible to have a meaningful target or cap on workloads which is a simple number. Cafcass has created and is trialling a "workload weighting system". This is "intended to encourage the movement of staff towards the median position" depending on the nature of the cases an individual Cafcass worker has, that could be between 12 and 35 cases.[229]

195. Cafcass was also equivocal about the related issue of whether staff on average currently had too high a workload. Baroness Howarth said that "I am concerned about the pressure we put our staff under and whether or not we can achieve the quality level we are now looking for while we are dealing with the quantity we have."[230] However, when Mr Clark was asked if the current median staff workload was too high he said "It is possible, but I don't think so."[231]

196. Cafcass's draft *Operating Manual* provides an illuminating insight into the priority, or lack of it, placed on ensuring front-line staff spend enough time with children. It talks a lot

225 Q 283

226 Q 281

227 Ev 157

228 Q 284

229 Ev 157

230 Q 285

231 Q 276

about "proportionate" working. It defines proportionate as "doing no more work than in necessary", which it further defines as "indispensible or essential", something it calls a "high test". The section on public law does recommend that guardians should be "more actively involved if the team [around the child] has no other professionals or safe carers safeguarding and speaking up for him/her."[232] It also says that "children's guardians will always communicate with children and young people to a high professional standard and ensure that older children in public law can contact them by email, text, etc."[233] However, it seems to us there is insufficient weight placed on the needs of the child. There is no mention of the need to keep children informed about the progress of their case, about supporting children in private law cases, or about the importance of developing a relationship with the child. The *Manual* talks about using a "watching brief" in "fallow periods" during which the guardian should keep in touch with the child's solicitor and the local authority, but there is no mention of the child, who may well be wondering why nothing appears to be happening with their case.

197. In oral evidence we put some of these concerns about the draft *Operating Manual* to Cafcass. Baroness Howarth told us that:

> In getting it into the wider remit, what I think we have missed is the trick of all the material about the direct work with children which will go into it. We were talking today about: maybe we should have put that in before it got more widely circulated. But we wanted our staff to have a first draft of a document on which they could then come back and say, "These are the areas we would like to add to."[234]

198. The Minister responsible for Cafcass, Tim Loughton MP, had a very clear view about whether Cafcass workers spent sufficient time with children. He told us that:

> despite the best intentions and some very good people working within Cafcass as guardians and others, the amount of quality time that they do spend, or are able to spend, with the actual children is far too low in many cases.[235]

199. **The entire family justice system should be focused on the best interests of the child. Cafcass as an organisation is not. We accept that Cafcass has had to make difficult decisions in order to reduce delays and the number of unallocated and duty allocated cases. However, in order to make progress Cafcass has had to offer a "safe minimum" service, and the amount of time that Cafcass workers currently spend with children is unacceptable in the long term. Cafcass needs to give its workers the opportunity to do what they want to do: spend more time with children. This will involve a change in management culture, and the wholesale re-writing of the draft Operating Manual to focus on identifying and meeting the needs of individual children. Cafcass will also have to re-examine its staff's workload. The current median workload may well be too high to enable Cafcass workers to spend enough time with children. This should not be done at the expense of letting delays escalate, however. There is no doubt that some of**

232 Operating Manual, Cafcass 2011, p 13

233 Operating Manual, Cafcass 2011, p 3–4

234 Q 290

235 Q 323

the time spent in managing the system could be redeployed to spending more time with children.

The case for major change

200. We heard arguments for and against any major restructuring or reform of Cafcass. The Interdisciplinary Alliance for Children[236] produced a *Draft Proposal for an Alternative Model for the Future Delivery of Court Services to Children in Family Proceedings in England.* The proposals included replacing Cafcass with a Family Justice Commissioning Board. This would allocate resources to 39 Family Court Welfare and Child Representation Units, which would commission services locally from a mixed range of Family Court Social Work Practices including practitioners working together in co-operative enterprises. The whole system would be the responsibility of the MoJ, not the Department for Education. We asked Martha Cover, from the Interdisciplinary Alliance for Children, why Cafcass could not be reformed. She told us:

> We have anxiously considered the possibility of reform of the organisation rather than abolition and starting again. But we have come to the conclusion, after a lot of debate, that the culture is so entrenched, and the inability of the organisation to take on board and to change to meet the concerns of all of the other partners in the family justice system is such, that we simply have to start again.[237]

201. However, the Alliance was not able to cost its proposals.[238] We were also concerned about how such a devolved system would be accountable and avoid duplication. The Interim Report also looked at the Alliance's proposals and concluded that:

> particularly in the short term, [there would] probably be a shortage of social work provision in some areas of England and Wales; in light of the current national shortage of social workers, and relative immaturity of the existing social work practice pilots, a centrally managed court social work function is preferable to a purchaser-provider commissioning structure.[239]

202. On 11 November the Committee of Public Accounts (PAC) published *Cafcass's response to increased demand for its services*[240] which said that "Cafcass, as an organisation, is not fit-for-purpose". Despite this, the Report did not recommend structural change, but instead made a number of recommendations including: better data collection, managing staff members' caseloads, managing sickness, performance-managing managers, and raising morale. The PAC commented on the impact of the change that had already taken place on staff: "Cafcass acknowledged that the morale of its staff was unacceptably low

236 The Interdisciplinary Alliance for Children proposal is supported by: ALC (Association of Lawyers for Children); NAGALRO (Professional Association for Children's Guardians and Children and Family Reporters and Independent Social Workers); FLBA (Family Law Bar Association); RCPCH (Royal College of Paediatrics and Child Health); Office of Children's Commissioner; Great Ormond Street Hospital; Grandparent's Association; Aire Centre; Adoption UK; BAAF (British Association of Adoption and Fostering); Children's Legal Centre; NYAS (National Youth Advisory Service); CRAE (Children's Rights Alliance for England); Together Trust; BASW (British Association of Social Workers); and Women's Aid

237 Q 219

238 Q 224

239 Interim Report, p 57

240 HC (2010–11) 439

before 2008, and said that staff had become tired of constant change". Linda Lee from the Law Society cautioned in oral evidence to us that: "if you throw out Cafcass and replace it with something else, the risk is that you just create a new set of problems you haven't addressed. It is important that we look at the problem, why it is occurring, and not try and address it by some other lever over here. We should look at the problem in pure management terms of a business."[241] Baroness Howarth, told us that:

> my great anxiety now is that having just reached some sort of stability—and we will still be criticised because we can't please everybody with an organisation that deals with what we deal with—that stability will be destabilised through the Family Justice Review. Our job is to try and keep that stability and to meet our critics.[242]

203. The Minister, Tim Loughton MP, told us why he had not made any major changes so far:

> Some people in the past have said that we should scrap Cafcass altogether, but you have to have somebody doing that job. [...] There are a number of reforms and improvements going through with Cafcass that are beginning to bear fruit. There have been some signs of improvement. On that basis, we deferred any decision about the actual future structure of Cafcass until after [the Family Justice Review].[243]

204. The Interim Report said that "we have not attempted an in depth study of Cafcass's effectiveness"[244] and did not comment on the quality of the management there. Apart from its comments on the Interdisciplinary Alliance's proposals it did not discuss the pros or cons of major changes to Cafcass. The Interim Report's conclusions and recommendations on Cafcass included:

- Cafcass should become part of the new Family Justice Service;[245]
- Some "smaller changes" to the way guardians work with children's solicitors including less detailed scrutiny of the child's care plan while continuing to help children understand what is happening in proceedings and to enable them to participate.[246]

241 Q 136

242 Q 285

243 Q 312

244 Interim Report, p 71

245 Interim Report, p 10

246 Interim Report, p 133

205. We asked the Minister for his reaction. He told us that:

> We are not going to make a final judgment until we have got the Final Report but [...] We all see a deal of logic in that direction. There is a lot of work to be done on the detail of a transition, the status of Cafcass within a court service within the MoJ and how we retain the integrity of a board of Cafcass. [...]In principle, that direction, probably, has met with a favourable response from both Departments, but then you have to start thrashing out the detail and that is a rather more complicated process.[247]

206. **We agree with the Interim Report that Cafcass should be made part of the proposed new Family Justice Service. However, we believe that in itself, this will not be enough. It needs to be the first step in a series of reforms designed to transform Cafcass into a less process-driven, more child-focused, and integral part of the family justice system.**

207. **We call on the Family Justice Review to address directly the detailed future structure of Cafcass in its final report. We were interested in the suggestions we heard in oral evidence about the development of a wider range of providers, together with a more localised service (perhaps linked to the proposed new Local Family Justice Boards). Any future proposals will have to take into account that Cafcass operates a cash limited system and has to be able to deliver a timely and consistent service to all children, regardless of changes in the volume of cases, over which it does not have control.**

247 Q 312

7 Courts

Case management

208. Case management refers to the approach taken by the judiciary to progressing cases. A well-managed case will be resolved with the fewest possible hearings consistent with justice. The judiciary have not, in the past, viewed themselves, as case managers. Sir Nicholas Wall, President of the Family Division, told us that the need for case management in the family courts had necessitated a culture change: "historically, the English judge has seen him or herself as the arbiter who sits back and waits, decides the issue and then goes away. In family law that has completely changed. We are now case managers and we are in charge. We have a quasi-investigative inquisitorial role."[248] Mrs Justice Pauffley, a High Court judge specialising in family law, agreed: "It is the judge's job to case-manage proactively right from the off and to try to ensure that the case is dealt with in the most expedient way possible."[249]

209. Case management powers are contained in Part 4 of the Family Procedure Rules 2010. The process by which case management is carried out, however, varies between courts. Sir Nicholas identified this as a problem, telling us: "In some places where you have a very proactive designated family judge...you will find that cases go through speedily. In other cases...because of the number of players in the system and the need to fulfil article 6—which is an important factor in the equation—cases do slip."[250] Evidence that different courts conclude similar cases in different timeframes is subject to the concerns over the quality of the data we have noted elsewhere; however, a recent Ministry of Justice study on reducing delay suggested that some courts were completing care and supervision cases up to five months quicker than the national average.[251]

210. We heard evidence of multiple problems with case management, including judicial continuity, poor identification of issues at the beginning of a case, excessive use of expert evidence, the failure of parties to file statements or evidence as directed, and consequent repeated adjournments because cases were not ready for determination. On judicial continuity, Craig Pickering of Families Need Fathers told us "we've got members who've had nine or 10 judges in the course of several years".[252] One of the elements within effective case management is judicial continuity. Sir Nicholas agreed there was a problem:

> What tends to happen, particularly amongst the circuit judiciary, is that they sit in crime, civil and family, and often the case has to wait for a judge rather than the judge going to do the case when the case is ready. One of the things we are very keen to address is judicial continuity and management of cases, which means that the

248 Q 166

249 Q 163

250 Q 167

251 *Reducing Delay—what works best?*, Ministry of Justice, 2011

252 Q 1

> judge can hear the case when the case is ready to be heard rather than the case having to wait for the judge.[253]

211. **Judicial continuity not only allows for effective case management and efficient use of judicial time but is also an important signal to parties, above all children, that their case is being treated with the respect it deserves. We welcome the President of the Family Division's recognition of this issue, and willingness to reconsider the current approach to assigning the judiciary to cases. Further, we welcome the senior judiciary's commitment to improving case management in the family courts more generally.**

212. In evidence to us, the judiciary themselves identified similar problems with case management to those that we had heard complaints about from other witnesses. Mrs Justice Pauffley told us: "There is sometimes an insufficient focus on issues so that cases are given too long a time estimate" and

> The wait for reports [...] sometimes causes more delay than any of us would want, but then it is for the judge, I would say, to reject an expert's time frame that is outside the child's time frame. The case has to be brought within something that is acceptable from the perspective of everyone. Sometimes cases are listed with a fact-finding that is perhaps unnecessary, so it is for the robust judge to case-manage that litigation so that the fact-finding is dispensed with and you get on with the process of deciding the child's future.[254]

Mr Justice Ryder, who was the author of the Public Law Outline (PLO), identified further issues with case management and the challenges posed by changes in family law:

> a fairly well demonstrated increase in complexity, for example, caused by international cases, multiple interpretation being required and new problems. Children in asylum circumstances present assessors and courts with quite interesting and diverse problems...the delay caused by sometimes too many experts, but certainly lack of expert availability, and also the lack of appropriate assessments at the time when we need them. They take too long and they are not always of the quality that one would want the first time round. That causes a delay...[and] poor issue analysis...You need both the advocates and the judge to get together with one mindset, which is to problem-solve a case, not to allow it to become over-sophisticated [...][255]

213. It was clear from the recommendations of the Family Justice Panel and the evidence we heard from the judiciary that there is broad agreement as to the way forward, both with case management and the wider challenges posed by a multi-party and resource-stretched system where decisions are intrinsically time-sensitive. The Panel recommended that the judiciary working for the new Family Justice Service must have a greater focus on

253 Q 165

254 Q 163

255 Q 164

leadership.[256] Mr Justice Ryder (from whom we heard evidence before the publication of the Family Justice Panel Interim Report) told us:

> you need a local understanding which is very strong, with local leadership of the family justice system which is strong. Your designated family judge, your Family Division liaison judge, is key to making this work. You have to have, and should have, business committees with each of the agencies represented on them where they discuss just the problems that you are identifying.[257]

214. The Minister told us that:

> One of the immediate problems that we saw when we came into Government was the lack of joined-up thinking between Departments and, indeed, with the judiciary. We have immediately acted to rectify that. At the highest level, we now hold quarterly meetings between myself, Mr Loughton and Sir Nicholas Wall, President of the Family Division. Those have proved to be very helpful and hopefully are providing a degree of leadership at the highest level that did not exist previously.[258]

215. The Family Justice Panel also recommended: "Judges with leadership responsibilities should have clearer management responsibilities. There should be stronger job descriptions, detailing clear expectations of management responsibilities and inter-agency working."[259] Mr Justice Ryder explained stronger performance management and multi-agency communication had recently been introduced to ask the questions crucial to reducing delay:

> recently, we have had local performance implementation groups and a national performance body as well, with the object of saying, "Look, is listing working in your area? Is local authority assessment process working in your area? Have we a shortage of guardians? Are they taking too long? Are we using too many experts? Are the police co-operating?" You put together each of the agencies in an interdisciplinary environment. It has to be a public, transparent environment where people can actually hear what the arguments are for and against improvements.[260]

216. He noted, however, that some areas were working better than others:

> in areas where you do not have that interdisciplinary co-operation, which can be for all sorts of local strategic reasons—quite often funding but not necessarily so; it may be lack of leadership in one or more of those organisations—the designated judge and the liaison judge will find difficulty trying to get the improvement that you will see elsewhere. That should not stop them trying.[261]

256 Interim Report, p 64

257 Q 166

258 Q 294

259 Interim Report, p 62

260 Q 166

261 *Ibid.*

217. Earlier attempts to tackle case management problems and inter-agency working provide evidence of how reform can work but must be applied consistently across the system. Introduced in 2008, the PLO[262] was a key reform arising from the 2006 Review of the Child Care Proceedings System in England and Wales, issued jointly by the Department for Constitutional Affairs (now the MoJ), the Department for Education and Skills (now the Department for Education) and the Welsh Assembly Government. The PLO introduced a more streamlined process intended to minimise unnecessary delay, with greater emphasis on case management and preparation by advocates. The timetable for each case would be focused around the needs of the individual child involved. The PLO sought to shift the balance in public law cases from an emphasis on a specific target time for completion of cases, to a more flexible requirement for cases to proceed at a speed appropriate to meet the needs of the individual child, known as the 'Timetable for the Child' whilst maintaining the overall objective of completing cases within 40 weeks.[263] Mr Justice Ryder, one of the authors of the PLO, told us that the PLO had "has fundamentally changed the landscape because we are talking about a problem-solving culture under the PLO which was not the level playing field, the judge referee system, that we case-managed cases with before."[264]

218. In 2009, the MoJ commissioned an early evaluation of the PLO. This concluded that, when implemented appropriately to the needs of the case, the PLO provides a clear structure for care and supervision cases. However, it also found that there was inconsistency in compliance with the PLO requirements.[265] This was reflected in a recent study by our specialist advisor, Professor Judith Masson, and Julia Pearce, which found little evidence of case management in compliance with the PLO in three of the four areas they studied.[266]

219. Poor compliance with the PLO creates more work for other parties in the family justice system. In November 2010, the Committee of Public Accounts found that the issue of sub-standard work by local authorities in care proceedings leading directly to an increase in the workload for Cafcass, which we noted above, is a result of not adhering to the PLO:

> The quality of assessments on care cases by local authority social workers varies. Poor quality assessments place an additional burden on Cafcass as the courts must request a new assessment from Cafcass family court advisers if they cannot rely on the work of local authority social workers. The Department should work with local authorities to ensure that they are fulfilling their responsibility under the Public Law Outline to undertake appropriate pre-action work with the family, and to produce good assessments so that cases can proceed without requiring extra interventions or investigations by Cafcass.[267]

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262 Following revision in April 2010, now known as the *Practice Direction Guide to Case Management in Public Law Proceedings*, but commonly known, and referred to here, as the *Public Law Outline* (PLO).

263 The 2010 revision to the PLO now requires cases to be completed in 30, 50 and 80 weeks.

264 Q 167

265 Jessiman *et al*, *An early process evaluation of the Public Law Outline in the family courts,* 2009, Ministry of Justice.

266 *Just Following Instructions? The representation of parents in care proceedings*.(2011) J. Masson and J. Pearce

267 HC (2010–11) 439

Litigants in person

220. Aside from a small 2005 study carried out by Professor Richard Moorhead for the then Department of Constitutional Affairs, there is very little evidence on either the impact of litigants in person appearing in the court system, the experience of such litigants or the number of people who currently represent themselves. The Minster told us that while the Ministry of Justice believed the number of unrepresented litigants in the family courts was "significant", the Department did not know how many there were.[268] We can only repeat what we have said elsewhere, in this Report and during other inquiries, that without robust data evidence-based policy making becomes impossible, and the potential for unintentional consequences arising from reform increases exponentially.

Numbers

221. During the course of our inquiry into the operation of the family courts, the Government consulted on proposals to end legal aid for most family law cases, except those where there was evidence of domestic violence, or where mediation was to be facilitated. The Ministry of Justice estimates that at least 210,000 people pursuing cases in the family courts will no longer be eligible for legal aid.[269] The Government believes that removal of legal aid will force more litigants into alternative dispute resolution. The Minister, Jonathan Djanogly MP, told us that, while the MoJ agreed that there would be an increase in the number of litigants in person in the courts: "Given that we think the overall numbers [of litigants] going to court will reduce, we do not see the additional pressures on the court being significant."[270]

222. During our legal aid inquiry Sir Nicholas Wall told us: "if public funding is removed from private law applications...then there will be a massive increase in litigants in person. If you want maintenance or to be maintained, or you want to have contact with or look after your children, you are not going to be prevented from doing so by an absence of public funding." When he appeared before us in this inquiry, the President told us he in fact feared an increase in the numbers of private law applications: "Unlike other areas of the law, people will not give up simply because they do not have public funding. There are other areas of the law such as immigration and so on where, no doubt, swathes of work may be cut out because there is no public funding. But, in family work, there is no doubt at all that...there will not be a diminution; there will be an increase, if anything, in the people who litigate."[271] Sir Nicholas told us that, without legal advice on the strength of their case at an early stage, parents would simply refuse to compromise outside court.

223. The Family Justice Panel agreed that "greater numbers of people" would be representing themselves in the family justice system. It also noted that implementing a policy which sought to put parents off from pursuing a dispute meant that some children, who would otherwise enjoy a relationship with their parent would simply lose contact.[272]

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268 Q 341

269 Government's Proposals for the Reform of Legal Aid in England and Wales, Cm 7967, 2011, Ministry of Justice

270 Q 339

271 Q 183

272 Interim Report, p 155

224. **The removal of legal aid from applicants in most private family law cases will increase the number of litigants in person in the family courts. It is self-evident that parents are unlikely to give up applications for contact, residence or maintenance for their children simply because they have no access to public funding. We are concerned that the Ministry of Justice does not appear to have appreciated that this is the inevitable outcome of the legal aid reforms.**

Impact

225. Mr Djanogly also told us: "We do not necessarily see there being an increase in time taken in all types of case because of an increase in the litigants in person. The evidence actually shows that, in some types of case, having litigants in person on both sides may reduce the time taken in court. We cannot take these things for granted."[273] We asked the Ministry of Justice for the evidence to which the Minister referred. The Department supplied us with a copy of a written parliamentary answer showing the average time taken for family proceedings:[274]

Average duration of cases completed in county courts or the High Court in England and Wales between 1 April 2009 and 31 March 2010, by legal representation

	Divorce		*Public law*		*Private law*	
Legal representative	*Mean duration (weeks)*	*Number of decrees absolute*	*Mean duration (weeks)*	*Number of orders*	*Mean duration (weeks)*	*Number of orders*
Both applicant and respondent	55.7	40,088	54.5	680	37.8	23,738
Applicant only	44.6	44,904	36.5	46	27.9	9,280
Respondent only	59.7	2,707	56.2	2,575	44.7	3,573
Neither applicant nor respondent	34.1	28,796	34.1	81	38.6	2,710

Notes:
Figures are given where the applicant/respondent's representative has been recorded or left blank. Therefore, it should be noted that parties without a recorded representative are not necessarily litigants in person.
Divorce:
1. Figures include dissolutions of marriage or civil partnership and annulments of marriage or civil partnership.
2. The duration is calculated from the earliest recorded petition date to the earliest recorded decree absolute date.
3. Figures exclude cases where there is no record of a petition and cases where the decree absolute date is before the petition
4. Time from petition to decree absolute may be affected by the time it takes the applicant to apply for the decree absolute once the decree nisi (first order) has been issued. In normal circumstances the applicant may apply for the decree absolute six weeks after the decree nisi has been issued, but (s)he may choose to wait longer than this.
5. The mean is the total of all of the durations, divided by the number of decrees absolute.

Public and Private Law:
1. Private law refers to cases brought under the Children Act 1989 where two or more individuals, usually separated parents, are trying to resolve a private dispute about their child(ren). Public law refers to child welfare cases where a local authority, or other authorised person, is stepping in to protect a child from harm or neglect.

273 Q 345

274 WPQ, *Official Report*,16 March 2011, col 412–3w

2. Private law includes cases where a section 8 order (contact, residence, prohibited steps, specific issue) was made or where a parental responsibility order was made. Public law includes cases where a care order or a supervision order was made. This does not necessarily mean that these were the orders applied for.
3. The durations in both case types are calculated from the earliest application date (or the date the case was transferred in to the court if that is earlier) to the date of the order event.
4. A case is defined as applicant represented if at least one applicant in the case has a recorded representative. Similarly with respondents.
5. The mean is the total of all of the durations, divided by the number of orders.

Source: HMCS FamilyMan system

226. A true picture of the impact on the courts of unrepresented litigants only appears when cases involving "active" parties are considered. Cases where a party either does not appear or does not oppose the application, for example an uncontested divorce, unsurprisingly take less time. Family cases involving unrepresented parties who take an active part in proceedings took longer, parties being less likely to settle.[275]

227. In addition to our grave concerns over the quality of the data on which the Ministry of Justice relies, the assertion that cases may take a shorter time when parties are unrepresented conflicts with all the other evidence we have heard about the experience of all parties in cases involving a litigant in person. The consensus was that litigants in person create delays, in some cases simply through lack of experience and awareness of procedure, and in others due to mental health, literacy and substance abuse problems. Sir Nicholas Wall told us:

> my experience of people who are not represented by lawyers is that they come in all shapes and sizes. Obviously some of them are very good; some of them are very nervous; some of them are very upset; and some of them are disturbed. But they do undoubtedly slow the system down.[276]

228. When we put the Ministry of Justice's assertion that cases in which a litigant in person appears may actually take less time to Mr Justice Ryder, a High Court judge specialising in family law, he told us "I cannot think of a single case where that would be correct in the time that I have been sitting."[277] He also pointed out that a high number of cases that get to court are settled at the first hearing:

> at this first appointment in private law about 70% of all cases—it varies across the country—are conciliated by the district judge or, in those areas where the family proceedings court does this, by the legal adviser with or without the magistrates. That is an extraordinary percentage of cases that don't fight in a traditional way through the courts. If we are then going to remove legal aid from those cases that need some legal assistance, the inevitable effect is going to be significant upon the judges.[278]

275 Moorhead and Sefton 2005, Department for Constitutional Affairs.

276 Q 182

277 Q 186

278 Q 183

229. Mrs Justice Pauffley described the difficulties the judiciary face in conducting hearings involving a litigant in person effectively and efficiently:

> It is extraordinarily difficult to manage a litigant in person. We all have a duty to listen to the arguments that they present. It would be rude and offensive, and, frankly, one might say, a denial of justice, to say, "I'm not interested in this; move on." There is only a limited amount of that in our armoury. In most cases a litigant in person will add enormously to the length of time a case will take, not least because most of them will want to litigate every last little issue.[279]

230. The judiciary's evidence that litigants in person cause delays in the family courts received support from other witnesses. Fiona Weir of Gingerbread told us "litigants in person are often one of the main causes of delays within the court system because the fact that they don't understand what is going on leads to a lot of delays."[280] The National Association of Child Contact Centres observed: "Timetables set out to aid the parties are rarely complied with [when litigants represent themselves] and LIPs lack the detachment and experience to drop untenable, weak or irrelevant arguments and to accept unpalatable decisions rather than pursuing doomed appeals leading to delay, increased costs and frustration for the represented party as well as the judge which may of itself hinder compromise."[281] Stephen Cobb, of the Family Law Bar Association, responding to the charge that lawyers could be expected to say that litigants in person caused delays in the system, said:

> Professor Richard Moorhead's 2005 research for the then Department for Constitutional Affairs concluded that the working of the family court was significantly impaired by the involvement of litigants in person in the courts. So it is not the Family Bar that is saying this: it is Professor Richard Moorhead and...probably anyone you ask who works in the family courts.[282]

231. The Family Justice Panel agreed that litigants in person cause delays in the system "We share these concerns, both as to the ability of litigants in person to conduct their case effectively and as to the inevitable increased burden in terms of time and resources this will place on the court."

232. Catherine Lee, Director of Access to Justice at the Ministry of Justice, told us:

> we did promise in the Legal Aid Reform consultation paper that we would be doing a post-implementation review specifically to look at the impact of litigants in person. We will be doing that. It will be a question of looking at the backlog, looking at the actual length of cases taken involving litigants in person and seeing whether there is a connection. As the Minister said, the evidence so far is not clear cut on the subject.[283]

279 Q 182

280 Q 113

281 Ev w72

282 Q 129

283 Q 345

233. When we repeated the Minister's evidence that cases with unrepresented litigants could take a shorter time to the President of the Family Division he issued an invitation: "I think he ought to come and sit with one of my colleagues or myself for a day with a litigant in person and then he might not give that evidence."[284]

Experience

234. Procedures and terminology in the family courts do not vary depending on whether a person is represented or not. As we heard from the judiciary and others, this is one of the factors that create delays when one or both parties are litigants in person. It also means the experience of court for many litigants in person is highly stressful. Fiona Weir, CEO of single parents' charity Gingerbread, told us a survey conducted by her organisation found that 78% of litigants in person found it "either difficult or very difficult to represent themselves in the court system."[285] The National Youth Advocacy Service told us that the experience of litigants in person led to a diminution in their confidence in the family justice system:

> The lack of understanding of court processes and the lack of legal advice results in unrealistic expectations of children's representatives, and protracted proceedings. This further increases delay and cost to public purse. This causes a lack of confidence in the system on the part of litigants, and has contributed to public and misguided campaigning, of which NYAS has direct experience. Children involved in the proceedings experience further trauma and uncertainty.[286]

235. We heard evidence about the experience of court for litigants in general, which we believe is applicable to the experience of litigants in person. Nicola Harwin, of Women's Aid, a charity supporting victims of domestic violence, told us that many of those using Women's Aid's services:

> feel very intimidated by the process of going to court and they don't really understand what's going on. They often feel very isolated...people feel that there's a pressure to agree. Indeed Lord Justice Wall said, as one of his conclusions from looking at the 29 Homicides report, that it was very important that people were able to give their consent freely and without pressure. I don't think it's very easy to do that. There's also the particular problem of having separate waiting rooms. Despite there being recommendations about this a number of years ago, there are still many courts where there aren't separate waiting spaces so that, if you are going to a hearing and are frightened of someone who is the applicant or the respondent, you are put in a position that's even more intimidating.[287]

Craig Pickering, of Families Need Fathers, agreed that the experience was intimidating, and said terminology such as "contact" and "residence" was alienating. Both Mr Pickering and Lynn Chesterman of the Grandparents' Association described involvement in the court

284 Q 186

285 Q 113

286 Ev w88

287 Q 26

process as akin to the feeling of being on trial, Ms Chesterman summing the experience up as "if somebody is making a decision: are you a good person or are you a bad person?"[288] Families Need Fathers had also found the Courts Service unhelpful and uninformative:

> The Courts Service, I have to say, is not great at communicating what is going to happen to you. If you look at their website, it is not what I would call user-friendly. A lot of courts around the country refuse to put up our posters saying "Come along to one of our self-help sessions. You can talk to people who have gone through similar experiences. We might even be able to ensure you don't have to come back to this court." They just won't let us put up the poster, which seems very strange.[289]

236. The Family Rights Group told us it provided "DIY information sheets" for litigants in person and the Family Justice Council Parents and Relatives sub-group was developing a leaflet setting out sources of specialist advice, although this support was vulnerable in the current funding climate.[290] The Government's response to the legal aid consultation stated that "the Government recognises that further examination of the system to support litigants in person is required and we intend to review this issue".[291]

237. **It is evident that non-lawyers accessing the family courts can find it a confusing and frustrating experience. While we accept that some steps have been taken by voluntary organisations to assist litigants in person, more clearly needs to be done and we welcome the fact that the Government is reviewing the available support system. We believe that the family court will need to become more attuned to dealing with parties representing themselves; and this will require procedures and guidance developed to accommodate the challenges posed by larger numbers of litigants in person.**

238. It appears the Ministry of Justice may be underestimating the difficulties for litigants in person in sourcing appropriate specialist advice. Mr Djanogly told us:

> On 6 April, the new Family Procedure Rules came into effect. These have been worked on for a long time. They have pulled together all the family legislation into one coherent set of rules. They will simplify those rules. They will simplify the application procedures. They significantly simplify the terminology involved within the system. All of these will greatly go to help litigants in person.[292]

239. The Family Procedure Rules 2010 constitute almost 300 pages of secondary legislation. While, as the Minister told us, they consolidate the procedural rules applying to cases in the family courts from the previous five sources, they are by no means written for litigants in person. Lucy Reed, a family law barrister and author of *Family Courts without a Lawyer: a handbook for litigants in person*, has commented that while "many large chunks

288 *Ibid*.

289 *Ibid*.

290 Ev w103

291 *Reform of Legal Aid in England and Wales: The Government Response*, Ministry of Justice, Cm 8072, p 159

292 Q 341

of the rules are...expressed in less lawyerly style...I still don't think the rules will win any Plain English Crystals."[293]

240. The Family Justice Panel made a number of recommendations on court procedure, including the creation of a two-track system in the family courts for complex and simple cases, where simple cases on a single narrow issue could be dealt with in a two-hour tightly managed hearing.[294] The Panel also suggests that the terms "contact" and "residence" no longer be used. It heard from an Australian judge that the move away from using these terms in 2006 had been "very beneficial."[295]

241. **We welcome the Family Justice Panel's recommendations on the creation of a two-track system in the family courts for simple and complex cases. We urge the Panel, however, to develop these proposals with unrepresented litigants in mind. In our view, this is the only realistic approach for robust reform of the family courts given the pending changes to legal aid in private law cases.**

Cross-examination by litigants in person where there are allegations of sexual abuse

242. There are currently no rules to prevent litigants in person cross-examining victims of alleged abuse, whether children or adults. Sir Nicholas Wall told us: "It is a real difficulty because in the criminal sphere there is a statutory intervention...A potential abuser cannot cross-examine a victim. In family law there is no such provision. It is enormously difficult."[296] The evidence we heard from the judiciary is that the courts have to operate an *ad hoc* approach to such cases. Mrs Justice Pauffley described possible routes to obtain representation for the alleged abuser:

> If a stepfather is accused by his adolescent step-children of having sexually abused them very seriously and over a number of years, you cannot have a man in that category cross-examining those young witnesses himself. It would be a denial of justice, and it would be emotionally the most upsetting of spectacles for any court to encounter. So you send them off to the Bar pro bono unit. You ring up chambers with whom you have perhaps a slight connection and you say, "Could you possibly send somebody along to represent this poor unfortunate?" But it is calling in favours, which is really outrageous in a civilised society.[297]

Mrs Justice Pauffley further stated that "The only other way I have seen it managed is for the guardian or the child's representative to shoulder the burden of cross-examining the young person with a list of questions provided by the accused, but that is less than satisfactory."[298]

293 http://pinktape.co.uk/2011/01/family-procedure-rules-2010-abridged-version/

294 Interim report, p 177

295 Interim report, p 163

296 Q 189

297 Q 185

298 Q 189

243. The Government's response to the legal aid consultation changed the proposals to include the provision of legal aid for the victims of domestic violence and the non-perpetrating parent in cases of abuse. We note, however, that this does not address the problem of cross-examinations by alleged perpetrators.

244. **The increase in litigants in person will give rise to more cases in which an alleged abuser cross-examines the person he or she is alleged to have abused. We recommend the Ministry of Justice considers allowing the court to recommend that legal aid be granted to provide a lawyer to conduct the cross-examination in such cases.**

8 Expert Witnesses

Background

245. In most contested cases about children the court will have reports from Cafcass, and in public law cases from local authority social workers. However, in most public law cases, and some private ones, the court requests extra information from one or more experts. Often these are medical or psychological reports, but reports from independent social workers and residential assessments are also used.

246. We heard evidence about the extent to which expert witnesses contributed to delays. A 2008 study found a strong correlation between the number of experts and the length of cases, but it was not possible to tell to what extent this was simply because these cases were more complex.[299] The evidence we received was unclear as to whether the main cause of delays was a shortage of experts, or unnecessary reports, or lack of case management by the judiciary.

A shortage of experts?

247. We heard strong anecdotal evidence of a shortage of expert witnesses. Barbara Esam from the NSPCC told us that: "there aren't enough experts around of sufficient quality. That means that the ones that are there are overworked and not available, which also causes delay."[300] *Just following instructions? The representation of parents in care proceedings*,[301] by Professor Judith Masson and Julia Pearce, quoted a judge as saying "you've got the problems of shortage of experts in some areas and long waiting times before they start work and produce a report in some specialties". Mr Justice Ryder told us in oral evidence that "the delay [is] caused by sometimes too many experts, but certainly lack of expert availability, and also the lack of appropriate assessments at the time when we need them."[302] The Magistrates' Association agreed saying that "experts in particular are in short supply and their reports take time."[303] Dr Freedman from the Consortium of Expert Witnesses told us that: "there are not many professionals able and willing to undertake Court work. This is because work for the Family Courts is difficult, time consuming, intellectually gruelling and emotionally demanding."[304] She told us that "this situation is particularly critical in London-based cases."[305] The Interim Report, which also identified a problem with a shortage of expert witnesses, said that there was a particular problem in some areas of the country, but did not identify which areas.[306]

299 Masson *et al*

300 Q 78

301 Masson and Pearce

302 Q 163

303 Ev w53

304 Ev 136

305 Ev w126

306 Interim Report, p 110

248. In contrast, a 2006 report for the Chief Medical Officer, *Bearing Good Witness*, suggested that most medical professionals who had not acted as experts had not been asked to do so. The Minister, Jonathan Djanogly MP, also disputed what we had been told. He told us that:

> I have also been told that there are no significant problems with access to appropriately publicly-funded expert witnesses in London. Different types of witnesses have different rates and the rates vary across the country, so maybe that is what people are looking at. But we do not see there being a problem in terms of people accessing experts in London.[307]

Unnecessary reports?

249. Harry Fletcher from NAPO told us in oral evidence that:

> I was an independent social worker a long time ago in care proceedings and often I was the only person who appeared apart from the local authority and people acting for the parents in court. Now I am sure that if I went into one of those proceedings there would be four or five people.[308]

250. However, he also noticed that the nature of cases had changed in recent years.[309] This point was made to our predecessor Committee in 2009, which heard that there had been a change in the nature of cases, with more cases involving clients with English as a second language and parents with learning difficulties.[310] If there has been a change in the nature of cases in recent years that could explain why there is a greater need for expert witnesses. However we also heard other possible explanations. Jonathan Ewen from Barnardo's suggested that:

> We believe that magistrates and judges are unnecessarily acceding to requests for further expert witnesses where, if they had greater trust in the social workers and the work that they prepared, that would not be necessary.[311]

251. The Interim Report found the same thing, concluding that there was a: "lack of trust in the judgement of local authority social workers, driven by concerns over the poor presentation of some assessments coming from often under-pressure staff. This increases the tendency to commission more reports and delay decisions."[312]

252. Jonathan Ewen went on to suggest that relations between the courts and social workers could be improved "by liaison committees, liaison forums, between the legal side and the local authority side."[313] Judith Timms from Nagalro told us that social workers could help tackle the lack of trust:

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307 Q 329

308 Q 202

309 Q202

310 Justice Committee, Eighth Report of Session 2008–09, *Family Legal Aid Reform*, HC 714

311 Q 83

312 Interim Report, p 113.

313 Q 83

> Sometimes as a guardian, in my practice, I've said in the past, "We don't need an expert in this case, because actually I can see what is needed, I feel I have the experience and I can put that across to the court." It is something to do with confidence in the role. I do think that social workers are sometimes sold short on how well equipped they are to go into court and stand up under cross-examination.[314]

253. Jonathan Ewen told us that the use of experts was due to a focus on the rights of the parents. He said that there was a culture which characterised the decision to remove a child or to grant a care order as a balancing act between the welfare of the child and the rights of the parent. This was wrong in law but had led to:

> a reluctance to go to the step of looking for adoption. As a consequence, adoption is being less used and judges and magistrates are much more likely to accept the idea of having expert witnesses to explore that particular issue, whereas we believe that the balance should be shifted back much more to seeing the paramountcy of the child exactly as that.[315]

254. We also heard that there was potential for more use to be made of people who were not "experts", but knew the child well, such as foster carers or teachers. The Minister, Tim Loughton MP, said that:

> There are people, I think, who should be available to give evidence in court who are rarely called on, such as foster carers. I go and speak to foster carers and rarely do they get asked into court to give their view on the future of a child they may have been looking after for months or even years, and yet they probably have a better-formed view than a Cafcass guardian, who has spent half-an-hour on the child in the last three months, but they are not asked.[316]

255. It should be noted, however, that there are different rules about the admissibility of testimony between expert and other witnesses. A foster carer could come to court and tell the court what a child had said to them, or how that child behaved. However, if the foster carer sought to draw conclusions as to why the child was behaving in that way, or what would be best for the child in future, questions would be raised by one of the parties about their qualifications to do so.

256. Our evidence reflected the of balancing the role of 'common sense' with the need for expert testimony. However, we also received case studies which showed the limits of common sense and the need for professional input in some cases:

314 Q 201

315 Q 81

316 Q 319

Not lying, but learning disabled[317]

A psychologist assessed a mother to determine if she had sufficient mental capacity to participate in proceedings about her child having suffered a non accidental injury. The Police and Local Authority were confident that she was lying. However, the cognitive assessment revealed that she had significant learning disabilities, probably acquired when she had meningitis as a child. Her disabilities were masked by well-established social skills, but her account of her own history and of the child's injury were vague. She appeared to be deliberately misleading professionals, but she was in fact a vulnerable and damaged woman, struggling to cope with pervasive cognitive difficulties.

Secret alcohol dependence[318]

A man claimed to have stopped drinking, despite a history of alcohol dependence. Liver function tests were essentially normal. The independent adult psychiatrist pointed out that essentially normal liver function tests can be present despite active alcohol dependence. He ordered hair-strand tests, which revealed hitherto unsuspected heavy regular drinking in the previous three months.

257. The Interim Report recommends less scrutiny by the court of the detail of the care plan. This could potentially reduce the number of expert witnesses needed. For example, if the court decides that a child should be taken in to care, and there is no family member available, the court will not have to consider whether the child should be placed in a specialist residential facility or in foster care, or to examine the services that the local authority should provide as part of the care package. However, this work will still have to be carried out by the local authority, at its expense.

258. **We are convinced that there are unnecessary expert reports in some family cases. We note the Minister's comments that greater use could be made of non-expert witnesses, including foster carers. However, foster carers have a distinct role from that of experts, and while they can be a valuable source of information they cannot replace experts in those cases where there is a genuine need for expertise.**

259. We heard evidence that the relationship between the judiciary and social workers can be problematic, and that this can lead to an increased demand for expert testimony. The judiciary needs to work with local authorities, Cafcass and social workers' representatives to address these issues, and to ensure social workers have the right training to enable them to present evidence authoritatively in court. We note that the Government has set up 42 local performance improvement groups bringing together local authority representatives, local judges, HMCTS, Cafcass and the LSC, and this is potentially a valuable forum to improve communications between the different elements of the family justice system. However, we think that, in addition, members of the judiciary in specific areas should meet local authority social workers and Cafcass staff to address the particular needs and concerns of all parties in those areas.

317 Ev w128

318 Ev w129

Case management and expert witnesses

260. As previously discussed in Chapter 7, we heard criticism about the lack of effective case management by judges. Expert witnesses told us about the impact of this lacuna in regard to their evidence:

> We are increasingly finding that our instructions from solicitors are influenced by the adversarial positions of the parties. We question whether this facilitates the expert witness helping the Court understand what may be best for the child. For example, increasingly, we find that because of their adversarial positions, solicitors ask us many, repetitive questions—50 is not uncommon—because each solicitor adds their own questions, and no one is in a position to synthesise the overall instructions.[319]

261. Longer reports increase the costs to legal aid, as experts are paid by the hour. They also contribute to delays as longer reports inevitably take more time to prepare. More worryingly, we also heard that the instructions were sometimes not in the best interests of the child:

> We also are finding that solicitors are increasingly attempting to 'protect' their clients by restricting our investigations. For example, it is not uncommon that we are asked to assess parents who are recently separated, and when we say that we need to interview the parents together, a solicitor may refuse. We believe that it is in the best interests of the child for the positions of both parents to be considered, in terms of what they can contribute to the child's care, as well as what risks they pose.[320]

262. Cafcass workers should, in theory, be appointed before experts are instructed, and can help ensure that any instructions are in the best interest of the child. However, delays within Cafcass mean that this does not always happen.

263. The judges we heard from were also in favour of more robust case management. Mrs Justice Pauffley told us that:

> The wait for reports [...] sometimes causes more delay than any of us would want, but then it is for the judge, I would say, to reject an expert's time frame that is outside the child's time frame. The case has to be brought within something that is acceptable from the perspective of everyone.[321]

264. The lack of case management has been indentified in other research. *Just following instructions? The representation of parents in care proceedings* quoted the concerns that two family judges had when case-managing expert witnesses:

> If from the judicial perspective, you are really robust and say, no, we're not going to have this, this and the other expert in this case, I think some of us feel that we are not at all confident that we would be supported by the Court of Appeal if those kind of decisions were taken upstairs. So the move to cut down on experts, I think, has to

319 Ev 136

320 Ev 136

321 Q 162

> come from the top down. I think until the Court of Appeal start giving the message loud and clear that judges are going to be supported if they take robust decisions about experts, the likelihood is that judges are going to allow too many experts in.
>
> I'm fed up with the parties huddling together outside court and coming into court with a raft of agreed directions for the court just to add its rubber stamp to, included in which are directions for experts' reports, and I've said to the Local Authorities "Why don't you just stand up to the other parties sometimes, say we don't need an expert, come into court, have the argument." It's very difficult to have an argument about whether there should be an expert in the case when you're faced with a piece of paper that everybody agrees to.[322]

265. Mr Justice McFarlane, Family Division Liaison Judge on the Midland Circuit, has now issued a practice direction stating that:

> the Designated Family Judges of the Midlands Region have determined that leave will not be given by the family courts of this region for the instruction of psychologists and independent social workers if they are unable to report within 3 months of the grant of leave. Once this practice is widely followed it is anticipated that experts will routinely become available as their waiting lists fall below 3 months and are maintained at that level.[323]

266. The direction goes on to say that "instructing solicitors must agree and dispatch letters of instruction without delay as directed and requests for extensions of time will engage consideration of whether the report should be dispensed with in the light of additional delay." The direction was introduced on 1 May 2011 so it is not yet possible to tell how successful it has been, or how the Court of Appeal will respond to decisions made as a result of it.

267. The Interim Report found many of the same problems we identified with the case management of expert witnesses. It also noted judges' concerns about how the Court of Appeal would react if requests for experts were refused[324] and recommended revising legislation to give judges clearer power to refuse assessments.[325] It recommended that judges should not accede to requests to use expert Independent Social Workers to do work that should have been done by local authorities or guardians.[326]

268. Finally, the Interim Report recommended that: "the judge should be responsible for the instructing of experts as a fundamental part of their case management duties. This requires them to control the letter of instruction as well as the choice of expert [...] and the scope of their work and timescales."[327] The Interim Report recognised that this would represent an increase in work for judges but felt that it would be worth it to enable them to progress cases more quickly. Judges do not generally have the support of administrative

322 Masson and Pearce

323 [2011] *Family Law* p 421

324 Interim Report p 113

325 *Ibid*, p 130

326 *Ibid.*

327 *Ibid*, p 132

staff who could draft a letter or contact experts to check availability. A consultation question asks whether judges should be responsible for drafting the letter of instruction (rather than just "controlling" it).[328]

269. **It is clear to us that a lack of case management by judges is leading in some cases to too many expert reports. We are very interested in the practice direction that Mr Justice McFarlane, Family Division Liaison Judge on the Midland Circuit, has issued prohibiting the use of expert witnesses who cannot report within three months. We call on the Department to monitor the success of this practice direction.**

270. **We agree with the Interim Report that judges should take more responsibility for the instruction of experts. However, judges do not generally have support staff who are able to draft letters or to ring round checking experts' availability. They also do not currently have the knowledge of the market to instruct experts. A simpler solution is for the parties' solicitors to continue to do the initial work, but for judges to provide much more rigorous oversight; requiring clear explanations of why additional assessments are needed, ensuring the parties' solicitors find another expert if there is a waiting list, and asking the parties' solicitors to work together to reduce the number of questions for the expert. More generally, the Government needs to examine whether—as was put to us by some witnesses—there is a shortage of expert witnesses in some locations and in some specialisms, and work with other interested parties to tackle any such shortfalls.**

Legal Services Commission

271. The Legal Services Commission (LSC) is responsible for contracting with legal aid providers, and for paying them. It is also responsible for approving and paying their disbursements, which include the costs of expert witnesses. Expert witnesses told us that this system, where expert witness must wait for the lawyers in a case to pass on the money from the LSC, increased their costs:

> In any given case, our funding is usually divided between all the parties, which means that we have to submit invoices and collect payment from, on average, four parties (e.g. the Local Authority, the mother's solicitor, the father's solicitor, and the children's solicitor). [...] Some solicitors do not pay our bills within 30 days, or even within several years. We have to employ financial staff to issue invoices to all the parties, chase payment from recalcitrant firms, and, sometimes, issue County Court proceedings. By that time, some law firms have gone bankrupt, leaving us with bad debts.[329]

272. In most public law cases the mother's solicitor, the father's solicitor and the children's solicitor would all be paid by the LSC, but would come from three separate firms of solicitors (to prevent conflicts of interest). So instead of an expert having to chase just the local authority and the LSC, they would have to chase four parties.

328 Interim Report, p 141

329 Ev 136

273. The current system, where the Legal Services Commission pays lawyers who then pass the money on to expert witnesses, makes things very difficult for expert witnesses. It also creates extra costs for expert witnesses who have to chase multiple solicitors for payment. These extra costs are then inevitably passed on to the taxpayer. **We recommend that the Legal Services Commission moves to paying expert witnesses directly. We understand that this would be an administrative burden for the LSC, but it needs to be balanced against the potential savings.**

9 Media and public access to the family courts

274. Under the Children Act 1989[330] it is a criminal offence punishable by a fine of up to £2,500 to publish material which would identify, or which would be likely to identify, a child involved in family court proceedings, unless the court has exercised its power to make an order to the contrary. Until April 2009, reporting on cases in the family courts was extremely limited; proceedings in the county court were invariably held in private. Following mounting media attention, widespread consultation and a critical report by our predecessor Committee,[331] the then Government introduced changes to the Family Proceedings Rules 1991, allowing the accredited members of the media to attend family court proceedings. The rules on media reporting, however, were not relaxed,[332] meaning that two of the main criticisms, the limited amount of information the press can report and the privacy conferred on all participants in a case, remained unaddressed.

The Children, Schools and Families Act 2010

275. In 2009, the then Government introduced a legislative scheme to increase media access to and openness in the family courts. The Children Schools and Families Act 2010 (CSFA 2010) contains two stages. The first extends the range of proceedings that the media can attend to include adoption cases,[333] and provides exceptions to the general rule that publication of information of proceedings is a contempt of court.[334] The second stage extends the type of information, defined as "sensitive personal information", that can be published.[335] Neither stage is in force.

276. We did not hear from any witness who was in favour of the scheme for media access in the CSFA 2010, although their reasons for disliking the measures varied. Representatives of the media told us that the approach in the 2010 Act actually reduced the amount that could be published, rather than increasing it. The Press Association told us:

> The reforms in the Act will, if brought into effect, impose even greater restrictions than those which exist at present, and can be expected to lead to further undermining of public confidence in the family courts and the family justice system.[336]

The Newspaper Society, in a submission with which the Society of Editors agreed, took a similar view:

330 Children Act 1989, s 97(2)

331 Constitutional Affairs Committee, Third Report of Session 2002–03, *Children and Family Court Advisory and Support Service (CAFCASS),* HC 614

332 Administration of Justice Act 1960, s12, makes it a contempt of court to report on proceedings conducted in private unless the court gives permission to do so.

333 CFSA 2010, s15

334 CFSA 2010, s17

335 CFSA 2010, s19

336 Ev w13

> the intention of increased transparency has been lost in the Act's drafting...the aim of achieving privacy for the families has been conflated into a renewed regime of secrecy which—if the relevant provisions in the Act are brought into force unamended—will not only fail to deliver the desired public accountability but will represent a major reduction in what can now be lawfully published, and will actually further reduce public debate and discussion of the family justice system. It will have a detrimental impact in terms of freedom of expression and will infringe Article 10 rights.[337]

277. The process by which the legislation was developed was similarly condemned. Several witnesses pointed out that the impact of the changes to the Family Procedure Rules had not been assessed before the new scheme had been drafted.[338] Dr Julia Brophy, who carried out research on behalf of the Children's Commissioner on young people's attitudes to reporting proceedings in the family courts, describing the Act as "rushed [and] ill-thought out",[339] told us that the impact on the children involved in court cases had not been assessed before the 2009 Rule change either.[340] Napo thought the legislative process was flawed. While Napo do "not oppose more information being published about Family Court decisions...we are concerned that these changes were rushed through in the 'wash up' before the dissolution of the last parliament. We are concerned that inadequate thought has been given to protecting the identities of children."[341]

278. A number of witnesses told us that the provisions in the CSFA 2010 were simply "unworkable"[342] due to their conflict with a child's right to privacy[343] and right to have his or her voice heard before decisions that affect his or her life are taken.[344] Dr Julia Brophy told us:

> Children start talking to experts—clinicians, social workers, guardians—right at the beginning of the case. It's at that point they will have to be told that the media will have access to the court. There is no option not to tell them. Medical ethics, the GMC ethics, about trust, honesty, and openness when they are dealing with consent with young people are clear. Equally, the advocate for the child and the guardian has to tell the child, and at that point, early on in the case, if the child votes with its feet and says nothing, you are then presented with a case where a judge is going to have to make very serious decisions about the future care of a child without direct information from the child. It's not surprising that children will vote with their feet if they are told. My concern at the moment is that they are probably, for the most part, not being told, and that is a breach of their Article 12 rights.[345]

337 Ev w108

338 Ev 117

339 *Ibid*.

340 Q 49

341 Ev 141

342 Ev 117 [Dr Julia Brophy]

343 Article 8 of the European Convention on Human Rights

344 Article 12 , United Nations Convention on the Rights of the Child

345 Q 49

The Medical Protection Society confirmed Dr Brophy's evidence on the ethical obligations of doctors and other medical professionals, and highlighted the confidential nature of the information that could be published under the CSFA 2010:

> The type of information—medical, psychological and healthcare treatment—is intensely personal. Even if it is reported in an anonymous way, it is likely to have a significant impact on the individuals involved and could inadvertently result in the individuals being identified, particularly in their local community. We cannot see how such a fundamental invasion of privacy can ever be in the wider public interest nor, indeed, in the interests of the administration of justice.[346]

279. The Family Law Bar Association supported: "greater transparency and accountability in the family courts...It is vital that the public knows and understands what happens in the Family Courts." However it was critical of the Act, calling it another part of an "ill-fitting jigsaw of statutory pieces" governing media reporting of family proceedings. Resolution expressed concerns about the impact of the legislation on children, particularly the broad power the CSFA 2010 gives the Lord Chancellor to remove the statutory protection from "sensitive personal information".[347] The Law Society told us implementation of the Act would have a "detrimental impact on family proceedings" and would lead to further delays as "the proposed framework may increase preliminary hearings where the court will be asked to prevent media representatives attending, and/or reporting on the case."[348] The Society agreed with Dr Brophy that there were concerns about the inhibition of children and parties, and highlighted the delays that would be caused by preliminary hearings to determine the level of access the media should be allowed.[349] Craig Pickering of Families Need Fathers, who campaign for greater transparency in the courts, effectively summed up the evidence from all our witnesses, when he said:"We would like [the MoJ] to go back to the drawing board and think again".[350]

280. Tim Loughton MP, the Children's Minister, told us that the Government would not implement Part 2 of the 2010 Act "at least" until the Family Justice Panel had completed its review. He acknowledged the opposition to the measures, and the impact the way the legislation had been passed had on its quality:

> I think it was a piece of legislation in haste, which managed, remarkably, to unite just about everybody in opposition to it—from the judiciary, who thought it could be too intrusive, to the children's charities, who thought it would compromise the welfare and confidentiality of children, to the editors of newspapers, who felt that it did not go far enough and was a fudge. I remember having all of them in front of a Bill Committee giving evidence and united from completely different angles on why this was a wholly unsatisfactory fudge. It was always going to have to be returned to. It was legislation which was put through in haste.[351]

346 Ev w32

347 CSFA 2010, s19

348 Ev w73

349 *Ibid*.

350 Q 36

351 Q 332

281. **We recognise the need for transparency in the administration of family justice, and the equally important need to protect the interest of children and their privacy. However, our witnesses were united in opposing implementation of the scheme to increase media access to the family courts contained in Part 2 of the Children, Schools and Families Act 2010. While their reasons for doing so differed, and were sometimes contradictory, such universal condemnation compels us to recommend that the measures should not be implemented, and the Ministry of Justice begin afresh. We welcome the Government's acknowledgement that the way the legislation was passed was flawed, and urge Ministers to learn lessons from this outcome for the future.**

Openness in the family courts—the way forward

282. The Constitutional Affairs Committee found in 2005 that there was a broad consensus across all groups that greater openness and transparency in the family courts was required. While united against the scheme set out in the CSFA 2010, our witnesses disagreed as to the way forward. We consider this issue is best considered through two questions: firstly, what is the aim of greater openness in the family courts; and, secondly, how is that objective best achieved?

283. Our evidence suggests that the primary aim of greater openness in the family courts is increased public confidence. Tim Loughton MP, the Children's Minister, summarised the concerns he had heard as follows:

> Whether or not it is true, there is a perception that there is a bias in the courts. Various fathers' groups will tell you that it is a bias in favour of the resident parent, usually the mother. There are others who will tell you that there are incompetent or perhaps even malign social workers and other local authority people who have got it in for certain families and will therefore use whatever methods to extract a child from his or her family, with all that being brushed under the carpet, or that the judges are complicit in trying to conceal where justice is not really being done.[352]

284. Families Need Fathers told us:

> The point of openness is to ensure that decisions are taken in the right way. By opening decisions to public scrutiny we don't want to identify children, vulnerable adults or their family. We do want the information to be available on how the decisions are decided [...]. The rules that prevent this in criminal cases involving children provide relevant experience on how to do this.[353]

285. The Newspaper Society told us: "The initiative towards greater openness arose from a background of increasing public lack of confidence in the operation of the family courts, particularly in public law cases."[354] The Press Association agreed "the culture of secrecy which has developed in the family courts over the years is counter-productive, particularly in relation to public confidence in family justice."[355] It suggested "the principle of open

352 Q 336

353 Ev 90

354 Ev w108

355 Ev w13

justice [should be] placed on a par with the idea that children involved in proceedings need to be protected from publicity."[356]

286. While these witnesses emphasised a lack of public confidence in the family courts, other witnesses highlighted the child's right to privacy over their personal information, safety concerns arising from the publication of information that could identify the child involved and the need for children to be able to speak freely to all those with a role in presenting their experiences and views to the court. The Royal College of Paediatricians and Child Health said: "our paramount principle is that a child's welfare must be maintained ... openness and transparency is a secondary priority. "Consent from parents or older children may be difficult to obtain if families are informed, as they should be, that health records/reports may be made available to the media. If this was so, then the quality of the report itself may be compromised."[357] The British Association for Adoption and Fostering, for example, told us: "Children must feel confident that they will not be identified as the subject of any proceedings and that the details of their family's private life and personal difficulties will not be publicised. Children must not be inhibited in disclosing their difficulties and participating in assessments by a fear that their friends and neighbours or the wider community will be able to read reports of the resulting court proceedings."[358]

287. Women's Aid said that it "believes that allowing media in the family courts could jeopardise the safety and wellbeing of children and young people and place them and their wider families, including children within the same family, at risk."[359]

Children's view of transparency in the family courts

288. In 2010, research on behalf of the Children's Commissioner found that children and young people involved in cases in the family courts were unhappy at the suggestion details of their cases could enter the public domain. Some 79% of children and young people in the public law sample and 91% in the private law group were opposed to any details of their cases being published in the press. When the children in the public law sample who thought some detail could be published in the media were asked to identify information that was suitable for publication "without exception these children selected statements vindicating children of blame or responsibility for events leading to care proceedings: they wanted it known that they were not 'bad' or 'naughty' children and that they had done their best in awful circumstances."[360] They rejected the suggestion that details of the neglect suffered or parental mental health problems should be published. When asked why they did not want details of their cases published, the children "said hearings address issues that are 'private'; they concern events that are painful, embarrassing and humiliating for children and an overwhelming majority said this information was not the business of

356 *Ibid*.

357 Ev w52

358 Ev w107

359 Ev 92

360 EV w70

newspapers—or the general public."[361] Children feared being identified and the attention, and even bullying, that would result.[362]

289. The Children's Commissioner also found children were mistrustful of the press: "a majority (63%) do not trust newspapers to tell the truth (79% of the private law sample and 46% of the public law group said this). The remainder thought they sometimes told the truth, "'they usually get the football results right'", but that journalists sensationalised stories or cherry-picked the information they published.[363]

290. The work of the Office of the Children's Commissioner on media reporting in the family courts gives a voice to the most important, and least heard, group of people in the family court system. The research makes plain that children involved in family court cases fear identification by their community to such an extent that knowing a case may be reported in the media could inhibit them from giving vital information to family justice service professionals.

Increasing public confidence in the family court system

291. We heard evidence from a number of witnesses that there are other ways to increase openness, and so public confidence, in the family justice system. The Magistrates' Association told us they supported the use of Family Court Open days "in order that the public should better understand the legal process, court procedure and why decisions are made."[364] Open days also allow litigants in person who have pending cases, as well as represented parties, to familiarise themselves with the court before the hearing. A year-long pilot to publish selected anonymised judgments from family proceedings in the magistrates and county courts ended in January 2011.[365] The evaluation of the pilot will be published in July 2011.

292. In this context, we note two things. First, the Family Justice Panel found: "Our own work has not led us to share concerns that arbitrary or ill-founded decisions are taken. In fact the reverse is the case. We have been impressed by the great care taken by the courts and all those involved in these difficult decisions."[366] Second, parents are now able to discuss cases with their MP, in our view, a necessary reassertion of a fundamental right.

293. Where the general public and the media do not have access to clear information on proceedings, then no-one—the judiciary, the Ministry of Justice or parents themselves—have any resource with which they can refute unfounded allegations of bias. Equally, where allegations may have foundation in fact, those with concerns are also without the information they need to tackle any injustice.

294. **There is a tension between allowing the media to publish even limited information about cases in the interests of increasing public confidence and a child's right to keep**

361 Ev 117

362 *Ibid*.

363 Brody report, para 7.1

364 Ev w53

365 The judgments were published on www.bailii.org.uk

366 Interim Report, p 55

personal information about them and their experiences private. There is a danger that justice in secret could allow injustice to children, or a perception of injustice. We believe the underpinning principle of the family court system, that all decisions must be made in the best interests of the child, must apply equally to formation of Government policy on media access to the family courts.

Conclusions and recommendations

Overview of the current system

1. Comparing the number of cases between years should be a simple exercise that would allow the Ministry of Justice to at least begin to assess the impact of policy and legislative changes on the family court system. We are therefore surprised that neither the current nor the previous administration has acted to provide a robust evidence base for the formation of policy. (Paragraph 13)

Data

2. This Committee and its predecessor committees have repeatedly highlighted the need for robust data gathering to allow the development of evidence-based policy. We were extremely disappointed by the serious gaps in data that we and the Family Justice Review found during our inquiries. It is a concern to us that major changes to the system are being contemplated when there are such gaps in the evidence base. The Ministry of Justice, in particular Her Majesty's Courts and Tribunals Service, and the Department for Education must begin to improve data collation now; without such evidence, reform of the family justice system could be fatally undermined before it has even begun. We think the Ministry of Justice should take the lead on data collation, and we wish to see a report on progress by the end of 2011. (Paragraph 27)

The Family Justice Review Interim Report

The focus of the interim report

3. We welcome the work of Sir David Norgrove and the Family Justice Panel. While the need for reform of the family justice system is clear, the evidence that we have heard on the most appropriate structure for the family justice system is limited. We therefore remain neutral as to the Panel's detailed proposals on the creation of a Family Justice Service, while taking a close interest in responses to the consultation. (Paragraph 35)

4. We welcome the focus of the Interim Report on the needs of the child. However, we are disappointed that the Interim Report did not look in more detail at how the family courts might cope with an increase in the number of litigants in person resulting from the Government's proposed changes to legal aid. We hope that the Panel can address this issue in more detail in its final report. (Paragraph 36)

Costs

5. We agree with Ministers that there are potential savings from implementing the proposals in the Interim Report. We are concerned that the Family Justice Review has been unable to cost its proposals and we look to Ministers to ensure the Review has all the information it needs fully to inform its final report. (Paragraph 44)

Government's response to the Interim Report

6. Undertaking changes to legal aid and implementing the recommendations of the Family Justice Review at the same time will be difficult. The Department must look carefully at the interactions between the two sets of proposals, and the cumulative impact on the different elements of the family justice system. The Department must monitor the situation carefully and intervene quickly if problems emerge. The Committee will return to this matter in the light of early experience of the legal aid changes. (Paragraph 46)

Underpinning Principles

Our evidence

7. The evidence shows that courts rarely deny contact between child and parent. Most applications that result in no contact are abandoned by the applicant parent. In our view this reflects the reality of the cases that come before the court. In the majority of cases it will be in a child's best interests to have meaningful contact with both parents. In cases where a parent constitutes a danger to his or her child, either directly or through failing to protect them from others, the courts must remain free to refuse, or specify the arrangements for, contact in order to protect the child. (Paragraph 65)

8. The Australian experience of introducing a shared parenting presumption shows that it does not contribute to children's well-being, which, in our view, must be the paramount aim and objective of the family courts. We believe therefore that the best interests of the child should remain the sole test applied by the courts to any decision on the welfare of children in the family justice system. (Paragraph 66)

The Family Justice Panel's recommendations

9. We do not see any value in inserting a legislative statement reinforcing the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm, into the Children Act 1989. Such a statement is not intended to change the current position as the law already acknowledges that a meaningful, engaged relationship with both parents is generally in a child's best interests. The Panel has concluded that the family court system is allowing contact in the right cases; in our view nothing should be done that could undermine the paramount importance of the welfare of the child. (Paragraph 71)

10. We welcome the intention behind the Family Justice's Panel's recommendation that there be a statutory six-month time limit on care and supervision proceedings, but question, on the evidence we have heard about delay, whether such a time limit would be feasible, even with the creation of a Family Justice Service. The average public law case currently takes over a year, despite the court's obligation to make decisions with as little delay as possible. It is not envisaged that the Family Justice Service will have greater resources than the current system: the aim is that it will use rather less. In these circumstances it may be that a statutory six-month time limit is unenforceable. (Paragraph 73)

Mediation and other means of preventing cases of reaching court

Number of cases reaching court

11. Cafcass, the Education Minister, and the MoJ all told us that it is not the case that too many care cases are coming before the courts. However, because of problems with the statistics it is not possible to tell if the proportion of cases in which the courts agree with the local authorities' assessment has changed. We note that in the past it has been necessary to commission research to calculate the proportion of applications resulting in various types of orders. There may be a need for further such research in future if there appears to be a significant shift in the proportion of cases in which the courts reject the assessments of local authorities. (Paragraph 81)

Family Group Conferences

12. Family Group Conferences are a way to enable parents to makes necessary changes in order to retain care of their children, or to enable children to remain with the extended family. In cases where it is not possible for the child to remain with the family, they can help reduce delays once the case reaches court. Given the high costs of court cases, legal aid and the high costs of keeping children in care, the potential saving from even a small reduction in the number of care cases is considerable. We were very impressed by the account of Family Group Conferences in Liverpool. It is a matter of regret that a service with an apparent 100% success rate is being cut back. (Paragraph 88)

Other means of diverting public law cases from court

13. We agree with the Interim Report that further research is required on a range of measures which could potentially help parents to make changes which could resolve pubic law cases without taking children into care, or without proceedings. We are particularly interested in the wider use of "letters before proceedings". However, the Department has no data on how often they are used, what the barriers are to their wider use, or how effective they are. Given that receiving a letter before proceedings confers entitlement to non-means-tested legal aid we find this lack of any evidence base particularly surprising. We recommend that the Government should commission such research. (Paragraph 91)

Number of cases reaching court

14. We received evidence that a large number of private law cases that currently reach court involve families with multiple problems. A high percentage of cases involve domestic violence or other child protection concerns. Care must be taken that any measures to divert cases from court only seek to do so where that is in the best interests of the child. This will be more complex than simply screening for domestic violence. (Paragraph 97)

Signposting

15. More support for separating parents could reduce the number of cases reaching court and reduce the negative impact of separation on children. However, there is currently a lack of evidence as to which early interventions are most effective. There

is also the risk that some of the numerous cases where one parent has no contact could be diverted into court. We are not clear to what extent the proposals in Strengthening Families are proposing a referral and signposting service or a service which itself provides additional help. We call on the Government to clarify this. (Paragraph 106)

16. Currently only one in ten separating parents resolves their disputes in court. The evidence we received is that a large number of these parents have multiple problems. This means that they are unlikely to be diverted from court by anything other than intensive intervention. In addition, there are many cases involving safeguarding concerns which should not be diverted from court. Some parents could be diverted from court by low-level intervention, but the Government should be realistic about the impact of any proposals on the number of private law cases reaching court. (Paragraph 107)

Resources

17. The wider funding to accompany any signposting service will be crucial. There is no point in referring parents to services which have no capacity to cope with additional demand. However, we know that resources are scarce and that it is unrealistic to make demands for widespread increased Government spending in the current climate. We heard during our previous inquiry into legal aid that the Big Society Bank will be a potential source of capital for charities and social enterprises, by means of social impact bonds and other financial products. We call on the Government to confirm that such bodies which provide early intervention for families which need assistance would potentially be eligible for such capital and to ensure that those bodies understand how they can become involved. We also think that the Government should consider whether the payment-by-results principle which it is championing elsewhere might be applicable here, with financial incentives available for organisations which have a successful impact providing effective support for families. Our predecessor Committee's report on Justice Reinvestment made the case for more funding to be spent on early intervention, with consequential reductions in the need for expensive prison spaces at a later date; we support that approach as a longer-term aspiration for criminal justice policy. (Paragraph 111)

Mediation

18. We broadly welcome the Practice Direction. The previous system, where people on legal aid had to consider mediation but those who could afford to pay their own fees did not, was patently unfair. The Practice Direction will ensure that all parties have considered mediation, which will reduce the burden on the courts. We also welcome the fact that the Practice Direction is not limited to mediation but includes other forms of dispute resolution. (Paragraph 118)

19. We note that the Practice Direction uses a definition of domestic violence similar to that in the legal aid Green Paper. In its response to the consultation on the Green Paper the Government adopted a broader definition and encompassed safeguarding concerns. We recommend that the Practice Direction is changed accordingly. (Paragraph 119)

Training

20. Poor privately-funded mediation is bad for parents (who have to pay for it), children (who are impacted by the delays it causes and by agreements which do not consider their needs) and also for the tax payer. While the tax payer does not have to pay for the mediation, the public purse bears the cost when mediation fails and cases reach court that could have been resolved by better trained mediators. We are very concerned that there are currently no minimum qualifications for privately-funded mediators. We agree with the Interim Report and recommend that privately-funded mediators should have to meet the current requirements for legally aided mediators set by the Legal Services Commission. (Paragraph 126)

Potential for greater use of mediation

Voice of the child

21. Hearing the voice of the child during mediation is vital. It is also important to ensure that agreements do not break down. We welcome that fact that LSC mediators need qualifications to meet children. However, we are concerned by evidence that some mediators do not see children. Children should be able to meet mediators or otherwise be involved in mediation and have their views taken into account, where they so wish. In cases where children have not been involved in the mediation process, steps must be taken by the mediator to ensure that the agreement is in their best interests, and that they are kept informed about what is happening. (Paragraph 151)

22. There is clear evidence that mediation can be effective, with a high proportion of parties reaching agreements or narrowing the issues in dispute. This avoids the use of the courts, with considerable savings for legal aid, Cafcass and the courts service. It can also be faster and less traumatic for families. We therefore share the Government's belief that there is scope for greater use of mediation. However, in developing its policies on the use of mediation, the Government needs to recognise that: some types of mediation appear more effective than others, and it is imperative that scarce public funds are used to best effect; and mediators need to be professionally trained and know how to recognise and handle sensitive cases where there are accusations of domestic violence or safeguarding concerns. We call on the MoJ, in its response to this Report, or sooner, to spell out how those principles will inform the greater use of mediation which is it seeking to encourage. (Paragraph 152)

Proposed changes to legal aid

23. We are concerned that the Government may not have budgeted for enough additional mediations in its legal aid proposals. With more than 200,000 people losing eligibility for legal help and representation, the Department's prediction that only 10,000 extra mediations will be required seems low (albeit more realistic than their initial estimate of 3,300). We welcome the Government's assurance that it will pay for mediation for all eligible people. However, to help manage the Department's

budget we call on it to re-examine the figures and bring forward more realistic estimates. (Paragraph 156)

Cafcass

Delays

24. While the exact figures are disputed, it is clear that Cafcass has made substantial progress in reducing the number of unallocated and duty allocated cases in public and private law. We welcome this progress and hope that it can be maintained. It continues to be a cause for concern, however, that Cafcass was unable to reassure us that, in the 221 cases allocated to managers, those managers were working actively on all those cases. We call on Cafcass to measure and monitor the amount of work carried out by managers in cases allocated to them in order to ensure that genuine progress is made and that these cases are not simply moved off the unallocated list to make those performance statistics look more acceptable. We expect Cafcass to report back to us on this point at the earliest reasonable opportunity. (Paragraph 173)

25. We share the concerns of the Committee of Public Accounts about the ability of Cafcass to sustain its recent progress given that there is no sign of a future fall in the number of care applications. We are also concerned about the ability of Cafcass to cope with a range of potential future stresses, including any restructuring of itself or of the court system, any additional delays in the court system, and cuts to local authority budgets (which could lead to more poorly prepared cases reaching court). (Paragraph 174)

Management

26. We are puzzled and concerned by Cafcass's continued aversion to the use of self-employed guardians, especially when the amount it spends on agency social workers has more than doubled in a year. Self-employed guardians are cheaper than agency staff and no more expensive than directly employed staff. At the same time they offer greater flexibility, and their expertise is valued by the judiciary. Cafcass should be making considerably greater use of self-employed staff, particularly in the geographical areas where it has difficulty recruiting. (Paragraph 180)

27. Proposed changes to the family justice system in the Interim Report will, if implemented, make demands on Cafcass in terms of change management. It will be crucial for management to deliver that change in ways which support the staff (and self employed and agency workers) to deliver the necessary services for children. The recent experience of Cafcass managing staff, communicating with stakeholders, and the production of the very imperfect draft Operating Manual all indicate that Cafcass management needs urgently to take steps to improve the way they communicate with staff and with others working in the family justice system. (Paragraph 185)

28. Whilst we recognise the need for Cafcass to be a managed service and for its staff to be supported, the appointment of experienced social workers could justify a lighter touch in management, allowing professional staff more discretion about the way they

carry out their role than the detailed and process driven Operating Manual would suggest. This is the future for social workers Professor Munro has set out in her report. Cafcass should look at the lessons that it can learn from her report and adopt Professor Munro's proposed approach. (Paragraph 186)

Service Cafcass provides to children

29. The entire family justice system should be focused on the best interests of the child. Cafcass as an organisation is not. We accept that Cafcass has had to make difficult decisions in order to reduce delays and the number of unallocated and duty allocated cases. However, in order to make progress Cafcass has had to offer a "safe minimum" service, and the amount of time that Cafcass workers currently spend with children is unacceptable in the long term. Cafcass needs to give its workers the opportunity to do what they want to do: spend more time with children. This will involve a change in management culture, and the wholesale re-writing of the draft Operating Manual to focus on identifying and meeting the needs of individual children. Cafcass will also have to re-examine its staff's workload. The current median workload may well be too high to enable Cafcass workers to spend enough time with children. This should not be done at the expense of letting delays escalate, however. There is no doubt that some of the time spent in managing the system could be redeployed to spending more time with children. (Paragraph 199)

The case for major change

30. We agree with the Interim Report that Cafcass should be made part of the proposed new Family Justice Service. However, we believe that in itself, this will not be enough. It needs to be the first step in a series of reforms designed to transform Cafcass into a less process-driven, more child-focused, and integral part of the family justice system. (Paragraph 206)

31. We call on the Family Justice Review to address directly the detailed future structure of Cafcass in its final report. We were interested in the suggestions we heard in oral evidence about the development of a wider range of providers, together with a more localised service (perhaps linked to the proposed new Local Family Justice Boards). Any future proposals will have to take into account that Cafcass operates a cash limited system and has to be able to deliver a timely and consistent service to all children, regardless of changes in the volume of cases, over which it does not have control. (Paragraph 207)

Courts

Case management

32. Judicial continuity not only allows for effective case management and efficient use of judicial time but is also an important signal to parties, above all children, that their case is being treated with the respect it deserves. We welcome the President of the Family Division's recognition of this issue, and willingness to reconsider the current approach to assigning the judiciary to cases. Further, we welcome the senior

judiciary's commitment to improving case management in the family courts more generally. (Paragraph 211)

Litigants in person

33. The removal of legal aid from applicants in most private family law cases will increase the number of litigants in person in the family courts. It is self-evident that parents are unlikely to give up applications for contact, residence or maintenance for their children simply because they have no access to public funding. We are concerned that the Ministry of Justice does not appear to have appreciated that this is the inevitable outcome of the legal aid reforms. (Paragraph 224)

34. It is evident that non-lawyers accessing the family courts can find it a confusing and frustrating experience. While we accept that some steps have been taken by voluntary organisations to assist litigants in person, more clearly needs to be done and we welcome the fact that the Government is reviewing the available support system. We believe that the family court will need to become more attuned to dealing with parties representing themselves; and this will require procedures and guidance developed to accommodate the challenges posed by larger numbers of litigants in person. (Paragraph 237)

35. We welcome the Family Justice Panel's recommendations on the creation of a two-track system in the family courts for simple and complex cases. We urge the Panel, however, to develop these proposals with unrepresented litigants in mind. In our view, this is the only realistic approach for robust reform of the family courts given the pending changes to legal aid in private law cases. (Paragraph 241)

Cross examination by litigants in person where there are allegations of sexual abuse

36. The increase in litigants in person will give rise to more cases in which an alleged abuser cross-examines the person he or she is alleged to have abused. We recommend the Ministry of Justice considers allowing the court to recommend that legal aid be granted to provide a lawyer to conduct the cross-examination in such cases. (Paragraph 244)

Expert Witnesses

Unnecessary reports

37. We are convinced that there are unnecessary expert reports in some family cases. We note the Minister's comments that greater use could be made of non-expert witnesses, including foster carers. However, foster carers have a distinct role from that of experts, and while they can be a valuable source of information they cannot replace experts in those cases where there is a genuine need for expertise. (Paragraph 258)

Case management and expert witnesses

38. It is clear to us that a lack of case management by judges is leading in some cases to too many expert reports. We are very interested in the practice direction that Mr

Justice McFarlane, Family Division Liaison Judge on the Midland Circuit, has issued prohibiting the use of expert witnesses who cannot report within three months. We call on the Department to monitor the success of this practice direction. (Paragraph 269)

39. We agree with the Interim Report that judges should take more responsibility for the instruction of experts. However, judges do not generally have support staff who are able to draft letters or to ring round checking experts' availability. They also do not currently have the knowledge of the market to instruct experts. A simpler solution is for the parties' solicitors to continue to do the initial work, but for judges to provide much more rigorous oversight; requiring clear explanations of why additional assessments are needed, ensuring the parties' solicitors find another expert if there is a waiting list, and asking the parties' solicitors to work together to reduce the number of questions for the expert. More generally, the Government needs to examine whether—as was put to us by some witnesses—there is a shortage of expert witnesses in some locations and in some specialisms, and work with other interested parties to tackle any such shortfalls. (Paragraph 270)

Legal Services Commission

40. We recommend that the Legal Services Commission moves to paying expert witnesses directly. We understand that this would be an administrative burden for the LSC, but it needs to be balanced against the potential savings. (Paragraph 273)

Media and public access to the family courts

The Children, Schools and Families Act 2010

41. We recognise the need for transparency in the administration of family justice, and the equally important need to protect the interest of children and their privacy. However, our witnesses were united in opposing implementation of the scheme to increase media access to the family courts contained in Part 2 of the Children, Schools and Families Act 2010. While their reasons for doing so differed, and were sometimes contradictory, such universal condemnation compels us to recommend that the measures should not be implemented, and the Ministry of Justice begin afresh. We welcome the Government's acknowledgement that the way the legislation was passed was flawed, and urge Ministers to learn lessons from this outcome for the future. (Paragraph 281)

Increasing public confidence in the family court system

42. There is a tension between allowing the media to publish even limited information about cases in the interests of increasing public confidence and a child's right to keep personal information about them and their experiences private. There is a danger that justice in secret could allow injustice to children, or a perception of injustice. We believe the underpinning principle of the family court system, that all decisions must be made in the best interests of the child, must apply equally to formation of Government policy on media access to the family courts. (Paragraph 294)

Formal Minutes

Tuesday 28 June 2011

Members present:

Rt Hon Sir Alan Beith, in the Chair

Jeremy Corbyn
Mrs Helen Grant
Rt Hon Elfyn Llwyd
Claire Perry
Yasmin Qureshi

Draft Report (*Operation of the Family Courts*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 294 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No.134.

[Adjourned till Tuesday 5 July at 10.15am.

Witnesses

Tuesday 16 November 2010

Page

Craig Pickering, Chief Executive, Families Need Fathers; **Lynn Chesterman**, Chief Executive, Grandparents' Association; and **Nicola Harwin**, Chief Executive, Women's Aid. Ev 1

Dr Julia Brophy, Oxford University; and **Dr Lynne Harne**, Bristol University. Ev 10

Tuesday 25 January 2011

Jonathan Ewen, Director, Barnardo's North East, and Director of Family Placement; **Barbara Esam**, Policy Lawyer, NSPCC; and **Fiona Weir**, Chief Executive Officer, Gingerbread. Ev 17

Stephen Cobb QC, Chairman, Family Law Bar Association; **Jane Wilson**, Member of Resolution National Committee and Chair of the Resolution Domestic Abuse Committee; and **Linda Lee**, President, Law Society. Ev 25

Tuesday 1 March 2011

Rt Hon Sir Nicholas Wall, President of the Family Division; T**he Hon Mrs Justice Pauffley**; and **The Hon Mr Justice Ryder**. Ev 34

Dr Judith Freedman, Consortium of Expert Witnesses to the Family Courts; **Judith Timms, OBE**, Policy Adviser, Nagalro; and **Harry Fletcher**, Assistant General Secretary, Napo. Ev 43

Tuesday 22 March 2011

Martha Cover, Co-Chair of the Association of Lawyers for Children, representing the Interdisciplinary Alliance for Children. Ev 50

Baroness Howarth OBE, Chair, **Anthony Douglas CBE**, Chief Executive, and **Bruce Clark**, Director of Policy, Cafcass. Ev 55

Tuesday 26 April 2011

Mr Jonathan Djanogly MP, Parliamentary Under-Secretary of State, Ministry of Justice, **Catherine Lee**, Director, Access to Justice, Ministry of Justice; and **Tim Loughton MP**, Parliamentary Under-Secretary of State, Department for Education. Ev 66

Tuesday 10 May 2011

Dr Rae Kaspiew, Senior Research Fellow, Australian Institute of Family Studies. Ev 78

Dr Maggie Atkinson, Children's Commissioner; and **Jenny Clifton**, Principal Policy Adviser (Safeguarding), Office of the Children's Commissioner. Ev 83

List of printed written evidence

1	Families Need Fathers	Ev 90
2	Women's Aid Federation of England	Ev 92
3	Grandparents' Association	Ev 109
4	Dr Lynne Harne	Ev 113, 115
5	Dr Julia Brophy	Ev 117
6	Barnardo's	Ev 122, 126
7	National Society for the Prevention of Cruelty to Children	Ev 126
8	Gingerbread	Ev 129
9	Consortium of Expert Witnesses to the Family Courts	Ev 136, 139
10	Napo	Ev 141
11	Nagalro	Ev 144
12	Interdisciplinary Alliance for Children	Ev 151, 155
13	Cafcass	Ev 157, 164, 179,180
14	Ministry of Justice	Ev 193, 196, 198, 200, 203
15	Ministry of Justice and the Department for Education	Ev 200

List of additional written evidence

(published in Volume III on the Committee's website www.parliament.uk/justicecom)

1	Shaun O'Connell	Ev w1
2	Professor Judith Masson	Ev w5
3	Paul Baddeley	Ev w7
4	His Honour Judge Clifford Bellamy	Ev w8
5	Press Association	Ev w13
6	Jill Canvin and Dr George Hibbert,	Ev w15
7	Bruce Edgington	Ev w19
8	Mark Willis	Ev w22
9	Gill King and Michael Griffith-Jones	Ev w25
10	Greater Family Panel	Ev w30
11	Medical Protection Society	Ev w32
12	Lisa Parkinson	Ev w35
13	PDJ Harrison	Ev w39
14	David Hodson	Ev w40
15	Nichole Tonkmor Sarsfield	Ev w45
16	Sarah Saunders	Ev w49
17	Royal College of Paediatrics and Child Health	Ev w52
18	Magistrates' Association submitted by the Family Courts Committee	Ev w53
19	Jane Dambe	Ev w58

20	Jeni Styring	Ev w59
21	Association of Lawyers for Children	Ev w62, 130
22	National Association of Child Contact Centres	Ev w72
23	Law Society of England and Wales	Ev w73
24	Cambridge Family Mediation Service	Ev w78
25	National Children's Bureau	Ev w79
26	Public and Commercial Services Union	Ev w81
27	Resolution	Ev w85
28	Julie Doughty	Ev w87
29	National Youth Advocacy	Ev w88
30	Family Law Bar Association	Ev w92
31	Jas Bains and Joanna Rees-Bains	Ev w96
32	Family Courts' Unions Cross Party Group	Ev w103
33	Family Rights Group	Ev w103
34	British Association for Adoption and Fostering	Ev w107
35	Newspaper Society	Ev w108
36	Society of Editors	Ev w111
37	British Association of Social Workers	Ev w112
38	Anne Eccleston	Ev w122
39	Pauline Jordan	Ev w123
40	Mike Quee	Ev w125
41	Janet Hayes	Ev w126
42	Consortium of Expert Witnesses	Ev w126
43	Legal Services Commission	Ev w129, 130
44	National Family Mediation	Ev w 132
45	Centre for Social Justice	Ev w135

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number. Session 2010–12

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770
Third Report	Government's proposed reform of legal aid	HC 681–I (*Cm 8111*)
Fourth Report	Appointment of the Prisons and Probation Ombudsman for England and Wales	HC 1022
Fifth Report	Appointment of HM Chief Inspector of Probation	HC 1021